

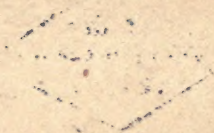
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SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
ALABAMA REPORTS	Vol. 152. 17-60
CALIFORNIA REPORTS	Vol. 153. 61-144
COLORADO REPORTS	Vol. 42. 145-183
ILLINOIS REPORTS	Vol. 235. 184-247
IOWA REPORTS	Vol. 137. 248-311
LOUISIANA REPORTS	Vol. 121. 312-336
MARYLAND REPORTS	Vol. 107. 337-407
MASSACHUSETTS REPORTS	Vol. 198. 408-466
MICHIGAN REPORTS	Vol. 153. 467-556
MISSOURI REPORTS	Vol. 212. 557-585
NEBRASKA REPORTS	Vols. 78, 79. 586-697
OREGON REPORTS	Vol. 50. 698-764
TEXAS CRIMINAL REPORTS	Vol. 53. 765-804
UTAH REPORTS	Vol. 33. 805-855
WASHINGTON REPORTS	Vols. 49, 50. 856-927
WISCONSIN REPORTS	Vols. 133, 134. 928-1036
ARKANSAS REPORTS	Vols. 81, 86. 1037-1116

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA.**—(83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90, 91) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38; (98) 39; (99) 42; (100, 101) 46; (102) 48; (103) 49; (104, 105) 53; (106, 107, 108) 54; (109, 110) 55; (111) 56; (112) 57; (113) 59; (114) 62; (115, 116) 67; (118, 119) 72; (120) 74; (121) 77; (122, 123, 124, 125) 82; (126, 127) 85; (128) 86; (129) 87; (130) 89; (131, 132) 90; (133) 91; (134) 92; (135) 93; (136) 96; (137) 97; (138) 100; (139) 101; (140) 103; (141) 109; (142) 110; (143) 111; (144) 113; (145) 117; (146, 147) 119; (146, 148) 121; (149) 123; (150) 124; (151) 125; (152) 126.
- ARKANSAS.**—(48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 22; (54) 26; (55) 29; (56) 35; (57) 38; (58) 41; (59) 43; (60) 46; (61, 62) 54; (63) 58; (64) 62; (65) 67; (66) 74; (67) 77; (68) 82; (69) 86; (70) 91; (71) 100; (72) 105; (73) 108; (74) 109; (75) 112; (76, 77) 113; (78) 115; (79) 116; (80) 117; (81, 82) 118; (83) 119; (84) 120; (85) 122; (81, 86) 126.
- CALIFORNIA.**—(72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 12; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38; (101) 40; (102) 41; (103) 42; (104) 43; (105) 45; (106) 46; (107) 48; (108) 49; (109) 50; (110, 111) 52; (112) 53; (113) 54; (114) 55; (115) 56; (116) 58; (117) 59; (118) 62; (119) 63; (120) 65; (121) 66; (122) 68; (123) 69; (124) 71; (125) 73; (126) 77; (127) 78; (128, 129) 79; (130) 80; (131) 82; (132) 84; (133) 85; (134) 86; (135) 87; (136) 89; (137) 92; (138) 94; (139) 96; (140) 98; (141) 99; (142) 100; (143) 101; (144) 103; (145) 104; (146) 106; (147) 109; (148) 113; (149) 117; (150) 119; (151) 121; (152) 125; (153) 126.
- COLORADO.**—(10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36; (19) 41; (20) 46; (21) 52; (22) 55; (23) 58; (24) 65; (25) 71; (26) 77; (27) 83; (28) 89; (29) 93; (30) 97; (31) 102; (32) 105; (33) 108; (34) 114; (35) 117; (36) 118; (37) 119; (38) 120; (39) 121; (40) 122; (41) 124; (42) 126.
- CONNECTICUT.**—(54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38; (64) 42; (65) 48; (66) 50; (67) 52; (68) 57; (69) 61; (70) 66; (71) 71; (72) 77; (73) 84; (74) 92; (75) 96; (76) 100; (77) 107; (78) 112; (79) 118; (80) 125.
- DELAWARE.**—(5 *Houst.*) 1; (6 *Houst.*) 22; (7 *Houst.*) 40; (9 *Houst.*) 43; (1 *Marv.*) 65; (2 *Marv.*) 69; (1 *Pennewill*) 73; (2 *Pennewill*) 82; (3 *Pennewill*) 94; (4 *Pennewill*) 103; (5 *Pennewill*) 119.
- FLORIDA.**—(22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37; (33) 39; (34) 43; (35) 48; (36) 51; (37) 53; (38) 56; (39) 63; (40) 74; (41) 79; (42) 89; (43) 99; (44) 103; (45, 46, 47) 110; (48, 49, 50) 111; (51, 52) 120; (53) 125.
- GEORGIA.**—(76) 24; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35;

(91, 92, 93) 44; (94) 47; (95, 96) 51; (97) 54; (98) 58; (99) 59; (100) 62; (101) 65; (102) 66; (103) 68; (104) 69; (105) 70; (106) 71; (107) 73; (108) 75; (109) 77; (110, 111) 78; (112) 81; (113) 84; (114) 88; (115) 90; (116) 94; (117) 97; (118) 98; (119) 100; (120) 102; (121) 104; (122) 106; (123) 107; (124) 110; (125) 114; (126) 115; (127, 128) 119; (129) 121; (130) 124.

IDAHO.—(2) 35; (3, 4, 5) 95; (6) 96; (7) 97; (8) 101; (9) 108; (10) 109; (11) 114; (12) 118; (13) 121; (14) 125.

ILLINOIS.—(121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56; (166) 57; (167) 59; (168, 169) 61; (170) 62; (171) 63; (172, 173) 64; (174) 66; (175) 67; (176) 68; (177, 178) 69; (179) 70; (180, 181) 72; (182) 74; (183, 184) 75; (185) 76; (186) 78; (187) 79; (188) 80; (189) 82; (190) 83; (191, 192) 85; (193) 86; (194, 195) 88; (196) 89; (197) 90; (198) 92; (199, 200) 93; (201) 94; (202) 95; (203) 96; (204, 205) 98; (206, 207) 99; (208) 100; (209) 101; (210) 102; (211, 212) 103; (213) 104; (214) 105; (215) 106; (216, 217) 108; (218, 219) 109; (220) 110; (221) 112; (222) 113; (223) 114; (224) 115; (225) 116; (226) 117; (227) 118; (228) 119; (229, 230) 120; (231) 121; (232, 233) 122; (234) 123; (235) 126.

INDIANA.—(112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3 Ind. App.; 141) 50; (4, 5, 6 Ind. App.; 142) 51; (7, 8 Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150; 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74; (23 Ind. App.; 154) 77; (24 Ind. App.) 79; (155) 80; (25 Ind. App.) 81; (156) 83; (26 Ind. App.) 84; (157; 27 Ind. App.) 87; (28 Ind. App.) 91; (158) 92; (29 Ind. App.) 94; (159) 95; (30 Ind. App.) 96; (160) 98; (31 Ind. App.) 99; (161) 100; (32 Ind. App.; 162) 102; (33 Ind. App.) 104; (163) 106; (34 Ind. App.) 107; (164) 108; (35 Ind. App.) 111; (165) 112; (36 Ind. App.) 114; (37 Ind. App.; 166) 117; (167) 119; (168) 120; (169) 124.

IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77; (110) 80; (111) 82; (112) 84; (113) 86; (114) 89; (115) 91; (116) 93; (117) 94; (118) 96; (119) 97; (120) 98; (121) 100; (122, 123) 101; (124) 104; (125, 126) 106; (127) 109; (128) 111; (129) 113; (130) 114; (131) 117; (132, 133) 119; (134) 120; (135) 124; (136) 125; (137) 126.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72; (61) 78; (62) 84; (63) 88; (64) 91; (65) 93; (66) 97; (67) 100; (68) 104; (69) 105; (70) 109; (71) 114; (72) 115; (73) 117; (74) 118; (74, 75) 121; (76) 123.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72; (102) 80; (103) 82; (104) 84; (105) 88; (106) 90; (107) 92; (108) 94; (109) 95; (110) 96; (111) 98; (112) 99; (113) 101; (114) 102; (115) 103; (116) 105; (117, 118) 111; (119) 115; (120) 117; (122) 121; (121) 123; (123, 124) 124.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72; (52 La. Ann.) 78; (104) 81; (105) 83; (106) 87; (107) 90; (108) 92; (109) 94; (110) 98; (111) 100; (112, 113) 104; (114) 108; (115) 112; (116) 114; (115, 117) 116; (118) 118; (119) 121; (120) 124; (121) 126.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74; (94) 80; (95) 85; (96) 90; (97) 94; (98) 99; (99) 105; (100) 109; (101) 115; (102) 120; (103) 125.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63; (87) 67; (88) 71; (89) 73; (90) 78; (91) 80; (92) 84; (93) 86; (94) 89; (95) 93; (96) 94; (97) 99; (98) 103; (99) 105; (100) 108; (101) 109; (102) 111; (103) 115; (104) 118; (105) 121; (106) 124; (107) 126.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60; (169) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75; (175) 78; (176) 79; (177) 83; (178) 86; (179) 88; (180) 91; (181) 92; (182) 94; (183) 97; (184) 100; (185) 102; (186) 104; (187) 105; (188) 108; (189) 109; (190) 112; (191) 114; (192) 116; (193) 118; (194) 120; (195) 122; (196) 124; (197) 125; (198) 126.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 72; (118) 74; (119) 75; (120) 77; (121, 122) 80; (123) 81; (124) 83; (125) 84; (126) 86; (127) 89; (128) 92; (129) 95; (130) 97; (131) 100; (132) 102; (133) 103; (134) 104; (135) 106; (137) 109; (138) 110; (139) 111; (136, 140) 112; (141, 142) 113; (143) 114; (144) 115; (145) 116; (146) 117; (147, 148) 118; (149) 119; (144, 150) 121; (146, 151) 123; (152) 125; (153) 126.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77; (78, 79) 79; (80) 81; (81, 82) 83; (83) 85; (84) 87; (85) 89; (86) 91; (87) 94; (88) 97; (89) 99; (90) 101; (91) 103; (92) 104; (93) 106; (94) 110; (95) 111; (96) 113; (97) 114; (98, 99) 116; (100) 117; (101) 118; (98, 102) 120; (103) 123; (104) 124.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71; (77) 78; (78) 84; (79) 89; (80) 92; (81) 95; (82) 100; (83) 102; (84) 105; (85) 107; (86) 109; (87) 112; (88) 117; (89) 119; (86, 89, 90) 122; (91) 124.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54; (134) 56; (135, 136) 58; (137) 59; (138) 60; (139) 61; (140) 62; (141, 142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71; (149, 150) 73; (151) 74; (152) 75; (153, 154) 77; (155) 78; (156) 79; (157) 80; (158, 159) 81; (160) 83; (161) 84; (162, 163) 85; (164) 86; (165) 88; (166) 89; (167, 168) 90; (169) 92; (170, 171) 94; (172) 95; (173) 96; (174, 175) 97; (176) 98; (177) 99; (178, 179) 101; (180, 181, 182) 103; (183, 184, 185, 186) 105; (187) 106; (188, 189) 107; (190, 191) 109; (192) 111; (193, 194) 112; (195, 196) 113; (197) 114; (198) 115; (199) 116; (200) 118; (201, 202) 119; (203, 204, 205) 120; (206) 121; (207, 208, 209) 123; (210, 211) 124; (212) 126.

MONTANA.—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69; (22) 74; (23) 75; (24) 81; (25) 87; (26) 91; (27) 94; (28) 98; (29) 101; (30) 104; (31) 107; (32) 108; (33) 114; (34) 115; (35) 119; (36) 122.

NEBRASKA.—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53; (47, 48) 58; (49) 59; (50) 61; (51, 52) 66; (53) 68; (54) 69; (55) 70; (56) 71; (57) 73; (58) 76; (59) 80; (60) 83; (61) 87; (62) 89; (63) 93; (64) 97; (65) 101; (66) 103; (67) 108; (68) 110; (69) 111; (70) 113; (71) 115; (72) 117; (73) 119; (74, 75) 121; (76, 77) 124; (78, 79) 126.

NEVADA.—(19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77; (25) 83; (26) 99; (27) 103; (28) 113; (29) 124.

NEW HAMPSHIRE.—(64) 10; (62) 13; (65) 23; (66) 49; (67) 68; (68) 73; (69) 76; (70) 85; (71) 93; (72) 101; (73) 111; (74) 124.

NEW JERSEY.—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51; (54 N. J. Eq.; 58 N. J. L.) 55; (59 N. J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.) 64; (56 N. J. Eq.) 67; (61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.) 73; (63 N. J. L.) 76; (58 N. J. Eq.) 78; (64 N. J. L.) 81; (59, 60 N. J. Eq.) 83; (65 N. J. L.) 86; (61 N. J. Eq.; 66 N. J. L.) 88; (62 N. J. Eq.) 90; (67 N. J. L.) 91; (63 N. J. Eq.) 92; (68 N. J. L.) 96; (64 N. J. Eq.) 97; (69 N. J. L.) 101; (65 N. J. Eq.; 70 N. J. L.) 103; (66 N. J. Eq.) 105; (71 N. J. L.) 108; (67 N. J. Eq.) 110; (68 N. J. Eq.; 72 N. J. L.) 111; (69 N. J. Eq.) 115; (73 N. J. L.; 70 N. J. Eq.) 118; (74 N. J. L.) 122; (71 N. J. Eq.) 124.

NEW YORK.—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127)

24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57; (153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160) 73; (161, 162) 76; (163, 164) 79; (165) 80; (166, 167) 82; (168) 85; (169, 170) 88; (171) 89; (172) 92; (173) 93; (174) 95; (175) 96; (176) 98; (177) 101; (178) 102; (179) 103; (180) 105; (181) 106; (182) 108; (183) 111; (184) 112; (185) 113; (186, 187) 116; (188) 117; (184, 189) 121; (190, 191) 123.

NORTH CAROLINA.—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54; (119) 56; (120) 58; (121) 61; (122) 65; (123) 68; (124) 70; (125) 74; (126) 78; (127) 80; (128) 83; (129) 85; (130) 89; (131) 92; (132) 95; (133) 98; (134) 101; (135) 102; (136) 103; (137, 138) 107; (139, 140) 111; (137, 141, 142) 115; (143) 118; (144) 119; (145) 122; (146, 147) 125.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73; (9) 81; (10) 88; (11) 95; (12) 102; (13) 112; (14) 116; (15, 16) 125.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63; (58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76; (62 Ohio St.) 78; (63 Ohio St.) 81; (64 Ohio St.) 83; (65 Ohio St.) 87; (66 Ohio St.) 90; (67 Ohio St.) 93; (68 Ohio St.) 96; (69 Ohio St.) 100; (70 Ohio St.) 101; (71 Ohio St.) 104; (72 Ohio St.) 106; (73 Ohio St.) 112; (74 Ohio St.) 113; (75 Ohio St.) 116; (76 Ohio St.) 118; (77 Ohio St.) 122; (78 Ohio St.) 125.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30) 60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76; (36) 78; (37) 82; (38) 84; (39) 87; (40) 91; (41) 93; (42) 95; (43) 99; (44) 102; (45) 106; (46, 47) 114; (48) 120; (49) 124; (50) 126.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74;

(194 Pa. St.) 75; (195 Pa. St.) 78; (196 Pa. St.) 79; (197 Pa. St.) 80; (198 Pa. St.) 82; (199 Pa. St.) 85; (195, 200 Pa. St.) 86; (201 Pa. St.) 88; (202 Pa. St.) 90; (203, 204 Pa. St.) 93; (205 Pa. St.) 97; (206 Pa. St.) 98; (207 Pa. St.) 99; (208 Pa. St.) 101; (209 Pa. St.) 103; (210 Pa. St.) 105; (211 Pa. St.) 107; (212 Pa. St.) 108; (213 Pa. St.) 110; (214 Pa. St.) 112; (215 Pa. St.) 114; (216 Pa. St.) 116; (217 Pa. St.) 118; (217, 218 Pa. St.) 120; (219, 220 Pa. St.) 123.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84; (23) 91; (24) 96; (25) 105; (26) 106; (27) 114; (28) 125.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90; (64) 92; (65) 95; (66) 97; (67) 100; (68) 102; (69) 104; (70) 106; (71) 110; (73, 74) 114; (75) 117; (73, 76) 121; (77) 122; (78) 125.

SOUTH DAKOTA.—(1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86; (15) 91; (16) 102; (17) 106; (18) 112; (19) 117.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89; (108) 91; (109) 97; (110) 100; (111) 102; (112) 105; (113) 106; (114) 108; (115) 112; (116) 115; (117) 119; (117, 118) 121; (119) 123.

TEXAS.—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86; (95) 93; (41, 42, 43 Tex. Cr. Rep.) 96; (96) 97; (44 Tex. Cr. Rep.) 100; (97) 104; (98) 107; (45, 46 Tex. Cr. Rep.) 108; (99; 47, 48, 49 Tex. Cr. Rep.) 122; (100; 50, 51 Tex. Cr. Rep.) 123; (52 Tex. Cr. Rep.) 124; (53 Tex. Cr. Rep.) 126.

UTAH.—(13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20) 77; (21) 81; (22) 83; (23) 90; (24) 91; (25) 95; (26) 99; (27) 101; (28) 107; (29) 110; (30) 116; (31) 120; (32) 125; (33) 126.

VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87; (74) 93; (75) 98; (76) 104; (77) 107; (78) 112; (79) 118.

VIRGINIA.—(82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75; (98) 81; (99) 86; (100) 93; (101) 99; (102) 102; (103) 106; (104) 113; (105) 115; (106) 117; (107) 122.

WASHINGTON.—(1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75; (22) 79; (23) 83; (24) 85; (25) 87; (26) 90; (27) 91; (28, 29) 92; (30) 94; (31) 96; (32) 98; (33) 99; (34) 101; (35) 102; (36)

104; (37, 38) 107; (39) 109; (40, 41) 111; (42) 114; (43) 117;
(44) 120; (45) 122; (46) 123; (47, 48) 125; (49, 50) 126.

WEST VIRGINIA.—(29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26;
(35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57;
(43) 64; (44) 67; (45) 72; (46) 76; (47) 81; (48) 86; (49) 87;
(50) 88; (51) 90; (52) 94; (53) 97; (54) 102; (55) 104; (56) 107;
(57) 110; (58) 112; (59) 115; (60) 116; (61) 123; (62) 125.

WISCONSIN.—(69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76,
77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35;
(84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91)
51; (92) 53; (93) 57; (94) 59; (95) 60; (96, 97) 65; (98, 99) 67;
(100) 69; (101) 70; (102) 72; (103) 74; (104, 105) 76; (106) 80;
(107, 108) 81; (109) 83; (110) 84; (111) 87; (112) 88; (113) 90;
(114) 91; (115) 95; (116) 96; (117) 98; (118) 99; (119) 100;
(120) 102; (121) 105; (122) 106; (123) 107; (124) 109; (125, 126)
110; (125, 127) 115; (128, 129) 116; (130) 118; (131) 120; (132)
122; (133, 134) 126.

WYOMING.—(3) 31; (4) 62; (5) 63; (6) 71; (7) 75; (8) 80; (9) 87;
(10) 98; (11) 100; (12) 109; (13) 110; (14) 116; (15) 123; (16)
125.

AMERICAN STATE REPORTS.

VOLUME 126.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Ainsworth v. Munoskong Hunting etc. Club.....	<i>Nav. Waters</i> ...	153 Mich. 185..	474
Alabama Lumber Co. v. Cross.....	<i>Evidence</i> ..	152 Ala. 562....	55
American Bonding Co. v. Loeb.....	<i>Judgment</i> ..	50 Wash. 104..	891
American Circular Loom Co. v. Wilson	<i>Equity</i> ..	198 Mass. 182...	409
American De Forest Wireless Tel. Co. v. Superior Court.....	<i>Const. Law</i>	153 Cal. 533....	125
Anderson v. McCarthy Dry-Goods Co.	<i>Negligence</i>	49 Wash. 398..	870
Bank of Luverne v. Sharp.....	<i>Bills & Notes</i> ..	152 Ala. 589....	58
Bannard v. Duncan.....	<i>Quitclaim Deed</i> .	79 Neb. 189...	661
Barker v. Western Union Tel. Co...	<i>Telegraph Co.</i> ...	134 Wis. 147....	1017
Barnes v. Danville Street Ry. & Light Co.....	<i>Carriers</i> ..	235 Ill. 566....	237
Bartlett Estate Co. v. Fairhaven Land Co.....	<i>Mortgage</i>	49 Wash. 58...	856
Bell v. Rocheford.....	<i>Negligence</i> ..	78 Neb. 304...	595
Bigham v. Dover.....	<i>Execution</i> ..	86 Ark. 323....	1096
Bradley & Co. v. Brown.....	<i>Insurance</i> ..	78 Neb. 836...	647
Brechlin v. Night-Hawk Min. Co..	<i>Res Judicata</i> ..	49 Wash. 198..	863
Brown v. Salt Lake City.....	<i>Mun. Corp.</i>	33 Utah, 222...	828
Buckley v. Buckley.....	<i>Divorce</i> ..	50 Wash. 213..	900
Campion v. Gillan.....	<i>Pardon</i> ..	79 Neb. 364...	667
Carpenter v. Sibley.....	<i>Appeal & Error</i> .	153 Cal. 215....	77
Carrahar v. Boston etc. R. R. Co..	<i>Carriers</i> ..	198 Mass. 549...	461
Carroll v. Draughton.....	<i>Judicial Sales</i> ..	152 Ala. 418....	51
Charon v. Clark.....	<i>Waters</i> ..	50 Wash. 191..	896
Chase v. Woodruff.....	<i>Deeds</i>	133 Wis. 555....	972
Cherokee Const. Co. v. Bishop....	<i>Leases</i> ..	86 Ark. 489....	1098
Cherry v. Louisiana etc. Ry. Co...	<i>Railroads</i> ..	121 La. 471....	323
Chesapeake etc. Telephone Co. v. Lysher	<i>Streets</i> ..	107 Md. 237....	389
City of New Orleans v. Charouleau.	<i>Mun. Corp.</i>	121 La. 890....	332
Cochran v. Zachery.....	<i>Wills</i>	137 Iowa, 585...	307

NAME.	SUBJECT.	REPORT.	PAGE.
Colburn's Estate, In re.....	<i>Wills</i>	153 Mich. 206...	479
Collins v. Capps.....	<i>Wills</i>	235 Ill. 560....	232
Comstock v. Boyle.....	<i>Judgments</i> ..	134 Wis. 613....	1033
Cowden v. Trustees of Schools....	<i>Official Bonds</i> ..	235 Ill. 604....	244
Dauphiny v. Buhne.....	<i>Libel</i>	153 Cal. 757....	136
Davidson v. Richardson.....	<i>Judgment</i> ..	50 Or. 323....	738
Dawson v. Western Maryland R. R. Co.	<i>Covenants</i> ..	107 Md. 70....	337
Doe v. Abbott.....	<i>Atty. & Client</i> ..	152 Ala. 243....	30
Dougherty v. Chicago etc. Ry. Co.	<i>Railroads</i> ..	137 Iowa, 257...	282
Dresel v. King.....	<i>Wills</i>	198 Mass. 546...	459
Edwards v. State.....	<i>Forgery</i> ..	53 Tex. Cr. 50..	767
Eisentraut v. Cornelius.....	<i>Executors</i> ..	134 Wis. 532....	1027
Ellis v. Brockton Publishing Co.	<i>Libel</i>	198 Mass. 538...	454
Empire Real Estate & Mortgage Co. v. Beechley.....	<i>Process</i>	137 Iowa, 7....	248
Eureka Stone Co. v. First Christian Church	<i>Mech. Lien</i>	86 Ark. 212....	1088
Farrell v. Manhattan Market Co.	<i>Tort</i>	198 Mass. 271...	436
Farrier v. Colorado Springs etc. Ry. Co.....	<i>Carriers</i> ...	42 Colo. 331...	158
Finch v. Noble.....	<i>Tax Title</i>	49 Wash. 578..	880
First Nat. Bank v. McCullogh....	<i>Appeal</i>	50 Or. 508....	758
First Nat. Bank v. Pilger.....	<i>Remaindermen</i> .	78 Neb. 168...	592
Fisher v. Northern Pac. Ry. Co....	<i>Carriers</i> ...	49 Wash. 258..	867
Fleming v. Walker.....	<i>Executors</i> ...	152 Ala. 386....	46
Flint v. Chaloupka.....	<i>Bankruptcy</i> ..	78 Neb. 594...	639
Gauthreaux v. Theriot.....	<i>Estoppel</i> ..	121 La. 87.....	328
Golladay v. Knock.....	<i>Remainders</i> ..	235 Ill. 412....	224
Grissom v. Atlantic etc. Ry.....	<i>Negligence</i> ..	152 Ala. 110....	20
Hamilton v. Winter.....	<i>Lim. of Actions</i> ..	50 Wash. 689..	921
Hammond Packing Co. v. State...	<i>Const. Law</i>	81 Ark. 519...	1047
Hanlin, In re Estate of.....	<i>Covenant</i> ...	133 Wis. 140....	938
Harmon v. Old Detroit Nat. Bank.	<i>Banking</i> ...	153 Mich. 73....	467
Harris v. Graham.....	<i>Mech. Lien</i>	86 Ark. 570....	1110
Harrison, Ex parte.....	<i>Lib. of Speech</i> ..	212 Mo. 88....	557
Hibernia Sav. & Loan Soc. v. Farn- ham	<i>Lim. of Actions</i> ..	153 Cal. 578....	129
Hicks v. National Surety Co.....	<i>Mortgages</i> ..	50 Wash. 16...	883
Hill v. Fruit Mercantile Co.....	<i>Sales</i>	42 Colo. 491...	172
Howard v. Kelly.....	<i>Execution</i> ..	137 Iowa, 76...	274
Howe v. Town of Gunnison.....	<i>Lim. of Actions</i> ..	42 Colo. 540...	181
Hulen v. Chilcoat.....	<i>Lis Pendens</i> ...	79 Neb. 595...	681

NAME.	SUBJECT.	REPORT.	PAGE.
Iles v. Mutual Reserve Life Ins.			
Co.	<i>Life Insurance.</i>	50 Wash. 49...	886
Illinois Steel Co. v. Schroeder.	<i>Equity.</i>	133 Wis. 561....	977
Ilsley v. Sentinel Co.	<i>Libel.</i>	133 Wis. 20....	928
Jacobs v. Bentley.	<i>Appeal & Error.</i>	86 Ark. 186....	1086
Johnston v. Schnabaum.	<i>Bills & Notes.</i>	86 Ark. 82....	1082
Jones v. State.	<i>Homicide.</i>	53 Tex. Cr. 131.	776
Kamm v. Normand.	<i>Nav. Waters.</i>	50 Or. 9....	698
Kinser v. Cowie.	<i>Corp. Stock.</i>	235 Ill. 383....	221
Knapp v. Wallace.	<i>Foreign Corp.</i>	50 Or. 348....	742
Knights of Columbus v. McInerney.	<i>Ben. Assns.</i>	153 Mich. 574...	541
Lakeside Lumber Co. v. Jacobs.	<i>Mun. Corp.</i>	134 Wis. 188....	1023
Lund v. Idaho etc. R. R.	<i>Injunction.</i>	50 Wash. 574..	916
Manning v. Foster.	<i>Husb. & Wife.</i>	49 Wash. 541..	876
Manti City Sav. Bank v. Paterson.	<i>Mortgage.</i>	33 Utah, 209...	817
Martin v. Thison's Estate.	<i>Divorce.</i>	153 Mich. 516...	537
Mayor etc. of Hagerstown v. Balti-			
more etc. R. R. Co.	<i>Mun. Corp.</i>	107 Md. 178....	382
McDaniel v. Sloss-Sheffield Steel			
etc. Co.	<i>Ad. Possession.</i>	152 Ala. 414....	48
McKibbin v. Box & Co.	<i>Druggist.</i>	79 Neb. 577...	677
McLean v. State.	<i>Const. Law.</i>	81 Ark. 304....	1037
Meyer v. Doherty.	<i>Conversion.</i>	133 Wis. 398....	967
Miller v. Farmers' Milling etc. Co.	<i>Corporations.</i>	78 Neb. 441...	606
Montgomery v. De Picot.	<i>Contracts.</i>	153 Cal. 509....	84
Montgomery Traction Co. v. What-			
ley	<i>Carriers.</i>	152 Ala. 101....	17
Moss v. Fitch.	<i>Pleadings.</i>	212 Mo. 484....	568
Mount v. Tremont Lumber Co.	<i>Negligence.</i>	121 La. 64....	312
Munger v. Beard.	<i>Lis Pendens.</i>	79 Neb. 764...	688
Murray v. Galbraith.	<i>Libel.</i>	86 Ark. 50....	1078
Myer v. Roberts.	<i>Land. & Tenant.</i>	50 Or. 81....	733
National Fire Ins. Co. v. Board of			
Assessors	<i>Taxation.</i>	121 La. 108....	313
Nebraska Hay etc. Co. v. First			
Nat. Bank.	<i>Banking.</i>	78 Neb. 334....	602
Nilson v. Sarment.	<i>Husb. & Wife.</i>	153 Cal. 524....	91
North v. Graham.	<i>Estates.</i>	235 Ill. 178....	189
Off & Co. v. Morehead.	<i>Const. Law.</i>	235 Ill. 40....	184
Owens v. State.	<i>Occupation Tax.</i>	53 Tex. Cr. 105.	772
People v. Calder.	<i>Statutes.</i>	153 Mich. 724...	550
People v. Spoor.	<i>Bigamy.</i>	235 Ill. 230....	197

NAME.	SUBJECT.	REPORT.	PAGE.
Peterson v. State.....	<i>Ordinances</i>	79 Neb. 132...	651
Phillips v. Eggert.....	<i>Attachment</i> ..	133 Wis. 318....	963
Pilon v. Viger.....	<i>Evidence</i> ..	198 Mass. 118...	408
Pugmire v. Oregon Short Line R. R. Co.....	<i>Mast. & Serv</i> ...	33 Utah, 27....	805
Reed v. State.....	<i>Liquors</i>	53 Tex. Cr. 4...	765
Rhoades v. Rhoades.....	<i>Husb. & Wife</i> ..	78 Neb. 495...	611
Ritzville Hardware Co. v. Benning- ton	<i>Exemption</i>	50 Wash. 111..	894
Rivet v. George M. Murrell Plant- ing & Mfg. Co.....	<i>Exemptions</i> ..	121 La. 201....	320
Ryan v. Dockery.....	<i>Husb. & Wife</i> ..	134 Wis. 431....	1025
Saxton v. Krumm.....	<i>Wills</i>	107 Md. 393....	393
Schultz v. Schultz.....	<i>Homestead</i> ..	133 Wis. 125....	934
Scott v. Scott.....	<i>Life Tenant</i> ..	137 Iowa, 239...	277
Seabrook v. Grimes.....	<i>Wills</i>	107 Md. 410....	400
Servonitz v. State.....	<i>Habeas Corpus</i> ..	133 Wis. 231....	955
Sherman v. Alberts.....	<i>Stat. of Frauds</i> ..	153 Mich. 361...	486
Southern Ry. Co. v. Reeder.....	<i>Waters</i>	152 Ala. 227....	23
Spokane v. Camp.....	<i>Ordinances</i> ..	50 Wash. 554..	913
Springfield Fire etc. Ins. Co. v. Reynolds	<i>Insurance</i>	107 Md. 107....	379
State v. Bartlett.....	<i>Crim. Law</i>	50 Or. 440....	751
State v. Excelsior Springs etc. Co..	<i>Crim. Law</i>	212 Mo. 101....	563
State v. Redmon.....	<i>Const. Law</i>	134 Wis. 89....	1003
State v. Rosenberger.....	<i>Sales</i>	212 Mo. 648....	580
State v. Withnell.....	<i>Mun. Corp</i>	78 Neb. 33....	586
Steele v. Gold Fissure Gold Mining Co.	<i>Corporations</i> . .	42 Colo. 529...	177
Supple v. Suffolk Savings Bank...	<i>Evidence</i> ..	198 Mass. 393...	451
Swartz v. Andrews.....	<i>Dower</i>	137 Iowa, 261...	285
Tannebaum v. Rehm.....	<i>Mun. Corp</i>	152 Ala. 494....	52
Thomas v. State.....	<i>Homicide</i> ..	53 Tex. Cr. 272.	786
Union Depot & Ry. Co. v. Meek- ing	<i>Railroads</i>	42 Colo. 89....	145
Van Buren Co. v. American Surety Co.	<i>Suretyship</i>	137 Iowa, 490...	290
Vitali, In re.....	<i>Crim. Law</i>	153 Mich. 514...	535
Walker v. Chanslor.....	<i>Evidence</i> ..	153 Cal. 118....	61
Wallace v. Wallace.....	<i>Divorce</i>	137 Iowa, 37...	253
Wallber v. Caldwell.....	<i>Lim. of Actions</i> ..	79 Neb. 418...	675
Walsh v. Colby.....	<i>Judicial Sales</i> ..	153 Mich. 602...	546
Wardrobe v. Leonard.....	<i>Judgments</i> ..	78 Neb. 531...	619

NAME	SUBJECT.	REPORT.	PAGE.
Washington v. State.....	<i>Homicide</i>	53 Tex. Cr. 480.	800
Western Glass Mfg. Co. v.			
Schoeninger	<i>Discovery</i>	42 Colo. 357...	165
Wolfe v. Childs.....	<i>Vendor & Ven.</i> ..	42 Colo. 121...	152
Wood, Curtis & Co. v. El Dorado			
Lumber Co.....	<i>Mech. Lien</i>	153 Cal. 230....	80
Young's Estate, In re.....	<i>Evidence</i>	33 Utah, 382...	843
Young v. Davis.....	<i>Lis Pendens</i> ...	50 Wash. 504..	910
Young v. State.....	<i>Self-defense</i> ..	53 Tex. Cr. 416.	792

AMERICAN STATE REPORTS.

VOLUME 126.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

MONTGOMERY TRACTION COMPANY v. WHATLEY.

[152 Ala. 101, 44 South. 638.]

CARRIERS—Protection of Passengers.—A carrier owes to its passenger the duty of protecting him from the violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care, and will be held responsible for its own or its servants' negligence in this particular, when, by the exercise of proper care, the act of violence might have been foreseen and prevented. (p. 18.)

CARRIERS—Protection of Passengers—Negligence of Conductor.—The conductor of a street-car in permitting a drunken passenger to attempt to walk up and down the aisle of the car while it is in motion, instead of requiring him to be seated, or, in the event of his refusal, ejecting him from the car, is negligent in the discharge of the duty which he owes to the other passengers, and the company is liable. (p. 18.)

CARRIERS—Drunken Passengers—Negligence of Conductor—Question of Fact.—That a conductor on a street-car has knowledge of the drunken condition of a disorderly passenger, and of his inability to stand, makes it a question for the determination of the jury whether such conductor, in the exercise of that degree of care exacted of him and of his company, ought to have foreseen that such passenger might do injury to some other passenger upon the car. (pp. 18, 19.)

CARRIERS—Protection of Passengers—Liability for Negligence of Conductor.—If an injury to a passenger on a street-car could have been avoided by requiring a drunken passenger to be and remain seated, the carrier cannot avoid liability to a passenger injured by the failure of the conductor on the car to do his duty in that respect, and it is not necessary that the conduct of the passenger be such that the conductor should have ejected him from the car before the injury occurred. (p. 19.)

Rushton & Coleman, for the appellant.

T. W. Martin and Hill, Hill & Whiting, for the appellee.

103 TYSON, C. J. Action by plaintiff to recover damages for personal injuries received, while a passenger upon one of

defendant's cars, by the falling of an intoxicated passenger upon or against her. There seems to be no dispute as to the principles of law which control the decision of this case, but the controversy arises over their applicability to the peculiar facts as deduced from the testimony. The evidence tends to show that the offending passenger was intoxicated and boisterous, and that just prior to his fall which occasioned the injury to plaintiff's limb he had fallen upon the floor of the car. It also tends to show that there was a vacant seat which he could have occupied, and that the conductor in charge of the car knew of his intoxicated condition, his boisterousness, and of his having fallen, previous to his fall against the plaintiff. Both falls, it appears, were while the car was in motion. A carrier of passengers owes to the passenger the duty of protecting him from violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care; and such carrier will be held responsible for its own or its servants' neglect in this particular, when by the exercise of proper care the acts of violence might have been foreseen and prevented: *Batton v. South & North Alabama R. R. Co.*, 77 Ala. 591, 54 Am. Rep. 80, and other cases cited in appellant's brief.

¹⁰⁴ The first point insisted upon is that as matter of law the conductor could not by the exercise of proper care have foreseen the act of violence done the plaintiff by the falling of the intoxicated passenger and have prevented it. If the offending passenger, who is shown to have been a large man, weighing some two hundred and twenty-five pounds, was unable to stand on account of his intoxicated condition, as the testimony tended to show and authorized the jury to so find, and his condition was known to the conductor, which the jury was also authorized to find, the conduct of that officer in permitting him to attempt to walk up and down the aisle of the car while it was in motion, instead of requiring him to be seated, or, in the event of his refusal, ejecting him from the car, was clearly an act of negligence in the discharge of the duty which he owed to the other passengers. With a knowledge of the drunken condition of the disorderly passenger, of his inability to stand, and of other circumstances shown, it was clearly a question for the determination of the jury whether the conductor, in the exercise of that degree of care exacted of him by law, ought to have foreseen that he might do injury to some passenger upon the car. It therefore cannot be affirmed as matter of law, under all the circumstances, that the conductor may not have reasonably antici-

pated the occurrence producing the injury complained of, which he could have prevented by the proper exercise of the police power committed to him.

The next point insisted upon asserts the proposition that, in order to hold the defendant liable, it must appear that the conduct of the passenger causing the injury complained of was such as to have made it the duty of the conductor to eject or exclude him from the car before the injury occurred. This seems to be the principle embodied in the two special instructions, numbered ¹⁰⁵ 3 and 5, requested of and refused by the trial court. It is undoubtedly the law that the servant of a carrier has the right to eject a drunken and disorderly passenger, when necessary to protect other passengers against his insults or violence; but if, under the testimony, the jury are authorized to find (as in this case) that the injury could have been avoided by requiring the drunken passenger to be and remain seated, the carrier cannot avoid liability by the failure of its servant to perform that duty.

There is no error shown by the record, and the judgment must be affirmed.

Haralson, Simpson and Denson, JJ., concur.

The Duty of a Carrier of Passengers for Hire to use all proper means and precautions to protect its passengers against injury caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is not less stringent than the obligation to prevent misconduct or negligence on the part of its own servants: *Kuhlen v. Boston etc. Ry. Co.*, 193 Mass. 341, 118 Am. St. Rep. 516; *Farrier v. Colorado etc. Ry. Co.*, 42 Colo. 331, post, p. 158. Where a party of intoxicated passengers fire pistols and explode dynamite sticks on a train, and the railway employes, though knowing or having an opportunity to know of such misconduct, make no attempt to preserve order until a passenger is accidentally shot, the railway company is liable for the injuries he sustains: *Nashville etc. Ry. Co. v. Flake*, 114 Tenn. 671, 108 Am. St. Rep. 925. Where certain passengers on an excursion train became drunk and disorderly, and openly threatened, in the presence and hearing of the conductor, that when a designated place was reached where they were to leave the train they would have revenge upon other passengers who had objected to their drunken, disorderly, and rowdy conduct, it became the duty of the company to take measures to prevent the threatened danger, and, failing to do so, it is answerable to an unoffending passenger injured thereby: *Spangler v. St. Joseph etc. Ry. Co.*, 68 Kan. 46, 104 Am. St. Rep. 391.

GRISSOM v. ATLANTA AND BIRMINGHAM AIR LINE
RAILWAY.

[152 Ala. 110, 44 South. 661.]

NEGLIGENCE—Sufficiency of Complaint.—It is necessary for a complaint claiming damages for an injury caused by negligence to allege such relationship between the plaintiff and defendant as to raise a duty from the former to the latter and a failure to perform it. (p. 21.)

MASTER AND SERVANT—Volunteer Assistant to Servant—Negligence of Master.—A person who volunteers to assist an employé, whether by request or otherwise, cannot thereby establish the relation of employer and employé so as to establish a claim for injury from negligence. (p. 21.)

MASTER AND SERVANT—Voluntary Assistant of Employé—Negligence of Master.—The mere fact that an employé has an assistant aiding him, with the consent and knowledge of the master, does not amount to an acquiescence on the part of the master in such volunteer's assuming the place of the employé, so as to render the master liable for negligence in causing an injury to such volunteer as his servant. (p. 22.)

Blackwell & Agee, for the appellant.

W. C. Tunstall, for the appellee.

¹¹¹ SIMPSON, J. This appeal is from the judgment of the court sustaining certain demurrers to counts in the complaint. The action is for damages on account of the death of plaintiff's (appellant's) intestate, and the main contention is whether or not the counts demurred to allege such a relation between said intestate and the defendant as to create the status of master and servant and render the defendant liable for negligence. The counts do not aver that the relation of master and servant, ¹¹² or employer and employé, existed, but state that the intestate's brother was in the employ of defendant, and that his duties were to pump water into a tank along the line of the defendant's railroad, by means of a gasoline engine for the use of locomotives, and that his said brother "had plaintiff's intestate to assist and aid him in running the gasoline engine and keeping the tank filled with water," and that he "had been so assisting . . . for about two years prior to" the date of the accident, "with the knowledge and consent of the defendant," or, as stated in the third count, that "said intestate, a youth sixteen years of age, was operating said pump from day to day, with and by the knowledge of the defendant and of defendant's pump repairer." "Actionable negligence is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negli-

gence. . . . The duty must be to the person injured": Southern Ry. Co. v. Williams, 143 Ala. 212, 38 South. 1013. It follows that it is necessary for a complaint, claiming damages for an injury caused by negligence, to allege such relationship between the plaintiff and the defendant as to raise the duty: Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 South. 729; Holmes v. Birmingham Southern R. R. Co., 140 Ala. 208, 37 South. 338; Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 South. 458; 13 Am. & Eng. Ency. of Pl. & Pr. 893.

The only suggestion of any relation raising a duty is that of employer and employé. This court has said that "under the statute the party claiming damages must be an employé at the time of the injury, by contract, express or implied, binding on defendant": Georgia etc. R. R. Co. v. Propst, 85 Ala. 203, 4 South. 711. Even if he is an employé, he must be acting within the scope of his ¹¹³ employment at the time of his injury: Southern Ry. Co. v. Guyton, 122 Ala. 231, 25 South. 34. Although there are a few cases, in other states, which do not adhere closely to the rule, yet the great weight of authority is that a person who volunteers to assist an employé, whether by request or otherwise, cannot thereby establish the relation of employer and employé, so as to claim for negligence, based on the duty which the employer owes to the employé: 2 Labatt on Master and Servant, sec. 630; Everhart v. Terre Haute & Indianapolis R. R., 78 Ind. 292, 41 Am. Rep. 567; note to Fox v. Sanford, 67 Am. Dec. 597; Church v. Chicago etc. R. Co., 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861, and note; Evarts v. St. Paul etc. R. Co., 56 Minn. 141, 45 Am. St. Rep. 460, and note, 57 N. W. 459, 22 L. R. A. 663; Southern Ry. Co. v. Guyton, 122 Ala. 231, 25 South. 34.

It is insisted, however, that the allegations of these counts present a case where the employer, by assenting to the service performed by the intestate, virtually made him its employé, so that the duties of master were assumed. There are some intimations in the books of such a principle. In the case of Bradley v. New York Cent. R. R., 62 N. Y. 99, 102, a party who was called by a foreman to aid in removing snow was held entitled to recover; but in that case the party was employed by the foreman, and the reason for the decision was that it was evidently within the powers of the foreman to employ aid on such occasions. The case of Barstow v. Old Colony R. R., 153 Mass. 535, 10 N. E. 255, after stating that, if the intestate was a mere licensee, the only duty owed him by the defendant was "not to injure him wantonly or willfully,"

merely goes on to remark that if he undertook voluntarily to perform service for the corporation, ¹¹⁴ and the agent assented to it, he placed himself in the position of a servant, and could not claim to occupy any better position than that of servant. This is a very different proposition from his being able, by such voluntary service, to establish the relation in favor of himself and against the master: *Atlanta etc. R. R. v. West*, 121 Ga. 641, 104 Am. St. Rep. 179, 49 S. E. 711, 67 L. R. A. 701. In the case of *Central Tr. Co. v. Texas & St. L. Ry. (C. C.)*, 32 Fed. 448, the party seeking to recover was either directed or accepted by the yardmaster, who had the authority to employ him. As stated by Labatt: "The essence of the defense, in this instance, is simply that a person cannot be subjected, without his own consent or that of his agent, to the obligations which the law has attached to the contract of hiring": 2 Labatt on Master and Servant, sec. 630. It is difficult to see how the mere fact that the employé had the intestate aiding him, with the knowledge and consent of the master, could amount to an acquiescence on the part of the employer in said intestate's assuming the place of an employé. At best, it could be but a recognition of the fact that said intestate chose to exercise the privilege of a licensee. There is no pretense that he was employed by anyone, or had assumed any obligation to do the work, much less that anyone had assumed any obligation to him. No emergency, or necessity, for his employment is shown, nor is there any intimation that the employé with whom he was had any authority to engage an assistant. Presumably he merely had him there in ease of his own labors.

This disposes of the demurrers to counts 1, 2, 3, 4, and 7. The demurrer to count 5 was overruled. Count 6 does not allege any injury.

The judgment of the court is affirmed.

Tyson, C. J., and Haralson and Denson, JJ., concur.

The Liability of an Employer to an Employé Who Volunteers upon a duty with which he is not charged is discussed in the note to McGill v. Maine etc. Granite Co., 85 Am. St. Rep. 622-627; and the liability of an employer to one who, at the request of his employés, volunteers to assist in the work, is discussed in *Johnson v. Ashland etc. Co.*, 71 Wis. 553, 5 Am. St. Rep. 243; *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362; *Bonner v. Bryant*, 79 Tex. 540, 23 Am. St. Rep. 361; *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141, 45 Am. St. Rep. 460; *Railroad Co. v. Ward*, 98 Tenn. 123, 60 Am. St. Rep. 848. One who without being employed, or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer, not entitled to

that degree of diligence on the part of the master which he is bound to exercise with reference to his servants. The master is only bound not to injure the volunteer willfully, and to use care not to injure him after notice of his peril: *Atlanta etc. R. R. Co. v. West*, 121 Ga. 641, 104 Am. St. Rep. 179.

SOUTHERN RAILWAY COMPANY v. REEDER.

[152 Ala. 227, 44 South. 699.]

WATERS—Navigable Streams—Drawbridges.—A drawbridge, constructed and maintained under and according to proper authority over navigable waters, is not an unlawful obstruction to navigation, but the owner is bound to provide for the safe and prompt passage of vessels through the draw. (p. 25.)

WATERS—Navigable Streams—Drawbridges—Control of—Damages.—Reasonable care and diligence in the use and control of a drawbridge over a navigable stream to permit the prompt passage of vessels is required of those in whose custody it is, and the want of such care and diligence carries liability for proximately resulting injuries. (p. 25.)

WATERS—Drawbridges—Signals for Opening—Statutory Regulations.—A statute prescribing the signals to be given by a boat in approaching a drawbridge over a navigable stream and the amount which may be recovered for a failure to comply with such signals need not necessarily prescribe an exclusive remedy for a failure to obey such signals, as other signals may be agreed upon between boat owners and bridge proprietors of a desire to pass through the bridge, but in order to recover the penalty prescribed by the statute and caused by the negligence of the bridge-tender, the statutory signals must be given. (p. 26.)

WATERS—Drawbridges—Signals for Opening—Damages for Failure to Comply with.—Although a statute prescribes the signals to be given in approaching a drawbridge over a navigable stream for the opening of the draw and fixes the amount as a penalty to be recovered for a failure to obey such signals, craftsmen and bridge proprietors may establish and use a signal different from that provided by the statute, and a boat owner may recover damages for the negligent conduct of the bridge-tender in failing to open the draw, after he is by such signal given a reasonable time and advised by those in control of the approaching vessel of an intention to pass the draw. (p. 26.)

WATERS—Drawbridges—Signals for Opening—Negligence.—After giving the proper signal, those in charge of a boat have a right, in reliance upon the performance of the duty of opening of a draw in a drawbridge, to approach the bridge at such speed and in such control of the boat, and to such nearness to the bridge as reasonable prudence and care, under all of the circumstances, require, and if this duty is performed, negligence cannot be imputed to those in charge of the boat. (p. 26.)

WATERS—Drawbridges—Signals for Opening—Negligence.—A boat owner, after giving the proper signal for the opening of the draw in a drawbridge, cannot, in reliance upon the performance of his duty by the bridge-tender, disregard due prudence and care and

speculate upon the hazards and dangers incident to the occasion and situation, but he must be at all times in such control of his vessel, which must be so equipped with the necessary and adequate machinery for control and operation as reasonable diligence requires, as that injury naturally resulting from the negligence of the tender may be, under skillful and prompt management, averted; otherwise the boat owner is guilty of contributory negligence. (pp. 26, 27.)

WATERS—Drawbridges—Negligence—Question for Jury.—In an action to recover for injuries to a boat caused by the negligence of a bridge-tender in failing to open the draw of a drawbridge in time, the issue of negligence on the part of the bridge-tender and contributory negligence on the part of those in charge of the boat is generally for the jury. (p. 27.)

WATERS—Drawbridges—Negligence—Proximate Cause.—If a drawbridge-tender is primarily negligent in failing to open the draw in time after the proper signal has been given, the operation of the boat by those in charge in undertaking to stop it in time to prevent injury, and the striking of the bridge, are not such intervening causes as to prevent the bridge-tender's original negligence from constituting the proximate cause of the injury, when those in charge of the boat are not guilty of contributory negligence. (pp. 27, 28.)

WATERS—Drawbridges—Signals to Open—Negligence.—If the proper signals to open the draw of a drawbridge are given by a boat owner, the duty to safely and with due dispatch open the draw arises, and the failure of the bridge-tender to understand the proper signals or to hear them is negligence, and no excuse for a dereliction in duty. (p. 28.)

WATERS—Drawbridges—Collisions—Measure of Damages for Negligence.—In an action to recover for injury to a boat caused by collision with a drawbridge on account of the failure of the bridge-tender to open the draw in time upon proper signals, the measure of damages is remuneration to the boat owner for necessary repairs to the boat and the market value of its use during the time necessary to make such repairs. (pp. 28, 29.)

WATERS—Drawbridges—Collisions—Evidence—Res Gestae.—In an action to recover for injury to a boat caused by the negligence of the tender of a drawbridge to open the draw in time upon proper signals, evidence that on the next morning after the injury the bridge-tender visited the boat and inquired of her master if he would take a named sum and drop the matter, is not admissible as part of the res gestae of the immediate transaction for redress of which the action is brought. (p. 29.)

EVIDENCE—Offer to Compromise.—In an action to recover for injury to a boat caused by the negligence of a drawbridge-tender in failing to open the draw in time upon proper signals, evidence that the bridge-tender, on the next morning after the injury, visited the vessel and inquired of her master if he would take a named sum and drop the matter is not admissible, as it was a mere offer to compromise. (p. 29.)

Action to recover damages to plaintiff's steamboat. The boat was injured by coming in contact with defendant's drawbridge where it spans a navigable stream. Negligence is predicated upon a failure to open the draw of the bridge upon proper and established signals. Pleas of the general issue and contributory negligence were interposed. It

was shown that the defendant owned and operated a draw-bridge across a navigable stream, and that it was used for the passage of trains. The defendant had established signals to be given by boats for the opening of the draw, and the plaintiff, on coming down the river with his boat, gave the proper signals for the opening of the draw. After the first signal was given a train was permitted to pass over the bridge, although the boat had the right of way. The boat was slowed down after the first signal, and after the last signal was given the steam was shut off, and the boat allowed to drift. The evidence was conflicting as to whether there was time after the last signal was given to open the draw before the boat reached the bridge. When the boat reached the bridge the draw was only partially opened and the pilot of the boat thereupon undertook to put on steam and back his boat. In doing so he broke the cam yoke, rendering the boat unmanageable, and the pilot then steered the boat against the stationary span of the bridge, causing the injury sued for, and such action was claimed to be necessary on the part of the pilot to save the lives of the passengers on the boat. Judgment for plaintiff, and defendant appealed.

Humes & Speake, for the appellant.

Simpson & Jones, for the appellee.

²³¹ McCLELLAN, J. A drawbridge, constructed and maintained under and according to proper authority over navigable waters, is not an unlawful obstruction to navigation; but the owner of the bridge rests under the duty and obligation to provide for the safe and prompt passage of vessels through the draw. Reasonable care and diligence in the use and control of the bridge is required of those in whose custody it is; and the want of such care and diligence in the performance or omission to perform the duty stated and assumed carries liability for proximately resulting injuries. Sections 3445 and 3446, Code of 1896, are penal in their nature, and so must be strictly construed. Observing this rule of construction, we cannot agree with counsel for appellant that they establish exclusively the signals to be given by vessels intending to pass a drawbridge; nor with its contention that for injuries proximately resulting from the negligence of the bridge proprietor or his employés, or from that of a boat owner, the penalty prescribed by the cited authorities is the sole and excluding remedy for the injured party. In the latter matter no such intention to exclude all other redress ²³² can be gathered from the statute, even after exempting it

from the familiar rule of construction applicable to penal enactments.

In respect to the set of signals mentioned in section 3445, the same observations are pertinent. That notice of an intention or desire to pass through a drawbridge may be properly conveyed to the tender by means other than the signals described in this section is not negatived by any language in it. The penalty stipulated, of course, could not be exacted unless the statutory conditions precedent were strictly observed. But this is far from excluding to craftsmen and bridge proprietors, suffering injuries attendant upon negligent conduct and seeking redress therefor in damages, the right to establish and use a signal method different from that provided by the statute. The gist of the action is the alleged negligent conduct of the bridge-tender in opening the draw after he was by proper signals, and these given in reasonable time, advised of the intention of those in control of the approaching vessel to pass the draw. Of course, when so advised, it was his duty to promptly so adjust the draw as that safe passage could be effected. In reliance upon the performance of this duty by the defendant's employé, those in charge of the craft had the right to approach the bridge at such speed and in such control of the boat and to such nearness to the bridge as reasonable prudence and care, under all the circumstances, would require. We apprehend that, short of an approach to a drawbridge so near or under such head, or under such conditions of water and wind or other weather surroundings as would probably, under all the circumstances, render such management of a vessel equipped with proper appliances for stopping it and for locomotion forward and backward, in charge of skilled employés, hazardous or dangerous to it or the ²³³ bridge, those in control may, without inviting the imputation of negligence on their part, take the vessel within such nearness to the structure as the circumstances and conditions adverted to would safely permit. Whether the necessary prudence was in the particular case observed, under all the circumstances attending the act, must generally be determined by the jury.

But, in reliance upon the performance of duty by the tender, the craftsman cannot, disregardful of due prudence and care, speculate upon the hazards and dangers incident to the occasion and situation. He must be at all times in such control of his vessel, which must be so equipped with the necessary and adequate machinery for control and operation as reasonable diligence would require, as that injury naturally

resulting from the negligence of the tender may be, under skillful and prompt action and management, averted. The reliance upon another that he will do his duty as bound is not without limit. One ordering his conduct upon such reliance cannot go beyond that point where commensurate care and prudence would indicate that further reliance and action thereon would likely result in injury if the duty anticipated of performance was not performed. Negligence, in a proper case, inhibiting recovery for injuries received, would intervene, if the reliance, carried into action, upon another's performance of duty, was disregarded of the care and prudence the circumstances and situation presented raised as the boundary of further reliance upon the assumption that the duty would be performed. No other rule of conduct could be declared, we think, than that stated. The navigable waters are such without limitation, except that set against negligence to the injury of another and that stated with reference to duties related to lawfully maintained drawbridges. No line can be drawn for the approach of vessels ²³⁴ to such structures with a view to passage; and the relative duty of those charged with the responsibility and management of vessels in such cases must be, in respect of negligence vel non, remitted to the triers of the fact to determine whether the prudence and care exercised was that requisite under all the conditions and circumstances surrounding: *King v. Ohio & M. R. R. (C. C.)*, 25 Fed. 799, 24 Fed. 335. As we gather it from the record, the issues of negligence vel non on the part of the bridge-tender and contributory negligence vel non of the plaintiff were properly submitted, under all the testimony, for the jury's consideration.

Proximate cause is defined thus: "That cause which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which that result would not have occurred." It is obvious that if the tender was primarily negligent in the performance of his duty, and if there was no contributory negligence on the part of those in charge of the vessel in respect of the approach to the bridge, both jury issues and by the jury determined in this case, the operation by which the boat was undertaken to be stopped after the discovery of the partially open condition of the draw, and in which the vital yoke broke, and that without the negligence of the boatmen, was the performance of the boatman's duty, and that duty arose out of the negligent conduct of the tender. It was the necessity to safety—a necessity entirely and only attributable

to the original negligence of the tender. The failure to stop the boat, short of injury, was due, it appears, solely to the breaking of the yoke; but that happening cannot, we think, avail to absolve the defendant from its liability from the natural consequence of its misconduct, which misconduct commanded the effort to stop the boat in the course of which the ²³⁵ machinery, without warning, broke. The effort to avert the result was in the interest not only of plaintiff's safety, but was also a motion to save a situation created by the defendant's negligence. To allow it exoneration from liability on that score would be to repudiate for it an act taken in obedience to a duty owed by the plaintiff arising because of the negligent defendant. One endangered by another's act or omission cannot supinely drift to injury. He must with due diligence exert himself to avert the injury. If his effort, well directed, failed without his fault, certainly no exemption from liability obtains to the advantage of him producing the necessity to make the effort. The breaking of the yoke was no intervening, efficient cause, severing the causal connection between the inceptive negligence and the resulting injury; nor can it be asserted, as matter of law, that the direction of the drift of the boat against a stationary span, with the purpose to avoid a collision with the swinging draw, and partially opened, was an act breaking the train of sequences put in operation by the primary negligence; nor can it be said that such an act was contributory to the resulting injury, since the unmanageable vessel was certain to strike the structure as it floated with the current of the stream.

The play upon the term "understood," with reference to the signals alleged to have been given, is not warranted. It was the legal duty of the defendant to provide a tender to understand and respond to proper signals and without undue delay open the draw. This duty is not measured by, nor the performance of it conditioned upon, the mere understanding of the signals by the tender. If the proper signals are given, the duty to safely and with due dispatch open the draw arises; and the failure of the tender to understand the proper signals or to hear them is no excuse for the dereliction in duty.

²³⁶ The rule for the measure of damages, applicable to this case and in keeping with which the jury were instructed and defendant's requested instructions refused, is affirmed in the case of *Williamson v. Barrett*, 13 How. (U. S.) 101, 14 L. ed. 68, which is elaborately annotated in 5 *Rose's Notes on United States Reports*, 145 et seq., to be those damages that would remunerate the plaintiff for necessary repairs and the market

value of the use or hire of the vessel during the time necessary to make the repairs and fit her for business. Both these elements of damage are, with reasonable certainty in amount, ascertainable, and we are unable to see how any injustice therefrom could result. The lower court, therefore, was not in error in its rulings in respect of the measure and elements of damages involved in this case.

Over the objection of defendant testimony was admitted to the effect that, the next morning after the injury complained of took place, the bridge-tender visited the vessel and inquired whether the plaintiff would take a named sum and drop the matter. This was error. The alleged declaration of the tender was not a part of the *res gestae* of the immediate transaction for redress of which the action was brought. Its inadmissibility is adjudged in the following decisions, among others, of this court: *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403; *Moore v. Nashville C. etc. R.*, 137 Ala. 495, 34 South. 617; *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 South. 176; *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 South. 577. The tender's alleged statement was also erroneously admitted, because, even if authorized by defendant, it was a mere offer to compromise: *Collier v. Coggins*, 103 Ala. 281, 15 South. 578.

Since another trial must be had, it is not necessary that specific consideration of other assignments of error be given. But it will probably be well, when the case is ²³⁷ again tried, to limit the testimony tending to show the damage, within the rule stated above, to those facts which will enable the jury, if they find for the plaintiff, to determine what the reasonable market value of the hire of the vessel during the time reasonably necessary to repair the damage sustained and the reasonable value of the repairs, or, to state the latter element differently, what the reasonable cost of such repairs was at the time made. What was in fact paid for the repairs is not the test, though; if shown to be reasonable in amount, it is evidence to go to the jury for their consideration.

For the errors indicated, the judgment must be reversed and the cause remanded.

Tyson, C. J., and Dowdell and Anderson, JJ., concur.

The Right to Obstruct Streams by the Erection of Bridges is discussed in *Commissioners of Burke County v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829; *Farmers' Co-operative Mfg. Co. v. Albe-marle etc. R. R. Co.*, 117 N. C. 579, 53 Am. St. Rep. 606; note to *Mizell*

v. McGowan, 85 Am. St. Rep. 707. The legislature may authorize the construction of a bridge over a stream entirely within the limits of the state, notwithstanding the bridge may work inconvenience to navigation; but under a general authority to build bridges over a stream a corporation must so construct them as not unnecessarily to interfere with navigation: **Railroad v. Ferguson**, 105 Tenn. 552, 80 Am. St. Rep. 908.

DOE EX DEM. CHAMBERLAIN, MILLER & CO. v. ABBOTT.

[152 Ala. 243, 44 South. 637.]

ATTORNEY AND CLIENT—Authority to Appear—Presumption.—An attorney who is regularly admitted and licensed to practice law is presumed to have authority to appear for the party whom he professes to represent. (p. 30.)

ATTORNEY AND CLIENT—Authority to Appear—Presumption—Burden of Proof.—The appearance in a suit by an attorney of the proper court is presumed to be authorized, and the burden of proof is upon the party denying the authority to show the want thereof. (p. 31.)

ATTORNEY AND CLIENT—Authority to Appear—When must be Challenged.—The right to require an attorney to establish his authority to appear for the party whom he assumes to represent must be exercised at the first term after service and before pleading, and cannot be exercised after the trial has been entered upon by the selection of a jury. (p. 32.)

ATTORNEY AND CLIENT—Authority of Attorney to Appear. Mere Denial of the authority of an attorney to appear for the party whom he assumes to represent is insufficient to challenge his authority and require him to produce it. (p. 32.)

ATTORNEY AND CLIENT—Authority of Attorney to Appear—Challenge of Waiver.—The right to challenge the authority of an attorney to appear for the person whom he assumes to represent may be waived. (p. 32.)

J. Aiken and G. D. Motley, for the appellant.

S. Blake, J. W. Overton and Lackey & Bridges, for the appellee.

²⁴⁵ **HARALSON, J.** The authority of an attorney at law, says Mr. Weeks, who is regularly admitted and licensed, to appear for the party whom he professes to represent, is presumed, until the contrary is shown; or, in other words, an appearance in a suit by an attorney of the proper court is presumed to be authorized. The burden of proof is upon the party denying the authority. But the author adds: "Notwithstanding this, the opposite party may, at the outset, compel the attorney to show his authority, or produce his warrant

of attorney. For this purpose due cause must be shown": Weeks on Attorneys at Law, secs. 196, 198, 200.

It is also said by Mr. Weeks that "in order to invoke the exercise of such power, the opposite party, when he ²⁴⁶ questions the authority of the attorney, must state facts showing, or tending to show, that the attorney did not possess the authority which he exercised. He must state such facts, and the grounds and reasons which induced him to believe that the attorney had no authority to appear; otherwise, the prima facie evidence, viz., the presumptions arising from the license and the fact of the appearance, will prevail," etc.: Weeks on Attorneys at Law, sec. 198.

"The authority of an attorney to represent his alleged client cannot be questioned at the trial, and such objection should, it seems, be taken at the first term. The application for plaintiff's attorney to show authority should be made before a plea is filed": 4 Cyc. 930.

In *Lucas v. Bank of Georgia*, 2 Stew. 147, this court said: "If, however, it were conceded that an attorney professing to represent a corporation should be required to produce the warrant of his appointment, we would say that in this case it had been admitted, or the right to demand its production waived, by pleading the general issue": *Gaines v. Tombeckbee Bank, Minor*, 50.

In this case, a suit was instituted in August, 1899, by the attorney, whose authority to do so is questioned, in favor of the plaintiffs against Thomas Abbott and others, in ejectment for the lands mentioned in the declaration. One of the defendants filed a plea that he was the tenant of one Whitten, and asked that the latter be made a party defendant; and he was, in August, 1900, admitted to defend, and filed a plea of not guilty; another defendant, in August, 1899, filed a plea of disclaimer; and another filed a plea of not guilty and disclaimer, and on that day—August 20, 1900—a trial was had and judgment rendered for the defendants. Thereafter, on August 22, 1900, plaintiffs moved for a new trial, and on August 24th, the judgment was set aside and a new trial granted.

²⁴⁷ On August 15, 1904, one of the defendants, Whitten, filed a sworn plea denying the partnership of the plaintiffs, and on the same day said Whitten filed a motion to require James Aiken to produce his authority to appear as an attorney from each and every lessor named in the declaration, which motion was filed with the clerk of the court, but was never called to the attention of said Aiken until after the jury

to try the cause had been selected, impaneled and sworn, in February, 1906, for the trial of the same, and that said Aiken knew nothing of said motion until after the plaintiffs had stated their cause to the jury, and then defendants called plaintiffs' attorney's attention to said motion.

James Aiken was sworn as a witness, presumably for defendant, and testified without objection that he was the agent for the plaintiffs in purchasing the lands sued for a short while before the Civil War; that he acted as their agent to collect rents and pay taxes on the land, and was never employed by them as attorney to bring this suit; that he had not heard from plaintiffs since 1868, and did not know whether they were living or dead, and prior to and including the year 1868 he had corresponded with plaintiffs about selling the lands sued for, and no correspondence was ever had about the bringing of this suit, but that it was instituted by him, under and by virtue of his authority as agent of the plaintiffs, looking after the lands, to protect the interest of plaintiffs when defendants went into possession of the lands.

Under this state of facts, if the authority of said Aiken to institute the suit had been properly challenged at the threshold, or commencement of the suit, at the first term after service and before pleading, it seems he might have been required to show his authority as an attorney to institute and prosecute it, but this authority ²⁴⁸ was not questioned until long after the commencement of the suit, and much pleading had been indulged, and not, in fact, until the trial of the cause was entered on, until after the jury had been selected, and the plaintiff's counsel had stated their cause to them.

Furthermore, the authority of the attorney was not questioned on any facts which were stated showing, or tending to show, a lack of authority, but simply upon a denial that the attorney had authority from any of the lessors to bring the suit. This, according to authorities, was insufficient to challenge the authority of the attorney and to require him to produce it: Weeks on Attorneys at Law, sec. 198, and authorities there cited.

We have not overlooked section 594 of the Code of 1896. This section is nothing more than declaratory of the common law, and the right by it may be waived just as the right secured to the defendant by the common law may be.

It follows that the court erred in dismissing the suit on the motion of defendants.

Reversed and remanded.

Tyson, C. J., and Simpson and Denson, JJ., concur.

RIGHT OF ATTORNEY TO APPEAR FOR THE PARTY WHOM HE ASSUMES TO REPRESENT, PRESUMPTION OF SUCH AUTHORITY, AND METHODS OF QUESTIONING IT.

- I. Authority to Appear Generally, 33.
- II. Who may Raise Question of Attorney's Authority, 35.
- III. Waiver of Right to Question Authority, 36.
- IV. Evidence of Authority to Appear, 36.
- V. Authority, a Question for the Jury, 38.
- VI. Presumption of Authority, 39.
- VII. Burden of Proof to Rebut Presumption of Authority, 41.
- VIII. Method of Attacking Authority.
 - a. Collateral Attack, 43.
 - b. By Motion, 43.
 - c. Authority must be Denied Under Oath, 44.
 - d. Sufficiency of Affidavit, 45.
- IX. Authority of Attorney cannot be First Questioned on Appeal, 45.

I. Authority to Appear Generally.

As a general rule the mere appearance of an attorney for one of the parties to a suit is deemed sufficient for the opposite party and for the court, who will look no further, and will proceed as if he had sufficient authority, and leave the party who may be injured to his action, unless fraud and collusion clearly appear in the case. In other words, it is not necessary that an attorney, regularly admitted, should prove his authority to represent a person in the first instance: *Tally v. Reynolds*, 1 Ark. 99, 31 Am. Dec. 737; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Howe v. Anderson* (Ky.), 14 S. W. 216; *Upham v. Bradley*, 17 Me. 423; *State v. Carothers*, 1 G. Greene, 464; *Post v. Haight*, 1 How. Pr. 171; *Republic of Mexico v. Arrangois*, 5 Duer, 643, 1 Abb. Pr. 437; *People v. Murray*, 2 Misc. Rep. (N. Y.) 152, 23 Civ. Proc. 71, 23 N. Y. Supp. 160; *Rogan v. Walker*, 1 Wis. 597; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. It is a general rule that the appearance of an attorney for the defendant is always deemed sufficient for the opposing party and for the court, who will look no further and will proceed as if he had sufficient authority: *Jackson v. Stewart*, 6 Johns. 34; *Austen v. Columbia Lubricants Co.*, 85 N. Y. 362.

If the defendants have been notified legally of the pendency of an action, the written authority of their attorney need not be first produced to enable him to act: *Dougherty v. Andrews*, 19 Ind. 406. But it has been decided that when the authority of an attorney is not in some way admitted, it must be proved: *State v. Tighman*, 6 Iowa, 496; *Wilcox v. Clement*, 4 Denio, 160.

It has also been decided, contrary to the weight of authority, that if the name of an attorney of the court appears on the record, the court will not allow the record to be contradicted to show that he was not authorized to appear in the first instance: *Smith v. Bowditch*, 7 Pick. 137. And unless the attorney of record be so situated as to excite the suspicion of the court, as when he is advocating inconsistent interests, his authority to appear will not be questioned: *Tallia-*

ferro v. Porter, Wright, 610. It is not necessary for an attorney to show authority to commence and manage a suit, whether the action is by an individual or a corporation, unless his authority is called for, and even when called for, if the attorney declares that he was employed by the plaintiff, or his agent, who he believed was authorized to employ him, this will generally be sufficient to authorize him to proceed: *Manchester Bank v. Fellows*, 28 N. H. 302. And ordinarily the attorney who appears for the plaintiff is not bound to produce his authority to do so unless it is required by the defendant: *Silkman v. Boiger*, 4 E. D. Smith, 236; *Chapman v. Chevis*, 9 Leigh, 297.

If an attorney who has been legally admitted to practice enters an appearance in a suit, his appearance may be received as evidence, and is sufficient to establish his authority to appear and to represent a suitor, whether a natural person or a corporation: *Gains v. Tombeckbee Bank, Minor*, 50; *Lucas v. Bank of Georgia*, 2 Stew. 147; *Shroudenebeck v. Phoenix Fire Ins. Co.*, 15 Wis. 632; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204.

It has been decided that it is error for a court to permit an attorney to appear for a party without proof of his authority, but that such error is cured by subsequent proof of his authority made during the trial: *Smith v. Ford*, 1 Wend. 48. But generally the court will not require, in addition to an appearance and an answer signed by counsel, an answer personally signed by a nonresident defendant before assuming jurisdiction of the person of such defendant: *Flint v. Comly*, 95 Me. 251, 49 Atl. 1044. And the court will not require attorneys to produce their authority to act on behalf of one of the plaintiffs, when there is no showing that they were not duly authorized, and, on the contrary, it appears that they were employed by the other plaintiff to take charge of the case generally, and that the one so employing them was, in fact, the party responsible in the case and bound to protect the other from liability: *O'Flynn v. Eagle*, 7 Mich. 306.

Although it is generally conceded that an attorney who appears in court is endowed with authority to represent the person whom he assumes to act for, still his authority may be questioned: *Standefee v. Dowlin*, Fed. Cas. No. 13,284a, Hemp. 209; and when his authority is disputed, he may be required to produce it: *Prentiss v. Kelley*, 41 Me. 436; *McKiernan v. Patrick*, 4 How. (Miss.) 333; *Low v. Settle*, 22 W. Va. 387. The court may, by virtue of the general power which it exercises over its officers, order the plaintiff's attorney to show his authority to bring the suit: *Board of Commissioners v. Purdy*, 36 Barb. 266; *King of Spain v. Oliver*, 2 Wash. C. C. 429, Fed. Cas. No. 7814; *Allen v. Green*, 1 Bail. 448. Or the court may order an attorney to show his authority to sue whenever the rights of the defendant seem to require it: *Vincent v. Vanderbilt*, 10 How. Pr. 324; *Ninety-nine Plaintiffs v. Vanderbilt*, 4 Duer, 632, 1 Abb. Pr. 193. An attorney of the court may generally sue or defend without proof of his authority, but the court may, under circumstances where the ends of justice require it, order him to produce his warrant or prove his authority: *State v. Houston*, 3 Harr. 15. Facts or circumstances must

first be shown, however, which raise a presumption that he is not authorized to appear before his authority can be legally questioned: *Cartwell v. Menifee*, 2 Ark. 356; but if the right of an attorney to appear is questioned upon evidently good grounds, it is the duty of the court to require him to exhibit his authority: *Colorado Coal etc. Co. v. Carpita*, 6 Colo. App. 248, 40 Pac. 248.

Whenever there is reasonable ground to presume that an attorney has commenced a suit without permission of the plaintiff, he should be required to produce satisfactory evidence of his authority: *Belt v. Wilson's Admr.*, 6 J. J. Marsh. 495, 22 Am. Dec. 88. Or if a suit is prosecuted for the use of another in whose derivation of right to sue there is a manifest defect, the attorney must show his authority: *McAlexander v. Wright*, 3 T. B. Mon. 189, 16 Am. Dec. 93. But the presumption that an attorney has the authority to appear for the party whom he assumes to represent can only be overcome by the court requiring the attorney to prove the authority under which he appears, and disclose the name of the person who employed him: *Planters' etc. Fire Assn. v. De Loach*, 113 Ga. 802, 39 S. E. 466.

II. Who may Raise Question of Attorney's Authority.

To call for an inquiry into an attorney's authority to appear in a case for either party, circumstances should be shown calculated to raise a suspicion of fraud or an attempt to impose upon the party or to pervert or abuse the process of the court: *Republic of Mexico v. Arangois*, 5 Duer, 643.

As to who may raise the question of the right of an attorney to appear for a party in a suit is a vexed question. However, an attorney's authority to appear will not be questioned at the instance of a stranger to the record: *Bryans v. Taylor, Wright*, 245. In California, an attorney may be compelled to show his authority to appear at the instance of either party to the suit: *People v. Mariposa Co.*, 39 Cal. 683. The general rule is, that the adverse party cannot require the attorney to affirmatively show his authority to appear for the party whom he assumes to represent: *Noble v. Bank of Kentucky*, 3 A. K. Marsh. 262; *Norberg v. Heineman*, 59 Mich. 210, 26 N. W. 481; *Baldwin v. Foss*, 13 Neb. 455, 16 N. W. 480; *White v. Merriam*, 16 Neb. 96, 19 N. W. 703; *Doolittle v. Gookin*, 10 Vt. 265; *Harrington v. Edwards*, 17 Wis. 586, 84 Am. Dec. 768. Defendant in partition, relying on title by adverse possession, cannot defeat a recovery by the plaintiff by showing that the suit was brought by his attorney without authority: *Hess v. Webb* (Tex. Civ. App.), 113 S. W. 618. However, it has been decided that an attorney must show his authority whenever the opposing party requires it: *Ex parte Gillespie*, 3 Yerg. 325. A party may require the attorney of his adversary to produce his warrant of attorney by showing that his rights will otherwise be jeopardized and himself brought into litigation without the consent of the man who stands on the record as his adversary: *McAlexander v. Wright*, 3 T. B. Mon. 189, 16 Am. Dec. 93. But the court will not generally question the authority of an attorney to

appear at the instance of the adverse party: *Doolittle v. Gookin*, 10 Vt. 265. And it devolves upon a defendant impeaching such authority to show by positive proof that such appearance is unauthorized: *Reynolds v. Fleming*, 30 Kan. 106, 46 Am. Rep. 86, 1 Pac. 61. Generally, the right of an attorney to enter an appearance in an action can be called in question only by the party himself: *Baldwin v. Foss*, 14 Neb. 455, 16 N. W. 480; *Hess v. Cole*, 23 N. J. L. 116.

III. Waiver of Right to Question Authority.

The right to question the authority of an attorney to appear for a party whom he assumes to represent may be waived in various ways. Thus, a defendant with reason to believe that an action was not brought at the instance of the real plaintiff, but of a stranger, may require the plaintiff's attorney to file his warrant of attorney, but he waives this right by pleading and putting the cause in issue: *Lucas v. Bank of Georgia*, 2 Stew. 147; *Campbell v. Galbreath*, 5 Watts, 423. By admitting service of papers on a motion for a new trial by an attorney for the defendant without objection and by serving papers in plaintiff's behalf on such attorney as such, any objection that he is not the attorney of record is waived: *Smith v. Smith*, 145 Cal. 615, 79 Pac. 275; and unless an objection is promptly made to the appearance of an attorney without authority to conduct proceedings, the defendant waives the right to make an objection to such appearance thereafter: *State v. Harris*, 14 N. D. 501, 105 N. W. 621. If a railroad company avails itself of the services of an attorney in certain litigation for several months, with knowledge of the facts as to the manner of his appointment, this is a ratification of any defect in the authority conferring the original appointment, and a waiver of want of authority by the defendant: *Southgate v. Atlantic etc. R. R. Co.*, 61 Mo. 89. If a person has knowledge of a judicial proceeding against him, and for a long period makes no objection to the authority of the attorney who represents him, he waives the right to avoid the legal effects of such proceeding, and to deny the authority of his attorney to represent him: *Mason v. Stewart*, 6 La. Ann. 736. If an attorney of plaintiff's intestate is authorized by the latter to represent him in suits to sell his land for debt, and such fact is known to the plaintiff, who is a claimant of the land in litigation, and he does not, after the intestate's death, revoke or question the authority of the attorney during the pendency of the suit, he waives all right to question such authority, and is estopped after a sale has taken place from setting up such want of authority: *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605. But the right to object to an appearance as attorney, for want of an authority to do so, is not waived, by having demanded a plea before the question of adjournment be considered: *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544.

IV. Evidence of Authority to Appear.

The admission that an attorney was retained by the party whom he assumes to represent and for whose use the action is brought

shows a sufficient legal authority for him to appear for such party: *Cartwell v. Meniffee*, 2 Ark. 356; *Markey v. Louisiana etc. R. R. Co.*, 185 Mo. 348, 84 S. W. 61. And the name of an attorney signed to a plea is sufficient evidence that he is the attorney of record: *Dalton City Co. v. Dalton Mfg. Co.*, 33 Ga. 243. The assumption by an attorney of authority within the scope of the ordinary power of a practicing lawyer to act for a party to an action is always presumptive evidence of his actual authority to act: *Christian & Craft Co. v. Coleman*, 125 Ala. 158, 27 South. 786; *Hirsh v. Fisher*, 138 Mich. 95, 101 N. W. 48; *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125; and in the absence of any notice or order of substitution, a showing by the record that certain attorneys have been acting for a party all through the case except upon the filing of an original answer, and have been recognized as such attorneys by the court and by the opposing counsel, is evidence that they are authorized attorneys in the action: *Hoppin v. First Nat. Bank*, 25 Nev. 84, 56 Pac. 1121. The testimony of an attorney that he was originally employed by the secretary of the defendant corporation, when he sues for the value of his services, and that such corporation had paid for services rendered by him, is admissible to show his authority to act for such corporation in a suit brought, if based upon the evidence of such secretary that he was so employed, as the employment of an attorney by a private corporation, as well as by a private person, may be shown by its conduct, and the rules under which it may be estopped from disputing its liability for his acts or by which its ratification of his acts may be established are the same: *Kelly v. Ning Yung Benev. Assn.*, 2 Cal. App. 460, 84 Pac. 321. In an action on a judgment, affidavits alleging the employment of an attorney, filed and made part of the record in the action are evidence of his authority to appear: *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, 54 N. E. 211. The preparation and filing of pleadings are presumed to be regular and strictly within the scope of the attorney's employment, and the statement of a ground of defense in an answer or demurrer is binding on the defendant until the want of authority is shown: *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938. If several attorneys are employed to defend an action, evidence of one of them that one of the defendants did not engage him to act as his attorney, without any evidence as to the want of authority of the other attorneys to represent such defendant, is insufficient to establish that such attorneys had no authority to appear for him in the action: *Patterson v. Yancey*, 97 Mo. App. 681, 77 S. W. 845. And the authority of the attorney of record to represent one whom he testifies is his client will not be decreed to be at an end on the testimony of another attorney, not of record, unsupported by other evidence: *Gigand v. City of New Orleans*, 52 La. Ann. 1259, 27 South. 794.

The mere declaration of an attorney is not, however, admissible to show the scope of his authority: *West v. A. P. Messick Grocery Co.*, 138 N. C. 166, 50 S. E. 565. One cannot prove his authority

to appear as attorney for a party in a suit by producing a letter from a third person simply requesting him to thus appear, even if such person is an attorney at law, unless it otherwise distinctly appears that the latter is attorney for the party: *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544. And if an attorney is called upon to show his authority, this is not satisfied by his declaration that the action was originally brought with the consent of the plaintiff as his representative: *Fisler v. Reach*, 202 Pa. 74, 51 Atl. 599. A written statement by the nominal plaintiff, though not sworn to, that a suit was prosecuted without his consent, supported by the admission of the attorney for plaintiff that he does not claim to represent such nominal plaintiff, is sufficient to require a dismissal of the case, in the absence of other proof, and the fact that, after an order of dismissal is entered by the court for want of such attorney to bring suit, the plaintiff signs an appeal bond does not amount to a ratification of such authority: *Bell v. Farwell*, 89 Ill. App. 638; affirmed 189 Ill. 414, 59 N. E. 955. If a wife injured by a railroad accident is visited by the representative of an attorney, who desires to obtain her case and is referred to her husband, who enters into a contract authorizing the attorney to commence suit against the company on behalf of her husband, and the attorney's representative testifies that the husband and wife authorized the attorney to commence the suit for the wife, but this is denied by both husband and wife, the testimony of such representative of the attorney was held insufficient to show an employment of such attorney to bring suit for the wife: *Whitesell v. New Jersey & H. R. etc. Co.*, 68 App. Div. 82, 74 N. Y. Supp. 217; but this certainly is not maintainable as a proposition of law. Such a case involves the credibility of the witnesses, and the question of fact thus presented must be determined by court or jury like any other question dependent on the credibility of witnesses. If an appeal is taken by a wife whose husband is not a party to the suit, and is not represented by counsel of record, the signature of the bond of appeal by the wife's attorney in the name of the husband is not sufficient evidence of the latter's authorization to maintain the appeal, and it must be dismissed: *Gibson v. Hitchcock*, 35 La. Ann. 1201. In an action to recover costs adjudged to plaintiffs and against defendants in the final decree entered in a suit in another state, in which the defendants, without service of process, appeared and answered by an attorney, it is not necessary to prove that such defendants directly employed such attorney: *Davis v. Cohn*, 96 Mo. App. 587, 70 S. W. 727.

V. Authority a Question for the Jury.

When the question of the authority of an attorney to appear in an action becomes material and contested, it must, after the evidence is in, be submitted to the consideration and determination of the jury, and it is error for the court to refuse to thus submit such

question: *Howard v. Smith*, 1 Jones & S. 124. Whether one who has assumed to act as attorney for another is authorized to do so is a question of fact to be determined by the jury under proper instructions from the court: *Vorce v. Page*, 28 Neb. 294, 44 N. W. 452; *Alsbaugh v. Jones*, 64 N. C. 29; *Newhart v. Wolfe*, 2 Penne. 295; *Henderson v. Terry*, 62 Tex. 281. And this question must ordinarily be determined in the court in which the attorney enters an appearance: *Clark v. Holliday*, 9 Mo. 711.

VI. Presumption of Authority.

Ordinarily, a record showing the appearance by an attorney for a litigant raises a presumption of his authority, and constitutes in law *prima facie* evidence of the authority of the attorney. To this point the authorities are so numerous and uniform that only a portion of them will be cited, among which are the following: *Wyatt v. Burr*, 25 Ark. 476; *Turner v. Caruthers*, 17 Cal. 431; *Garrison v. McGowan*, 48 Cal. 592; *Lawrence v. Jarvis*, 32 Ill. 304; *Ferris v. Commercial Nat. Bank*, 158 Ill. 237, 41 N. E. 1118; *People v. Parker*, 231 Ill. 478, 83 N. E. 282; *Harshey v. Blackman*, 20 Iowa, 161, 89 Am. Dec. 520; *Wheeler v. Cox*, 56 Iowa, 36, 8 N. W. 688; *Hendrix v. Fuller*, 7 Kan. 331; *Esley v. People*, 23 Kan. 510; *Handley v. Stator*, Litt. Sel. Cas. 186; *Kelley v. Benedict*, 5 Rob. 138, 39 Am. Dec. 530; *Postal Telegraphic Cable Co. v. Louisville etc. Ry. Co.*, 43 La. Ann. 522, 9 South. 119; *Henck v. Todhunter*, 7 Har. & J. 275, 16 Am. Dec. 300; *Hager v. Cochran*, 66 Md. 253, 7 Atl. 462; *Steffe v. Old Colony R. R. Co.*, 156 Mass. 262, 30 N. E. 1137; *Corbitt v. Timmerman*, 95 Mich. 581, 35 Am. St. Rep. 586, 55 N. W. 437; *Gemmell v. Rice*, 13 Minn. 400; *Shirling v. Scites*, 41 Miss. 644; *Lester v. Watkins*, 41 Miss. 647; *Kepley v. Irwin*, 14 Neb. 300, 15 N. W. 719; *State v. Crumb*, 157 Mo. 545, 57 S. W. 1030; *Vorce v. Page*, 28 Neb. 294, 44 N. W. 452; *Missouri Pac. Ry. Co. v. Fox*, 56 Neb. 746, 77 N. W. 130; *State v. California Min. Co.*, 13 Nev. 203; *Beckley v. Newcomb*, 24 N. H. 359; *Norris v. Douglass*, 5 N. J. L. 817; *Easton & Amboy R. R. Co. v. Township of Greenwich*, 25 N. J. Eq. 565; *Ward v. Price*, 25 N. J. L. 225; *Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184; *Bacon v. Mitchell*, 14 N. D. 454, 106 N. W. 129, 4 L. R. A., N. S., 244; *Bogardus v. Livingstone*, 2 Hilt. 236; *Hamilton v. Wright*, 37 N. Y. 502; *People v. Murray*, 2 Misc. Rep. (N. Y.) 152, 23 N. Y. Supp. 160, 23 Civ. Proc. Rep. 71; *Howard v. Smith*, 1 Jones & S. 124; *Pillsbury's Lessee v. Dugan's Admr.*, 9 Ohio, 117, 34 Am. Dec. 427; *Miller v. Preston*, 154 Pa. 63, 25 Atl. 1041; *Sanders v. Price*, 56 S. C. 1, 33 S. E. 731; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *Anderson v. Hultman*, 12 S. D. 105, 80 N. W. 165; *Merritt v. Clow*, 2 Tex. 582; *Fowler v. Morrill*, 8 Tex. 153; *Low v. Settle*, 22 W. Va. 387; *Shroudenbeck v. Phoenix Fire Ins. Co.*, 15 Wis. 632; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. ed. 616; *Bonnifield v.*

Thorp, 71 Fed. 924; Underfeed Stoker Co. v. American Ship Windlass Co., 165 Fed. 65.

If a person of full age and laboring under no disability is named as plaintiff in a suit filed by a duly licensed attorney, the presumption is that such attorney had authority to file the suit in behalf of such person: *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303. And it is to be presumed that an attorney is duly authorized to represent any parties for whom he assumes to act, whether such parties are plaintiffs or defendants: *Clark v. Morrison*, 5 Ariz. 349, 52 Pac. 985; *San Francisco Savings Union v. Long*, 123 Cal. 107, 55 Pac. 708; *Pacific Paving Co. v. Vizelich*, 141 Cal. 4, 74 Pac. 352; *Ebel v. Stringer*, 73 Neb. 249, 102 N. W. 466. A general or special appearance in an action by an attorney is presumptive evidence of his authority to appear for the party whom he assumes to represent: *Cutting v. Jessmer*, 101 App. Div. 283, 91 N. Y. Supp. 958. The appearance in court of an attorney, claiming to represent a litigant, is *prima facie* evidence of his authority to act for him, and such authority must be overcome by clear and convincing evidence: *Hunter v. Bryant*, 98 Cal. 247, 33 Pac. 51. In fact, the appearance of an attorney for the plaintiff is *prima facie* evidence of his authority to act, and the fact that in argument he declines to answer a question as to his authority to act will not sustain a conclusion of law that he had no such authority: *Andrews v. Thayer*, 30 Wis. 228. It makes no difference whether the attorney appears for the plaintiff or the defendant, if he makes an appearance in court to prosecute or defend a party. It must be presumed, in the absence of anything to the contrary, that he has full right, power and authority to make such appearance and to represent such party: *Esley v. People*, 23 Kan. 510. An attorney of the circuit court is presumed to have authority to appear for a client in whose behalf he has entered an appearance in due form, and the opposite party cannot require him upon demand, to affirmatively establish such authority: *Norberg v. Heineman*, 59 Mich. 310, 26 N. W. 481. Whenever the appearance of an attorney is entered of record, it is always considered as done by the authority of the party for whom he professes to act, and what he does in the case is binding on the party, except in cases of fraud or imposition: *Kelly v. Benedict*, 5 Rob. 138, 59 Am. Dec. 530; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18.

If a pleading is interposed by counsel for "the defendants," it will be presumed that counsel is acting for all of the defendants: *Adams v. Mowry*, 6 Mo. App. 581; or if a complaint alleges a cause of action and prays process against two, only one of whom is cited, and there is no answer, but the judgment recites that the parties appeared by attorney, and confessed judgment, and then proceeds to render judgment against the aforesaid defendants, the presumption is that the attorney appearing had authority from both de-

defendants: *Miller v. Alexander*, 8 Tex. 36. If several parties join in a suit by their solicitor, his authority to appear and act for all is presumed, unless some of the parties object to the proceedings, or an adverse party shows affirmatively that the suit is commenced and carried on in the names of some of such parties without authority: *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

If an agent for an absent defendant has been in the habit of employing an attorney for the absent defendant and paying the attorney for his services out of the funds of such defendant, who was in the habit of leaving the conduct of his suits with such agent, the presumption is that an appearance entered by such attorney for such defendant was by authority: *Garrison v. McGowan*, 48 Cal. 592.

But the assumption by an attorney, even if generally retained, to act for his principal outside of the due and orderly prosecution, defense or conduct of litigation on his behalf or proceedings in court, does not create any presumption of actual authority so to act: *Horseshoe Mining Co. v. Miners' Ore Sampling Co.*, 147 Fed. 517, 77 C. C. A. 213. Or the fact that persons were office associates of an attorney at law, and employed by the same employer, does not justify a presumption that such attorney had authority to appear, and represent them in a suit brought against such persons: *Thomson v. Patek*, 235 Ill. 341, 85 N. E. 603. If a codefendant in a suit to foreclose a purchaser's right under a land contract appears as attorney for all of the defendants, the trial judge has a right to presume his authority to acknowledge on behalf of all service of demand of payment and tender of deed: *Odd Fellows' Savings Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109. If the directors of a bank adopt a resolution for a call for unpaid stock, which provides that in default in the payment the attorney for the bank may take such action to enforce collection as he may deem necessary, and a suit is brought by such attorney, the court, in the absence of a showing to the contrary, must presume that such attorney was authorized to bring the suit, thus rendering the question of the validity of the resolution authorizing the attorney to enforce collection immaterial: *People's Home Savings Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329.

Under the bankruptcy law providing that a creditor may oppose the discharge of a bankrupt, and defining the term "creditor" as including the duly authorized agent, attorney or proxy of a creditor, and as a proceeding in bankruptcy is in the nature of an equitable proceeding, an attorney who has appeared at previous stages in such bankruptcy proceeding, and who enters his appearance in opposition to the discharge of the bankrupt, must be presumed to be duly authorized to appear and oppose such discharge: *In re Gasser*, 104 Fed. 537, 44 C. C. A. 20.

VII. Burden of Proof to Rebut Presumption of Authority.

As before stated, the presumption is that an attorney appearing in court for either a plaintiff or a defendant has authority to do so,

and where such authority is questioned the burden of proof is on the party attacking, and such want of authority must be established by positive evidence: *Stubbs v. Leavitt*, 30 Ala. 352; *Broadway v. Sidway*, 84 Ark. 527, 107 S. W. 163; *Great West Min. Co. v. Woodmans*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; *Wehlem v. Burk*, 119 Iowa, 742, 94 N. W. 243; *Roselius v. Delachaise*, 5 La. Ann. 481, 52 Am. Dec. 597; *Kepley v. Irwin*, 14 Neb. 300, 15 N. W. 719; *Vorce v. Page*, 28 Neb. 294, 44 N. W. 452; *Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184; *Howard v. Smith*, 1 Jones & S. 124; *Holder v. State*, 35 Tex. Cr. 19, 29 S. W. 793; *Thomas v. Steele*, 22 Wis. 207; *Bonnifield v. Thorp*, 71 Fed. 924.

One alleging that an entry of appearance by an attorney was without his authority must affirmatively show that fact: *Dey v. Hathaway etc. Tel. Co.*, 41 N. J. Eq. 419, 4 Atl. 675. It is not necessary, in the first instance, for an attorney to prove his signature to a stipulation, or that he was the attorney for the party, the burden of proof being upon the party to show that such attorney was not his attorney, or that his signature was not genuine: *Brewster v. Manning*, 6 Hun, 530. If a person of full age and laboring under no disability is named as plaintiff in a suit filed by a regular attorney, it is presumed that he had authority to file the suit in behalf of such person, but such presumption is not conclusive; and may be rebutted by a preponderance of evidence by such party: *Bigham v. Kistler*, 114 Ga. 453, 40 S. E. 303. However, if the right to bring suit is denied by the plaintiff, who moves for a substitution of attorneys, the attorney moved against must affirmatively establish his authority: *Stewart v. Stewart*, 56 How. Pr. 256. If the authority of an attorney who appears for one party is denied by the opposite party, the burden of proving such lack of authority is upon the latter: *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243. And if the defense in an action is based on an alleged want of authority of plaintiff's attorney to give a certain notice, the burden of proof is on the defendant to prove such want of authority: *Barkley Cemetery Assn. v. McCune*, 119 Mo. App. 349, 95 S. W. 295; *Nolan v. St. Louis etc. R. R. Co. (Okl.)*, 91 Pac. 1128. An allegation in an answer setting up want of authority on the part of an attorney to commence an action is an affirmative defense, and the action will not abate until such want of authority is shown: *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138. If, in an action by an attorney against a client for breach of contract of employment, the defendant claims that she was induced to enter into it by fraud on the part of the attorney, the burden of proving that her consent was so obtained is upon the defendant: *Weil v. Fineran*, 78 Ark. 87, 93 S. W. 568. The entry of an appearance by an attorney is presumed to have been authorized, and the defendant, to relieve himself from the effect of such appearance, has the burden to prove to the satisfaction of the court that it was unauthorized: *Aaron v. United States*, 155 Fed. 833, 84 C. C. A. 67. The presumption that an attorney who appears in a case generally had

authority to act, supported by the evidence of the general agent in charge of the suit showing the employment of such attorney, is not overcome by other testimony on the part of the defendant that he had no authority to act: *Famous Mfg. Co. v. Wilcox*, 180 Ill. 246, 54 N. E. 211. If the defendant relies upon an alleged accord and satisfaction entered into on behalf of plaintiff by an attorney at law, it is incumbent on defendant to show that such attorney had express authority to make such settlement: *Fosha v. Prosser*, 120 Wis. 336, 97 N. W. 924.

VIII. Method of Attacking Authority.

a. Collateral Attack.—The authority of an attorney to appear cannot be questioned in a collateral attack: *Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682; *Succession of Patrick*, 20 La. Ann. 204; *Donohue v. Hungerford*, 1 App. Div. 528, 37 N. Y. Supp. 628; *Dillard v. Crocker*, *Speers' Eq.* 20. On such an attack the authority of an attorney to appear for the person whom he assumes to represent is conclusively presumed: *Corbett v. Timmerman*, 95 Mich. 581, 35 Am. St. Rep. 586, 55 N. W. 437; *Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360. On the other hand, it has been decided that a judgment may be impeached collaterally by a defendant by proof that he was not served with process and did not appear, although the record recites that he was served, and contains a forged appearance by an attorney in his behalf: *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Shelton v. Tiffin*, 6 How. (U. S.) 163, 12 L. ed. 387. A person may by a bill in equity dispute the authority of an attorney to appear for him: *Courtney v. Dyer*, 1 Ky. Law Rep. 134.

The authority of an attorney to appear for a party cannot be questioned or impugned by a mere suggestion of want of authority: *Turner v. Caruthers*, 17 Cal. 431; *Hayes v. Curry*, 9 Mart., O. S., 87; *Fisher v. Moore*, 12 Rob. 95; *Campbell v. Arceneaux*, 3 La. Ann. 558. An attorney's authority to appear and prosecute a suit cannot be questioned by demurrer: *State v. Baxter*, 38 Ark. 462; *Mix v. People*, 116 Ill. 265, 4 N. E. 783; *Gibson v. State*, 59 Miss. 341. The authority of plaintiff's attorney to institute the suit cannot be questioned by or in the answer filed by the defendant: *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7; *Mix v. People*, 116 Ill. 265, 4 N. E. 783; *Robinson v. Robinson*, 32 Mo. App. 88; *North Brunswick v. Booraem*, 10 N. J. L. 257; *Watrous v. Kearney*, 79 N. Y. 496.

b. By Motion.—The only proper method of attacking an attorney's authority is by motion, supported by oath, as courts will not without cause shown upon a mere motion require an attorney to produce his warrant of authority: *Lester v. McIntosh*, 101 Ga. 675, 29 S. E. 7; *Hellman v. McWhennie*, 3 Rich. 364. The authority of an attorney to appear cannot be called into question except by a motion directly for that purpose, based on affidavits showing prima

facie, at least, want of his authority. The proceeding may be by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown: *Turner v. Caruthers*, 17 Cal. 431; *Bonnifield v. Thorp*, 71 Fed. 924. An objection to the right of an attorney to appear for a party must always be made by motion: *People v. Lamb*, 85 Hun, 171, 32 N. Y. Supp. 584; and the authority of an attorney to appear for a party to an action in a court of record may be controverted while the action is pending. This question may be raised upon due notice by sworn petition, or by motion supported by proper affidavit to vacate the appearance for want of authority, and if an issue is made upon such petition, or motion, it may be tried and determined by the court as other issues of fact: *Dillon v. Rand*, 15 Colo. 372, 25 Pac. 185. If a statute provides that the court may, on motion of either party, require the attorney for the adverse party to produce and prove authority under which he appears, and until this is done may stay all proceedings by him in behalf of the party for whom he assumes to act, it provides the exclusive method of testing the authority of the attorney to act: *State v. Beardsley*, 108 Iowa, 396, 79 N. W. 138. An order granted on motion to compel an attorney of the plaintiff to produce his authority for using the plaintiff's name must direct that the authority be produced to the court granting the order, and state the time and place at which it is required to be presented: *Turner v. Davis*, 2 Denio, 187, 2 How. Pr. 86. If it is desired to question an attorney's authority to appear, an affidavit with a request for the proper rule in the court where the action is pending is one method which may be adopted: *Williams v. Butler*, 35 Ill. 544.

If an action is brought in the name of a town, and it is shown that the pendency of the action was known to its inhabitants, and had been reported at a town meeting without opposition, the plaintiff's proceedings will not be stayed on motion of the defendant made on the ground that the attorney had no authority to bring the action: *Town of Delhi v. Graham*, 3 Hun, 407.

In case it appears from the affidavits that the attorney appearing for a party may not have been invested with authority to represent him in the action, it is error to deny a motion to compel such attorney to disclose his authority: *Hollins v. St. Louis etc. R. R. Co.*, 57 Hun, 139, 25 Abb. N. C. 93, 11 N. Y. Supp. 27.

c. Authority must be Denied Under Oath.—The attorney's authority to appear must always be denied under oath: *Kelly v. Benedict*, 5 Rob. 138, 39 Am. Dec. 530; *Postal Tel. Cable Co. v. Louisville etc. Ry. Co.*, 43 La. Ann. 522, 9 South. 119; *City of New Orleans v. Steinhart*, 52 La. Ann. 1043, 27 South. 586. If a person repudiates the authority of an attorney at law, who acted for him, it is necessary that it should be supported by his own oath and not that of an agent: *Boykin v. Holden*, 6 La. Ann. 120. But in Louisiana it is not absolutely necessary that an affidavit be first made as a condi-

tion precedent to the admission of evidence of the want of the authority in an attorney to appear for a party, as it is permissible for such party to first go on the stand and testify on the subject: *Bender v. McDowell*, 46 La. Ann. 393, 15 South. 21.

d. Sufficiency of Affidavit.—The authority of an attorney in a suit may always be questioned by an affidavit and on the production of sufficient proof, and he may be required to show his authority, but an affidavit stating that the party was informed and believed, and had good reason to believe that the attorney had no authority to appear, is not sufficient foundation for a rule against the attorney to show his authority: *Valle v. Picton*, 16 Mo. App. 178, 91 Mo. 207, 3 S. W. 860; *People v. Mariposa Co.*, 39 Cal. 683; *Robinson v. Robinson*, 32 Mo. App. 88; *Staudefor v. Dowlin*, Hempst. 209, Fed. Cas. No. 13,284a. Such an affidavit is not sufficient to overcome an affidavit by the attorney that he has such authority: *Bonnifield v. Thorp*, 71 Fed. 924. The affidavit must state circumstances rendering it probable that the action was unauthorized, and it is not enough to swear to a mere impression or belief: *Bonnefoy v. Landry*, 4 Rob. 23; and an affidavit by plaintiff that he believed that neither the person who employed defendant's attorney nor the attorney himself had authority to appear in the cause is insufficient to require the attorney to make proof of his authority: *Wright v. Allen*, 26 Wis. 661. To the same effect is *Savery v. Savery*, 8 Iowa, 217. As a general rule, a court ought not to entertain a motion for a rule against an attorney to show his authority to prosecute a suit if the motion is made at the term when the case is to be tried and the issue has been made at a former term, and if allowed at such a stage of the proceedings, the affidavit on which the rule is based must at least state facts which render it highly probable that the attorney is prosecuting the case without authority: *Low v. Settle*, 22 W. Va. 387; and in order to invoke the exercise of the power of the court to question an attorney's authority to appear, the party must show by his affidavit facts at least tending to show that such attorney does not possess the authority assumed. A mere affidavit by opposing counsel, who moves to dismiss for want of authority in the attorney to appear, on an affidavit that he is informed and believes that the attorney was not authorized to appear on the trial, when unsupported by other evidence, is insufficient to overcome the presumption of such attorney's authority to appear: *People v. Mariposa Co.*, 39 Cal. 683. But on a motion to dismiss an action commenced by an attorney without authority, allegations in the moving affidavits as to lack of authority, not contradicted or explained, must be taken to be true: *Commissioners of Excise v. Purdy*, 13 Abb. Pr. 434.

IX. Authority of Attorney cannot be First Questioned on Appeal.

So far as can be discovered, it is a universal rule that the question as to whether one of the attorneys of one of the parties to a suit was unauthorized to appear for him cannot be first raised on ap-

peal, and this is especially true when no objection to his appearance was first made in the court below: *Moon v. Easley*, 18 Ala. 619; *Cochran v. Leister*, 2 Root, 348; *Sanderson v. Town of La Salle*, 117 Ill. 171, 7 N. E. 114; *Ryors v. King*, 48 Ind. 237; *McGarry v. New York County Supervisors*, 31 N. Y. Super. Ct. (1 Sweeney), 217; *Abernathy v. Latimore*, 19 Ohio, 286; *Bingham's Trustees v. Guthrie*, 19 Pa. 418; *Fowler v. Morrell*, 8 Tex. 153. The question of the authority of an attorney who signed and filed a pleading in a cause cannot be raised for the first time on appeal: *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 665. The appellate court cannot originate an inquiry as to the authority of an attorney to appear for a party in the lower court upon an appeal from the judgment thereof: *Talbot v. McGee*, 4 T. B. Mon. 375.

FLEMING v. WALKER.

[152 Ala. 386, 44 South. 536.]

EXECUTORS AND ADMINISTRATORS—Coexecutors—Devastavit—Liability.—A devastavit by one of two or more executors or administrators does not charge his coexecutor unless he has intentionally or otherwise contributed to it, or made himself liable by the execution of a bond. (pp. 46, 47.)

EXECUTORS AND ADMINISTRATORS—Coexecutors or Trustees—Devastavit—Liability.—If funds in the hands of an executor have never been transferred from himself as such executor to himself and another as coexecutors or cotrustees, the latter is not liable for a devastavit of such fund committed by the coexecutor. (p. 47.)

Action against one Fleming and one Billing, as cotrustees for one W. Alsop, for an accounting by them as trustees of said Alsop, and as the executors of the estate of Sarah Alsop, and to charge Fleming for a devastavit committed as to the funds of W. Alsop. Judgment against defendants charging them as trustees, but not as executors, with a devastavit committed by Billing. Fleming appealed from such judgment, and the plaintiffs prosecuted a cross-appeal from the decree discharging the defendants as executors.

Rushton & Coleman, for the appellants and cross-appellees.

Gunter & Gunter and T. W. Martin, for the appellees and cross-appellants.

389 ANDERSON, J. "The rule is that a devastavit by one of two or more executors or administrators shall not charge

his companion, provided he has not intentionally or otherwise contributed to it," and, of course, upon the further fact that he has not made himself liable by the execution of a bond: *Turner's Exrs. v. Wilkins*, 56 Ala. 173; *Knight v. Haynie*, 74 Ala. 542; *Williams v. Harrison*, 19 Ala. 277; 2 *Woerner's American Law of Administration*, sec. 738; *Hinson v. Williamson*, 74 Ala. 180. It appears from the evidence that the entire fund left by the testatrix, Mrs. Alsop, had been loaned Billing, and he held it as her debtor up to the time of her death. Conceding that Billing, who was in possession of the fund through his bank, an institution owned and controlled by him, became chargeable as executor, upon assumption of office as such (*Seawell v. Buckley's Distributees*, 54 Ala. 592), there was no proof that his coexecutor, Fleming, ever acquired the control or custody of the fund, or in any way directed the management or control thereof as coexecutor, and was not, therefore, liable for the devastavit of Billing, if committed in his executorial capacity and not as trustee.

It is insisted that the same rule of liability for the devastavit of a coexecutor or coadministrator does not apply to cotrustees, and that they are charged with a greater degree of care as to the trust fund than the former, and that they may be made liable for a mere acquiescence³⁹⁰ or neglect to bring their cotrustee to a speedy account. Whether this be a recognized distinction or not we need not determine, for the reason that Fleming cannot be held liable as a cotrustee unless the devastavit by Billing was committed while the fund was held by him as trustee for Walter Alsop, and not as one of the executors of the estate. In order to establish this liability the partial settlement by the executors with some of the legatees, other than Walter, in which the larger portion of the personal assets of the estate was distributed, is relied upon as showing that the fund belonging to Walter was in legal effect transferred from Billing as executor to Billing as trustee. The proof, according to our finding, establishes no more than a mere retention of the fund belonging to Walter by Billing along with the other personal assets belonging to the estate not distributed to the other legatees; and clearly the mere retention by Billing, in the absence of an affirmative act showing his intention to hold it as trustee, did not operate to terminate his liability as executor and impose a liability upon him in his capacity as trustee, for the obvious reason that his holding may be as well referred to his representative capacity as executor as that of trustee. Indeed, the retention must be

referred to Billing's executorial capacity, unless it be made to appear "by some plain and unequivocal act" that he elected to hold the fund in his capacity as trustee: *Governor v. Read*, 38 Ala. 252; *Perkins v. Moore*, 16 Ala. 9; *Davis v. Davis*, 10 Ala. 299.

The judge of the city court erred in holding Fleming liable as a cotrustee, but correctly held that he was not liable as co-executor. The decree of the city court is reversed, and one is here rendered dismissing the bill as ³⁹¹ to Fleming on the original appeal, and affirming the decree on cross-appeal.

Reversed and rendered on original appeal, and affirmed on cross-appeal.

Tyson, C. J., and Dowdell and McClellan, JJ., concur.

One Executor is not Liable, as a rule, for waste committed by a co-executor, nor for assets which the latter received and misapplied without his knowledge or consent: *Municipal Court v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890, and see cases cited in the cross-reference note thereto.

McDANIEL v. SLOSS-SHEFFIELD STEEL AND IRON COMPANY.

[152 Ala. 414, 44 South. 705.]

ADVERSE POSSESSION—What Constitutes.—To constitute an adverse possession, there must be an actual occupancy, clear, definite, positive and notorious, and it must be continued, adverse, and exclusive during the whole period prescribed by the statute, with an intention to claim title to the land occupied. (pp. 49, 50.)

ADVERSE POSSESSION—Defective Right or Title.—Possession of land, to be adverse, must be under claim of right or title if the occupant knows his title to be defective. (p. 50.)

ADVERSE POSSESSION—Character of.—If one enters upon land, with knowledge that he has no title thereto, but thinking that it belongs to the United States government, he does not hold adversely to the true owner though he cuts timber on the land at various places and times, and cultivates a field for an indefinite time. (p. 50.)

J. D. Strange and J. D. Cruse, for the appellant.

Percy & Benners and Tillman, Grudd, Bradley & Morrow, for the appellees.

⁴¹⁶ SIMPSON, J. These two cases were tried together and submitted here together by agreement. The bills were filed by the appellant, and sought to quiet the title as against both

defendants to northeast quarter of northeast quarter of section 17, township 18 south, range 1 west, in Jefferson county, and as to the Tennessee Coal, Iron and Railroad Company to the four forty-acre tracts of land in said county described as follows: The northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter of section 17, and the southwest quarter of southeast quarter and southeast quarter of southwest quarter of section 8, all in township 18 south, range 1 west. The parties agreed in writing that the defendants, respectively, held perfect paper titles to the land and that the complainant claimed only by adverse possession. No claim of adverse possession, under Code 1896, section 1541, has ever been filed by the complainant. The testimony shows that complainant is living in a house on the northeast quarter of section 17, township 18, range 1, around which is a fence inclosing six or six and one-half acres. The decree of the chancellor declares that the defendants have the legal titles to all of the lands respectively claimed by them, and are entitled to the same, except as to the surface of said home place; the minerals thereunder being owned by the Sloss Iron and Steel Company.

The complainant testified that he entered upon the land in 1872, built the house, sold out his claim, and afterward bought it back, moving there the second time January 10, 1882, since which time he has continued to live there, and that it has been fenced practically all of the time; that he claimed it as his home from the first, but that he knew when he entered it that he did not have ⁴¹⁷ any title to it; that he thought it belonged to the United States government; and that he had as much right to it as anyone. There was testimony by the complainant and others about complainant's cutting timber on the lands at various places and times. There was also testimony to the effect that there was a field, besides the home place, that had been cultivated by the complainant; but there is not in the record any definite description of said field on which a decree could be rendered, and while it is stated that it was cleared and enlarged from time to time, there is no evidence from which it could be definitely said that any specified portion of said field had been occupied for any definite time. In order to establish adverse possession, as against the holder of the legal title, "the law is stringent in requiring clear proof of the requisite facts. There must be, first, an actual occupancy, clear, definite, positive, and notorious; second, it must be continued, adverse and exclusive during the whole period described by the statute; third, it must be with an intention

to claim title to the land occupied": 3 Washburn on Real Property, 4th ed., pp. 135, 136. "Where a party enters upon land and takes possession, without claim of title or right, his occupation is subservient to the paramount title, not adverse to it. It is nothing more than a trespass, and no matter how long continued, can never ripen into a good title": 1 Cyc. 1029; Bernstein v. Humes, 78 Ala. 134; Badger v. Lyon, 7 Ala. 564. Of course, this principle must not be so extended as to contravene the other principle that a party may claim adversely, though he knows that his title is defective, but he must claim a right to the land. The "possession must be under claim of right or title": 1 Cyc. 1008; Newton v. Louisville etc. R. R. Co., 110 Ala. 474, 19 South. 418 19; Bernstein v. Humes, 75 Ala. 241; Dothard v. Denson, 72 Ala. 541; Kennedy's Exr. v. Townsley's Heirs, 16 Ala. 239.

Even if a person who acknowledges that he went into possession as a mere trespasser without any claim of right could be said to be holding adversely to the true owner, the evidence in this case does not come up to the requirement of the law as to that part of the land which the chancellor decreed to the defendants: Chastang v. Chastang, 141 Ala. 451, 109 Am. St. Rep. 45, and cases cited, 37 South. 799. The statute does not provide for any more distinct decree in favor of the complainant than was rendered in this case, but provides only that the court shall "decree whether the defendant has any right, title, or interest in, or encumbrance upon, such lands, or any part thereof," etc., and makes the decree binding on both parties: Code 1896, sec. 812. The decree of the court is affirmed.

Tyson, C. J., and Haralson and Denson, JJ., concur.

The Essentials of Adverse Possession are that it must be hostile, under claim of right, actual, open, notorious, exclusive and continuous for the statutory period; if any of these constituents is wanting, the possession will not bar the legal title: Chastang v. Chastang, 141 Ala. 451, 109 Am. St. Rep. 45; Wilson v. Braden, 56 W. Va. 372, 107 Am. St. Rep. 927. Good faith is not an essential: Dawson v. Falls City Boat Club, 136 Mich. 259, 112 Am. St. Rep. 363; but a claim of right or of title is, although at least one court has supposed otherwise: Carney v. Hennessey, 74 Conn. 107, 92 Am. St. Rep. 199, and cases cited in the cross-reference note thereto.

CARROLL v. DRAUGHON.

[152 Ala. 418, 44 South. 553.]

JUDICIAL SALES to Next Friend—Reversal of Decree.—The next friend to infant complainants in proceedings which result in a decree under which a sale of land is made, and at which he becomes the purchaser, is not a stranger to the suit, but a real actor, and, in effect, stands in the shoes of the complainants, and cannot be such a bona fide purchaser as to render his title good, as against the real owner upon the reversal of the decree. (p. 51.)

R. H. Walker, for the appellant.

W. O. Mulkey, for the appellee.

420 ANDERSON, J. "When property is sold under execution or chancery decree, and the plaintiff becomes the purchaser, receiving title, if the judgment or decree be afterward reversed, his title is left without ground or consideration to rest on, and it will be set aside and vacated. If, however, a stranger purchases and receives title, a subsequent reversal will not furnish ground for setting the sale aside, unless the judgment or decree under which the sale was made is void on its face, in contradiction to being merely erroneous and reversible. In **421** the first case, setting the sale aside simply restores the parties to their relative rights held by them before the sale. In the latter case, to set aside the sale would leave the purchaser with his money expended, and nothing realized in its stead": *Ivie v. Stringfellow*, 82 Ala. 545, 2 South. 22; *Freeman on Judgments*, secs. 482, 484; *Marks v. Cowles*, 61 Ala. 299; *Freeman on Executions*, sec. 345.

The bill avers that the respondent Draughon was the next friend to the infant complainants in the proceeding, which resulted in the decree under which the sale was made, and at which he purchased. While the infants may have been the real parties to the decree, Draughon was not a stranger to the suit, but was the real actor, and in effect stood in the shoes of the complainants, so far as purchasing at the sale, and cannot be such a bona fide purchaser as to render his title good, as against the owner, upon a reversal of the decree. This court has decided in the case of *Phillips v. Benson*, 85 Ala. 416, 5 South. 78, that an attorney of record of the plaintiff occupies no better position in purchasing, under a decree which was subsequently reversed, than his principal; and we see no reason why the same rule should not apply to the next friend. It may be true that the authority of a next friend is not the same as that of an attorney: *Isaacs v. Boyd*, 5 Port.

388; 14 Am. & Eng. Ency. of Pl. & Pr. 998. But the next friend really directs and controls the attorney, and occupies a position that should render him familiar with every step in the litigation; and we see no good reason why he should be accorded greater protection, when purchasing at a sale under a decree rendered at his instance, than the infant complainants, or the attorney who conducted the litigation subject to his orders.

⁴²² The chancellor erred in sustaining the motion to dismiss the bill for want of equity, and the decree is reversed and one is here rendered overruling said motion.

Tyson, C. J., and Haralson and Denson, JJ., concur.

The Right of a Guardian Ad Litem to Purchase at a sale of the infant's property is discussed in the note to *Fletcher v. Parker*, 97 Am. St. Rep. 1003.

The Effect of the Reversal of a Judgment is the subject of a note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 124. Innocent third persons have a right to rely upon the judgment or decree of a court having jurisdiction both as to the subject matter and the parties, and interests acquired by them under it will be protected notwithstanding its subsequent reversal: *Ure v. Ure*, 223 Ill. 454, 114 Am. St. Rep. 336.

TANNEBAUM v. REHM.

[152 Ala. 494, 44 South. 532.]

MUNICIPAL CORPORATIONS—Ordinances—Control of Theaters.—A municipal ordinance making it the duty of the chief of the fire department to assign a fireman to all performances in any theater, he to be paid by the manager of such theater, is within the charter power of the city and a valid exercise of its police power. (p. 54.)

CONTRACTS FOR LABOR—Implied—Right to Recover.—If a municipal ordinance provides that a fireman shall be assigned to attend all performances given at any theater, he to be paid by the manager of such theater, the fireman so assigned and attending is entitled to bring an action in his own name against such manager to recover the reasonable value of the services rendered. (pp. 54, 55.)

W. C. Ward and S. D. and J. B. Weakley, for the appellant.

Sharpe & Miller, F. S. White & Son and H. K. White, for the appellee.

⁴⁹⁵ DOWDELL, J. The plaintiff's right of action is based on the following ordinance of the city of Mobile:

"Sec. 542. The mayor, at the request of the manager of any theater, may detail or appoint not exceeding four regular or special police officers to attend the theater every night of performance who shall be paid by the manager for their services, and whose duty it is to preserve strict order and decorum within the theater, and arrest and eject therefrom any person who may create disturbance, either by loud and boisterous talking, whistling, swearing, holloing, or any other ungentlemanly or indecent acts or conduct. They are vested with full ⁴⁹⁶ power and authority to call any person to assist or aid them in the performance of their duty.

"It shall be the duty of the chief of the fire department to assign one fireman to all performances in any theater, said fireman to be stationed at the fire plugs located on the stage, who shall be paid by the manager, and whose duty shall be to have charge of the fire hose, and in case of fire to use every effort to extinguish the same. It shall also be the duty of said fireman to see that all fire apparatus is on hand, and in working order, prior to each performance; and the said fireman is hereby clothed with police authority to enforce all theater ordinances. Any violation of the foregoing clauses shall be punished by a fine of not more than \$50.00, or less than \$5.00."

No question is raised as to the ordinance being regularly adopted; but its validity is questioned, as to the authority and power of the municipality to enact and enforce the same, and this is the principal question in the case. The purpose of the ordinance is manifest. Its chief object is the protection of persons against the dangers of fire and the preservation of human life. Its enactment is an exercise of police power. Its validity depends upon whether this power is vested in the municipality by the legislature under the grant of powers contained in its charter, or other legislative enactment, special or general, and whether the same in its provisions is reasonable in the exercise of such granted powers.

Section 20 of an act of the General Assembly of Alabama, entitled "An act to provide a charter for the city of Mobile," approved February 6, 1897 (Acts 1896-97, p. 559), provides, among other things, that the general council, the legislative body of the municipality, "shall have and exercise full police powers within the limits of the city of Mobile." In the same section, in the enumeration ⁴⁹⁷ of the duties of the general council, it is further provided that "it shall also be their duty to prevent crime and arrest offenders, to protect the rights of persons or property, to guard the public health, to preserve

order," etc. Section 21 (page 500) confers the right and power to regulate theaters. In Dillon on Municipal Corporations, fourth edition, page 211, section 141, it is said: "Many of the powers exercised by municipalities fall within what is known as the 'police power' of the state, and are delegated to them to be exercised for the public good. Of this nature is the authority to suppress nuisances, preserve health, prevent fires, to regulate the use and storing of dangerous articles, to establish and control markets, and the like." It is further said by this text-writer: "Every citizen holds his property subject to the proper exercise of the police power, either by the state legislature directly or by public or municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'police laws and regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria* or in the theory of the law he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

The ordinance cannot be said to be unreasonable, in that the city assumes to designate the man to perform the particular service, or imposes the cost of such service ⁴⁹⁸ upon the manager. The duty of protecting the person or citizen from dangers of fire in the exercise of the police power would seem to carry with it the right to employ the most effective means to that end, and this would include the right of designating competent agents or servants for the performance of such duty. The doctrine as to the right of the municipality to impose the cost of the performance of such services by the fireman on the manager of the theater, as was done in the case at bar, was upheld in the case of *New Orleans v. Hop Lee*, 104 La. 601, 29 South. 214, and in the case of *Harrison v. Baltimore*, 1 Gill (Md.), 264. Of course, such cost or expense must be fair and reasonable. We are of opinion that the ordinance in question was clearly within the police power of the municipality, and that it is not unreasonable. The ordinance expressly provides that the manager shall pay the fireman for the services rendered. The suit was, therefore, properly brought in the name of the party performing the

service. The evidence was without dispute that the services were rendered and that the compensation claimed was reasonable.

The only other question presented by the record relates to the exclusion of the ordinance offered by the defendant in evidence as to the license imposed for theaters. We are unable to see the relevancy of this evidence. The license tax imposed on theaters was for the purpose of revenue, and could have no bearing upon or connection with the other questions discussed in the case. The court committed no error in sustaining plaintiff's objection to the introduction in evidence of this ordinance.

⁴⁹⁹ The evidence being without dispute, the court properly gave the general charge requested by the plaintiff.

The judgment appealed from is affirmed.

Tyson, C. J., and Anderson and McClellan, JJ., concur.

Under the Police Power a Business or Occupation affected by a public interest may be made the subject of reasonable regulation and supervision, and be made to defray the expense of such supervision and regulation by the payment of a tax: Fort Smith v. Hunt, 72 Ark. 556, 105 Am. St. Rep. 51; St. Louis v. Liessing, 190 Mo. 464, 109 Am. St. Rep. 774.

The Law of Theaters and Like Shows is the subject of a note to Horney v. Nixon, 110 Am. St. Rep. 525.

ALABAMA LUMBER COMPANY v. CROSS.

[152 Ala. 562, 44 South. 563.]

EVIDENCE—Admission—Harmless Error.—In an action to recover on an account for lumber sold and delivered, it is harmless error to admit books of account in evidence without first showing that the witness knew the entries made therein were original, when the same thing is shown by the defendant as is shown by such entries. (p. 56.)

EVIDENCE—Admissibility.—In an action to recover for lumber sold and delivered, evidence as to "what was the custom in this district as to where lumber was to be measured by wholesale dealers," is not admissible when it is not shown that the district inquired about embraced the place where the lumber was sold and delivered. (p. 57.)

TRIAL—New Trial—Intoxication of Juror.—The fact that a juror, during the trial of a case or while the jury was deliberating on their verdict, drank intoxicating liquors is not ground for a new trial unless there is some reason to suppose that such liquor was drunk at such time or in such quantity as to unfit the juror for the performance of his duties, or unless it was furnished by the party in

whose favor the verdict was afterward rendered, or unless the circumstances were such as to create a reasonable belief that the drinking may have improperly influenced the verdict. (p. 57.)

TRIAL—New Trial—Intoxication of Juror—Evidence.—If a party makes a motion for a new trial on the ground that one of the jurors was in such a state of intoxication at the time of the final consideration of the case that he could not properly consider it, he, to be successful, must affirmatively show that he was not aware of the misconduct or disqualification of the juror before the verdict was rendered. (p. 57.)

M. L. Ward, for the appellant.

P. Scott, for the appellee.

563 DENSON, J. Assumpsit to recover on an account for lumber sold and delivered by plaintiff to the defendant. It does not appear from the evidence of the witness Benton that the items reported to him by the teamsters were original entries. Neither did it appear, at the time the book was offered in evidence, that the witness Benton knew that the entries were correct at the time they were made. In this state of the evidence the court erred in admitting the book in evidence: *Bolling v. Fannin*, 97 Ala. 621, 12 South. 59; *Lane v. May & Thomas Hardware Co.*, 121 Ala. 296, 25 South. 809; *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 South. 425; *Callaway & Truitt v. Gay*, 143 Ala. 524, 39 South. 277, and authorities there cited.

564 But the point is made that this error should not work a reversal of the cause, as it affirmatively appears by the record that after the book was admitted the witness Benton, without objection, testified as follows: "I mailed defendant a statement showing the amount of lumber, and an additional statement thereof shipped in each car, and I kept a copy of the same"; and it affirmatively appears that the witness then produced a copy of the statements of about twenty cars of lumber shipped to the defendant, and the bill of exceptions recites that defendant (in the same connection) produced the statements of cars of lumber which were introduced as evidence and were correct "in comparison" with plaintiff's books, as above shown. At the foot of each of the statements is a summing of the total of each kind of lumber and of the total amount due by the statement. It is thus made to appear that the statements were received by the defendant. They were produced by him on the trial, and it is shown that they showed what was disclosed by the books—nothing more. The statements were competent evidence: *Hirschfelder v. Levy*, 69 Ala. 351; *Rice v. Schloss*, 90 Ala. 416, 7 South. 802. In

this state of the evidence, we think it is affirmatively shown that the defendant suffered no injury by the books being allowed in evidence.

While the defendant was being examined as a witness, he was asked by his counsel this question: "What was the custom in this district as to where lumber was to be measured by wholesale dealers?" The court sustained an objection to the question. This ruling may be justified on two or more propositions; but we will rest its justification on the ground that it does not appear that the district embraced the place where the goods were sold and delivered, and, if not, the question was subject to the specific objections made.

⁵⁶⁵ Motion for a new trial was made by the defendant and overruled by the court. Error is insisted with respect to only one ground in the motion; that is, that "one of the jurors was in such state of intoxication at the time of the final consideration of said cause that he could not properly consider said cause." It is reprehensible conduct on the part of a juror to indulge in the use of intoxicating liquors during the trial of a cause, and such indulgence should subject the juror to punishment by the court for contempt. "But the courts generally have adopted the rule that the fact that a member of a jury did, during the trial of a cause or while deliberating on their verdict, drink intoxicating liquors, will not be ground for a new trial, unless there is some reason to suppose that such liquors were drunk at such time or in such quantities as to unfit the juror for the performance of his duties, or unless they were furnished by the party in whose favor the verdict was afterward rendered, or at least unless the circumstances were such as to create a reasonable belief that the drinking may have improperly influenced the verdict": 2 Thompson on Trials, secs. 2566, 2567; see authorities collated in notes 1, 2, 3 and 4, sec. 2566. This seems to be a safe and sound rule. Under it we cannot say that the court erred in overruling the motion for a new trial. We think, too, that where motions for new trials are predicated on grounds like the one under consideration, the party complaining should affirmatively show that he was not aware of the misconduct or disqualification of the juror before the verdict was rendered: *Oliver v. Herron*, 106 Ala. 639, 17 South. 387; *Sowell v. Bank of Brewton*, 119 Ala. 92, 24 South. 585.

⁵⁶⁶ We have found no reversible error in the record, and the judgment of the circuit court will be affirmed.

Tyson, C. J., and Haralson and Simpson, JJ., concur.

The Drinking of Intoxicating Liquors by Jurors as Vitiating Their Verdict is discussed in the note to *Hilton v. Southwick*, 35 Am. Dec. 257. As a general rule, a verdict will be set aside when it appears that one or more of the jurors indulged in an excessive use of liquor during the trial: *Brown v. State*, 137 Ind. 240, 45 Am. St. Rep. 180; *State v. Broussard*, 41 La. Ann. 81, 17 Am. St. Rep. 396; *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401.

BANK OF LUVERNE v. SHARP.

[152 Ala. 589, 44 South. 871.]

BILLS AND NOTES—Indorsers of Non-negotiable Paper—Liability.—The indorser of a non-negotiable note is liable to the indorsee to the same extent as the indorser of a negotiable instrument. (p. 58.)

BILLS AND NOTES—Liability of Indorser of Non-negotiable Paper.—Under the Alabama statute an indorsee of a non-negotiable note, to charge an indorser, is bound to exercise the diligence required to first recover of the maker, unless there is a waiver by the indorser or proof of an excuse for not showing such diligence. (p. 59.)

BILLS AND NOTES—Liability of Indorser of Non-negotiable Instrument.—The indorser of a non-negotiable note is liable to an indorsee who acquires the paper before maturity, though the maker cannot be held liable on account of a failure of consideration. (p. 59.)

Action by an indorsee against an indorser of certain non-negotiable notes, the principal not being sued. These notes were indorsed by one Sharp, and the indorsee purchased them from the holder, one Tharpe, for a valuable consideration before maturity. The reason alleged why the makers of the notes were not sued was because the suit would or could have been defeated on a plea of failure of consideration. The complaint was demurred to on the ground that an accommodation indorser of a non-negotiable note is not liable when the complaint shows that the maker is not liable thereon for want or failure of consideration as to the maker of such note. The demurrer was sustained and the plaintiff appealed.

M. W. Rushton, for the appellant.

Pearson & Richardson, for the appellee.

592 ANDERSON, J. While there is considerable conflict and confusion among the cases, as well as the text-books, as to the liability of the indorser of a non-negotiable note, we are disposed to follow the line of decisions holding that the indorser of a note not negotiable is liable to the indorsee to the same extent as the indorser of a negotiable note (Byles

on Bills, 146, and note; *Jones v. Fales*, 4 Mass. 245; *Sanger v. Stimpson*, 8 Mass. 260; the only distinction being, not as to extent of liability, but as to the action of the indorsee to fasten the liability after default by the maker. In case of negotiable notes, there must be protest and notice, if not waived, and in case of non-negotiable notes, when the indorsee seeks to recover against the indorser, he must aver and prove the exercise of the diligence required by the statute to first collect from the maker and a failure to do so or an excuse for not doing so: *Ryland v. Bates*, 4 Ala. 342. In fact, our statutes upon this subject seem to have been enacted upon the theory that the extent of the liability of the indorser of a non-negotiable note is the same as that of the indorser of one that is negotiable, and prescribes the steps to be taken in order to fasten the liability as to the former, because not subject to protest and notice, in case of default by the maker.

Section 892 of the Code of 1896 provides for the bringing of suits in order to charge the indorser or assignor ⁵⁹³ of a non-negotiable note; section 893 provides for a waiver of suit against the maker by the written consent of the indorser or assignor; and section 894 provides excuses for a failure to sue the maker before attempting to collect from the indorser. In the case at bar the complaint does not aver a compliance with section 892, or a waiver under section 893, but avers an excuse under the terms of subdivision 5 of section 904, and which reads as follows: "When any defense, except a setoff to the merits of such contract or writing, exists which would prevent a judgment for all or any portion of the sum due or the value of the thing payable by such contract or writing." The defendant in the lower court demurred to the complaint upon the idea that, inasmuch as it showed upon its face that the maker could not be held liable because of a failure of consideration, he (the indorser) is not liable, and therefore fails to state a cause of action against him. We do not understand that the effect of the indorsement, which was made before maturity, merely rendered the indorser liable to a purchaser for value in the event the maker had no defense to the note. The indorsement was, in effect, a guaranty to a purchaser for value before maturity of the payment of the note if not made out of the maker, and was in no sense subject to all defenses that could be made by the maker against the collection of same. The note purported to be for a valuable consideration, and the indorsement cannot be held to be without consideration and of no effect, because of a subsequent failure of the payee to deliver the thing, the price for which the note was given.

We are not unmindful of the distinction as to the maker's right to defend as to negotiable and non-negotiable instruments; but we are dealing with indorsers, and ⁵⁹⁴ not makers. The trial court erred in sustaining the demurrers of the defendant to the complaint, and the judgment is reversed and the cause remanded.

Tyson, C. J., and Simpson and Denson, JJ., concur.

An Indorsement of a Non-negotiable Note is, according to *Matchett v. Anderson Foundry etc. Works*, 29 Ind. App. 207, 94 Am. St. Rep. 272, a warranty of the maker's ability to pay, if due diligence is used by the holder. For other authorities upon the effect of an indorsement of non-negotiable paper, see *Willis v. French*, 84 Me. 593, 30 Am. St. Rep. 416; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828; *Chicago Trust etc. Bank v. Chicago Title Co.*, 190 Ill. 404, 83 Am. St. Rep. 138.

CASES

IN THE

SUPREME COURT

OF

CALIFORNIA.

WALKER v. CHANSLOR.

[153 Cal. 118, 94 Pac. 606.]

EVIDENCE—Title to Land, When Admissible in Reduction of Exemplary Damages.—In an action to recover for personal injuries sustained by the plaintiff in a contest over the possession of land from which the defendants sought to dispossess him, evidence of their title is admissible on the question of exemplary damages. (p. 64.)

JURY TRIAL—Question for the Jury.—Malice in fact is always a question for the jury. (p. 67.)

EVIDENCE OF INTENT.—Where All Persons may Testify, a witness may be examined as to the intent with which he did an act, where such intent is material in the action. (p. 67.)

TITLE, Burden of in an Action for Assault and Battery.—In an action to recover for personal injuries inflicted by the defendants, evidence on their behalf is admissible to show the title to the property where the injury was inflicted, and that the defendants had such title and right to the possession, and in what they did employed no more force than was necessary to expel an intruder, and the effect of the evidence is not to be restricted to the question of exemplary damages. (pp. 68, 74.)

REAL PROPERTY—Right of Owner to Expel Intruders.—At the common law an owner of real estate had the right to enter upon it to expel by force intruders, and in doing so was entitled to use all the force necessary to secure possession, and therefore is not subject to an action of tort for damages resulting from his entry or from any assault upon, or physical injury sustained by, one in wrongful possession, provided no more force is used than is necessary to dispossess him. This common-law rule remains in force in California, except in so far as it has been changed by provisions of the code relative to the summary remedy provided therein for the forcible entry upon real property. (p. 68.)

ASSAULT AND BATTERY Justifiable Against an Employer, When Justifiable Against His Employé.—A person in taking possession of his own real property is justified in using the same force against an employé of a trespasser thereon as he would be justified in using against the employing trespasser. (p. 75.)

APPEAL AND ERROR—Rejection of Evidence, When cannot be Regarded as Nonprejudicial.—If a court errs in rejecting evidence offered by the defendants in an action to recover for personal injuries inflicted on them by the plaintiff for the purpose of showing that the

defendants were the owners of real property and entered thereon to expel an intruder and his employés, and used no more force than was necessary in so doing, and the jury has awarded plaintiff a sum for exemplary damages and another sum as actual damages, the judgment cannot be affirmed as to actual damages on the ground that it appears from the evidence that the defendants used unnecessary force and violence, where it also found that the defendants had not title and were trespassers ab initio, and had no right or business on the land, and were there in violation of law. (pp. 75, 76.)

EVIDENCE to Show that Trespassers Expelled were Armed.—

In an action to recover for personal injuries inflicted by the defendants in an effort to take possession of their property by force, evidence is admissible on their part to show that the employers of the plaintiff took possession of such property by force, and were armed when taking such possession and when resisting the defendants' effort to retake possession. Such evidence shows the character of the force which the defendants had the right to anticipate and overcome. (p. 76.)

Byron Waters, for the appellants.

A. D. Warner, Thomas Carroll, John Leo and W. W. Kaye, for the respondent.

120 LORIGAN, J. This action was brought to recover damages for an assault and battery alleged to have been committed by defendants upon plaintiff.

The evidence discloses that the assault and consequent injuries to plaintiff occurred in a contest between two oil companies for the possession of a quarter section of land.

Trial was had before the court without a jury, and from the findings of the court it appears that on April 14, 1901, an oil corporation known as the Superior Sunset Oil Company went into the possession of said quarter section—the northwest quarter of section 26, township 32 south, range 23 east, M. D. M., in Kern county—and was in occupation thereof on April 20, 1901, and continued to occupy it until some time thereafter; that on the nineteenth day of April, 1901, plaintiff went into the service of said corporation, and at the time the injuries complained of by him were sustained was upon said premises, together with certain officers and other employés of said corporation; that about the hour of 12:30 A. M. of April 20, 1901, these defendants (appellants herein), who were either officers, directors, or stockholders of another oil company known as the Mt. Diablo Mining and Development Company, together with the employés of said company, all armed with rifles, guns and pistols, went upon said land with the intention of driving all persons connected with the Superior Sunset Oil Company therefrom; that upon the entry of defendants and such employés upon the said land, an employé of the Superior Sunset Oil Company—Cornell—went out to

meet them in order to ascertain their reason for coming on the land; that when he came up to them defendants commanded him to throw up his hands, and, upon his refusal to do so, began shooting at him; that when the shooting commenced plaintiff and others connected with the Superior Sunset Oil Company ran over to where the defendants were to ascertain what was going on; that these defendants and those with them immediately began shooting at plaintiff and those who accompanied him, firing some seventy-five or a hundred shots; that plaintiff was shot through the body and received several other gunshot wounds at the hands of defendants and those with them, ¹²¹ resulting in great suffering to plaintiff, and in his permanent disfigurement and injury, to such an extent as to incapacitate him from doing any physical work.

The court further found that at the time of the shooting the Superior Sunset Oil Company was in possession and occupation of said quarter section, claiming it as its own, as lands chiefly valuable for petroleum oils, under oil mining locations thereof, and that when defendants entered thereon they had no right or business on said land, and were there in violation of law; that the shooting of plaintiff by said defendants was willful and deliberate, the result of an unlawful conspiracy by defendants to violently and by force of arms drive the officers and employes of the Superior Sunset Oil Company and plaintiff off said lands, and that such shooting by defendants was wanton and done with malice and deliberate intent to harm the plaintiff and the other parties who were with plaintiff on the land.

The court rendered judgment in favor of plaintiff against nine of the defendants for the sum of eight thousand five hundred dollars—five thousand dollars thereof being for actual damages, and three thousand five hundred dollars for exemplary damages. These nine defendants appeal from the judgment and from the order of the court denying their motion for a new trial.

Before proceeding to consider the merits of these appeals it is proper, as bearing on the points presented here for consideration, to say that there was testimony in the case, introduced on behalf of defendants, that when the officers and employes of the Superior Sunset Oil Company were about to enter and take possession of said quarter section on April 14, 1901, they were met by the superintendent of the Mt. Diablo Oil Company (of which the defendants were officers, directors, and stockholders), who was then upon the section, and who told them that the land belonged to the Mt. Diablo Mining

and Development Company, that the company had an oil derrick on it, that he was superintendent, managing the property for it, and they were forbidden to enter, but nevertheless did so. There was evidence also offered by defendants, that after they entered on the property on the night of the shooting their spokesman stated to the person representing the Superior Sunset Oil Company, who came to meet them, that they (defendants) were representatives of the Mt. Diablo company and ¹²² were there to notify the Superior Sunset Oil people to get off the land—that the land belonged to the Mt. Diablo company; that the Superior Sunset Oil Company not only refused to vacate, but notified defendants to immediately withdraw or take the consequences; that this declaration and notice was immediately followed by shots being fired at defendants by persons representing and in the employ of the Superior Sunset Oil people, who were in the background; that the defendants returned the fire and the shooting then became general on both sides, resulting in the wounding of plaintiff and other employés of the Superior Sunset Oil Company; that thereupon the firing ceased and the defendants withdrew from the premises.

The principal points urged on the appeal for a reversal are as to the rejection of evidence by the trial court, offered by the defendants under their amended answer.

In that answer defendants set up that the Mt. Diablo Mining and Development Company was the owner of the lands in question, and on the fourteenth day of April, 1901, was in the possession thereof, and that defendants were employés, officers, and directors of that corporation; that on the fourteenth day of April, 1901, the Superior Sunset Company forcibly dispossessed said Mt. Diablo company, and thereafter maintained possession of said lands; that on April 19, 1901, defendants, at the instance of the Mt. Diablo company, and on its behalf, went on the said lands to protect the interest of said corporation, and while thereon were shot at by plaintiff and other employés of the Superior Sunset Oil Company without cause or provocation, and only returned the fire of said parties in defense of their lives; and that any gunshot wounds received by plaintiff were by reason of said unlawful attack of the Superior company's employés upon the defendants.

While many exceptions were reserved to the rulings of the court in the admission and rejection of testimony, the points relied on on this appeal relate only to the rejection by the court of evidence tendered by the defendants to show the title

of the Mt. Diablo Oil Company to the quarter section in question, and the refusal of the court to allow the witnesses of defendants to testify as to their intentions in going upon said land, and to the taking of the advice of counsel relative to ¹²³ their contemplated action in doing so; also to the refusal of the court to permit defendants to show that the officers and employés of the Superior Sunset Oil Company were armed with deadly weapons when, on April 14, 1901, they came upon the quarter section where plaintiff was subsequently injured, and that they were armed from that time up to the occurrence out of which plaintiff's injuries were sustained.

Upon the trial of the cause the plaintiff was permitted to show that the quarter section in question was, on April 19, 1901, unoccupied public land, and that the Superior Sunset Oil Company on that day took possession of and occupied it; that it built a bunk-house and cook-house on the land for its officers and employés, and had been, up to the time of the entry by defendants, engaged in constructing a derrick and placing the necessary machinery for oil drilling purposes, and the court, as we have heretofore stated, found that said Superior Sunset Oil Company was, at the time of the injury of plaintiff, in the possession and occupancy of said land, claiming it as its own.

When the defendants tendered their evidence to show title in the Mt. Diablo Mining and Development Company to the land, as set up in their amended answer, an objection interposed by counsel for plaintiff that "any question of title is irrelevant and immaterial for any purposes of the case" was sustained, the court stating: "I don't think if they had a United States patent they would have any right to go there and force parties who were there wrongfully off the premises. I am not going to try any question of title." Subsequently, the whole deraignment of title of the Mt. Diablo Mining and Development Company to this quarter section was deemed offered by defendants, objected to and the objection sustained. Under exceptions taken by defendants to both these rulings, the question as to the correctness of such rulings is presented for review.

This appeal was originally heard by the district court of appeal for the second appellate district, and in deciding it, it was held by that court that the rulings of the trial court, rejecting the offer of proof of title, as far as it was interposed as a defense against the claim of plaintiff for actual damages was correct; that the matter of title of the Mt. Diablo company was not a material issue in the case. The appellate

court, however, ¹²⁴ held that while evidence relative to the title of the Mt. Diablo company was inadmissible to prove title as a defense to the claim for actual damages, it was admissible as bearing upon the claim of plaintiff for exemplary damages; that for this latter purpose it was admissible, and was one link in defendants' chain of defense, namely, that the Mt. Diablo company had rights in the land, which defendants, as officers and stockholders of that company, were endeavoring to protect; that the other links in this chain of defense were to be found in the other evidence sought to be introduced relative to the taking by defendants of the advice of counsel and their intentions in entering upon the land where the shooting took place.

In harmony with these views, the appellate court held that it was error to exclude the evidence tendered on all these matters—the title of the Mt. Diablo company, the taking of advice of counsel, and the intentions of defendants—solely, however, because they were admissible as bearing on the question of exemplary damages, and directed that the judgment and order appealed from should be reversed for this error, unless the plaintiff would, within a given time, elect to accept the judgment for actual damages alone and release that portion of the judgment awarding him exemplary damages.

A petition of appellants that the cause be heard and determined by this court having been granted, the matter is now before us for disposition.

There can be no question but the district court of appeal was right in holding that the evidence offered by the defendants of title in the Mt. Diablo company to this land, the taking of advice of counsel by defendants as to their contemplated action with reference to entering upon the property in question, and their intentions in doing so, were admissible on the question of exemplary damages. Damages of an exemplary character could only be assessed against the defendants upon a showing of malice in fact as distinguished from malice in law. Under the claim made by the plaintiff for exemplary or punitive damages, the good faith and motives of the defendants were directly in issue. And, as bearing on that issue, any facts which tended to show their motive and intent in entering upon the premises in question were admissible. As was properly said by the district court of appeal on that subject: ¹²⁵ "In some forms of action, certain facts being shown, a cause of action for actual damages is conclusively established. Even in such cases the evidence so held to be conclusive as to actual damages is at most prima facie evidence only

of the right to exemplary damages: Childers v. San Jose Mercury P. & P. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392. Malice in fact is defined in the former case to be a 'spiteful or rancorous disposition which causes an act to be done for mischief.' Malice in fact is always a question for the jury: Badostain v. Graziade, 115 Cal. 425, 47 Pac. 118. Under our system, where all persons may testify, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action. Even in a criminal case a defendant may testify as to the intent with which he entered a building or killed a human being, although, of course, a jury is not bound to believe the witness either in a criminal or civil action. But such testimony is competent and relevant and not immaterial: Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50; People v. Morton, 72 Cal. 62, 13 Pac. 150; Kyle v. Craig, 125 Cal. 107, 57 Pac. 791."

Upon this point it is unnecessary to engage in any further discussion, because the claim of appellants that this testimony offered by them was admissible upon the question of exemplary damages is not contested by respondent in his original brief. The claim of error in this respect is not there discussed by counsel for respondent, or authority advanced by him in support of the ruling of the trial court in his briefs. Nor in the supplemental brief of respondent, filed on rehearing here, is it undertaken to defend the rulings in this regard. All that is insisted on here is, that some evidence offered as to the good motives and intentions of the defendants in making entry on the land did not sustain them. But this is beside the point urged here. The question is not what was the effect of the evidence on these points which was admitted, but whether it was error to reject other and additional evidence offered on this subject, and we make no question but that it was.

But while we agree with the district court of appeal in its views as to the admissibility of all this evidence offered, as far as it went, we are of the opinion that that court took too restricted ¹²⁶ and constrained a view as to the extent to which proof of title in the Mt. Diablo company, offered by appellants, was available to them, when it held that such evidence was admissible upon the question of exemplary damages alone.

The amended answer set up that the Mt. Diablo Mining and Development Company was the owner of the land in question on April 14, 1901, and had been forcibly dispossessed therefrom by the Superior Sunset company on that day; that

the defendants, as officers, directors, and employés of the Mt. Diablo company, at its instance and on its behalf, went on said premises on the nineteenth day of that month to protect the interest of the latter company; that while there they were attacked by the employés of the Superior Sunset company, and defended themselves against said attack, and that any injuries sustained by plaintiff were received while defendants were repelling such attack in self-defense. In other words, that the Mt. Diablo company, at all such dates, as owner of the land, was entitled to the possession of it; that the defendants, as officers thereof, entered only in the exercise of the right of entry possessed by said company as owner of the property, and only used such force against those wrongfully in possession as was necessary to protect them in the exercise and assertion of such right.

The view of the district court of appeal was that this defense could not be asserted against a claim for actual damages; that although one was the owner and entitled to the immediate possession of property, yet if he attempted to obtain possession of his property by force, and in doing so, injury was sustained by a trespasser thereon, proof of such right of entry which the owner attempted to exercise, employing no more force than was necessary to expel the trespasser, would be available to him in defense of a claim for exemplary damages only; that the existence of such right, and its exercise, without unnecessary force, would be no defense against a claim of the trespasser for actual damages sustained by him while the owner was asserting his right of entry.

This view, however, is incorrect. The rule obtaining in this state is subject to no such limitation. It is broader and is the rule of the common law. At common law the owner of real estate had the right to enter upon his property to expel by force an intruder, and in doing so was entitled to use all the ¹²⁷ force necessary to secure possession. Having the right of entry and exercising it, he would not be subject to an action for tort for damages resulting either from his entry or from any assault upon or physical injury sustained by one in wrongful possession, provided he used no more force than was necessary to dispossess him. The trespasser could only maintain an action for damages against the owner, provided an excessive use of force was employed in making the entry or dispossessing him, and then only for that excess. The rule of the common law is the rule which obtains in this state, except in as far as it has been changed by the provisions of the code relative to the summary remedy provided therein for a for-

cible entry made upon real property. Under these provisions a right of action is given to one wrongfully in actual possession of property where a forcible entry is made, even by the owner, in which action damages occasioned through the forcible entry may be recovered, and judgment for the restitution of the property had. But the code prescribes a method of procedure and the extent of the remedy for such forcible entry, and that remedy is exclusive. A person wrongfully in possession, dispossessed by the owner of the property having a right of entry, and no excessive force being used in asserting it, is not entitled to maintain any other action than is afforded for a forcible entry under the code. He was not entitled to maintain, under such circumstances, any action whatever under the common law, and the common-law rule has only been changed in this state to the extent, and no further, that the code affords him a remedy under its provisions referred to which he otherwise would not have.

Having these principles in mind, it will be observed that this action is not brought under the provisions of the code relative to forcible entry. It is an action brought purely for assault and battery, and is subject to the common-law rule as to such actions, which is that it is a complete defense to their maintenance, either for exemplary or actual damages, if it be shown that the injuries claimed to have been sustained by one wrongfully in possession were sustained while the owner of the property was exercising a right to the possession of his land, although using force to obtain such possession, if no more force was employed than was necessary to accomplish it.

¹²⁸ We have said that this rule of the common law applies in this state to actions of this character, and we proceed now to refer to the authorities so declaring. This entire matter—the rule of the common law and the extent to which it has been changed by the summary proceeding for forcible entry under the code—is so thoroughly considered in the cases to be referred to as to make some quotations from them suffice for any further discussion of the subject.

Referring first to the case of *Canavan v. Gray*, 64 Cal. 5, 27 Pac. 788, the facts there presented this situation: The defendant Gray, who was the owner of a certain house in which plaintiff was wrongfully in the possession of certain rooms, caused the house to be unroofed, and in so doing damaged the personal property of the plaintiff, who brought an action for the injury and obtained a verdict in her favor. The motion of the defendant for a new trial upon the ground

of insufficiency of the evidence to sustain the verdict being denied, he appealed.

In disposing of the appeal this court said: "The vital question is, Can the plaintiff, upon these facts, maintain an action of trespass against the defendant? All agree that at common law the plaintiff could not, upon the facts disclosed by this record, maintain any action whatever against the defendants. It is also conceded that the only change which has been made in the law relating to this subject is that made by the statute which, in this state as in many others, provides a summary remedy for forcible entry upon or into any real property. It is only as to the extent of the change wrought by this statute that there is any difference of opinion. . . . The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the Code of Civil Procedure, but it establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice: Code Civ. Proc., sec. 4. An action of forcible entry would be a proceeding under the code, and its provisions relating to that subject, in such a proceeding, would have to be liberally construed. The code has established the law of the state respecting that subject. It had provided a remedy and prescribed a course of procedure in cases of forcible entry. ¹²⁹ And all statutes, laws, or rules on that subject heretofore in force in this state, whether consistent or not with the provisions of the code on the same subject, are repealed and abrogated. . . . The legislature has provided a remedy for forcible entry, no matter by whom made. But it has provided only one remedy. Before there was any legislation on the subject, a person in the actual rightful or wrongful possession of real estate could maintain trespass against anyone, not having a right to enter, for a forcible entry upon it. A person in the wrongful possession could not maintain an action against the owner, having a right to enter, for a forcible entry. But the statute gives a person even in the wrongful possession a right of action, and prescribes its form, against the owner having a right to enter, if he make a forcible entry. Neither expressly nor by necessary implication does the statute give to a person in the wrongful possession the right to maintain any other than the action of forcible entry when such entry is made by the owner, having the right to enter. The legislature has provided a particular remedy for a forcible entry made under such circumstances, but we are unable to see upon

what principle it can be held that another and different remedy, and one which did not exist at common law, and is not given by statute, is equally available in such a case. . . . As the evidence shows that the premises upon which the alleged trespass was committed were owned by the defendant, H. W. Gray, and that he was entitled to the immediate possession of the same, and that the plaintiff was in the wrongful possession thereof, the defendants' motion for a new trial should have been granted on the ground that the evidence was insufficient to justify the verdict."

The other case to which we refer, and which reaffirms the doctrine of *Canavan v. Gray*, 64 Cal. 5, 27 Pac. 788, is the case of *Burnham v. Stone*, 101 Cal. 164, 35 Pac. 627. There an action was brought by plaintiff against a number of defendants to recover damages for the alleged killing of the wife of plaintiff, Jennie Burnham. Epitomizing the facts as much as possible, it appears that one of the defendants, Levi P. Stone, was the owner of several tracts, according to the government survey, of a section of land in San Diego county, upon one subdivision of which a dwelling-house and other buildings were situated. In his absence certain persons named Goings took possession of ¹³⁰ that portion of the land on which the buildings were located. Stone brought an action against them in the justice's court for forcible entry and detainer, but the complaint did not correctly state the subdivision of the section on which the buildings were located. They were on an entirely different subdivision. He had judgment for the restitution of the premises as described in the complaint and a writ of restitution was issued and delivered to a constable for service. The constable went to the premises upon which the buildings were situated and demanded that the Goings vacate them, which they refused to do. The constable returned later in the day with the defendants Levi P. Stone and James Stone and found Mrs. Burnham, the Goings, and others, in the house with the doors barred, and they still refused to vacate. The day following, the constable, the Stones, and others returned, and in an effort to execute the writ, or obtain possession, one of the constable's posse and one of the Goings, Mrs. Burnham, and another, were killed or mortally wounded. The jury returned a verdict against all the defendants, and James Stone appealed.

It appears that the court instructed the jury, at the request of plaintiff, that in going upon the land for the purpose of obtaining possession by force, or show of force, all the defendants were trespassers, and their entry unlawful, and

because thereof, each defendant was liable for the killing of Mrs. Burnham, although the killing was not intended, contemplated, aided, abetted, or advised by him; that if he aided, abetted or encouraged the unlawful entry upon the premises it was sufficient to fix his liability, and that such entry was unlawful unless the writ of possession covered or included the premises where the homicide occurred.

In passing upon the correctness of this instruction this court said: "In view of a new trial and of the possibility that the writ does not refer to the buildings as a part of the description of the land, it becomes necessary to consider the instructions upon the supposition that the writ did not cover the premises from which it was attempted to evict the defendants in the writ.

"In such case the instructions were also erroneous. It is conceded that Levi P. Stone was the owner of the buildings and premises where the homicide occurred, and that he had a ¹³¹ right to the possession at that time. Mrs. Burnham made no claim that she was entitled to the possession. Her mother and brother were in possession, and the record shows that when the constable, after demanding that they vacate the premises the morning of the day before the homicide, and being met with a refusal, returned in the afternoon he found Mrs. Burnham there with the others in the house and the doors barred. She was also there when the constable and owner of the premises returned the next day with the posse, and at least aided and abetted her mother and brother in retaining possession. Under these circumstances, if she had survived, she could not have maintained an action for assault and battery, or for any injury she might have sustained in an endeavor of the owner to obtain possession, even if the effort were forcible.

"In *Canavan v. Gray*, 64 Cal. 5, 27 Pac. 788, it was held that where the owner of real property having the right of possession makes a forcible entry, the person in wrongful possession cannot maintain an action of trespass, that the remedy provided by statute for a forcible entry is exclusive. . . .

"And the law, as generally adopted in the United States, may be assumed to be substantially as laid down by Baron Parke. If the owner of land wrongfully held by another enter and expel the occupant, but make use of no more force than is reasonably necessary to accomplish this, he will not be liable to an action of trespass *quare clausum*, nor for assault and battery, nor for injury to the occupant's goods,

although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for a breach of the peace, or under the statute for making forcible entry.' . . .

"The general ground upon which these authorities are based is that at common law trespass would not lie against the owner if he were entitled to the possession, as in such case the person in possession, being in wrongfully, could maintain no action against the owner, unless unnecessary force was used, and that the statutes of forcible entry and detainer having provided a remedy in such cases, that remedy is exclusive so far as the wrongful possessor is concerned; but the public being interested in preserving the peace may punish the owner¹³² for resorting to force. *Canavan v. Gray*, 64 Cal. 5, 27 Pac. 788, proceeds upon this ground."

After citing a number of authorities from different jurisdictions in support of this rule, including *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, where it is said: "It is clearly the English law, and as we believe the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess," our court then proceeds to an examination of the instructions referred to, and says: "In the light of these authorities the instruction that the entry upon the premises by force, or show of force, was unlawful, and that if appellant aided and abetted such entry that he was liable for the death of Mrs. Burnham, though he did not aid, abet, advise, or encourage the actual killing, is erroneous. No liability for damages was created against any of the defendants for the entry upon the land, nor for the expulsion, or attempted expulsion, of the occupants by force, unless more force or violence was used than was reasonably necessary, and no such qualification appears in the instructions given to the jury. It is quite true that appellant did not, in his answer, plead the ownership and right of entry to Levi P. Stone. The case was tried, however, without any apparent reference to the issues made by appellant's answer, and all the facts were given in evidence without objection or limitation. The court stated to the jury the substance of the complaint, that all the defendants, except Freeman, had answered denying the allegations of the complaint, and alleging that Mrs. Burnham and others acting with her first assaulted them; that they used no more force than was necessary to protect themselves from injury, and also alleged facts tending

to justify themselves under the writ of restitution. The jury were expressly instructed that the question of the title to the land was not before them; that 'admitting that Stone was the owner of the land, and that Mrs. Goings was wrongfully in possession of it, this gave Stone, or anyone acting with or for him, no right to enter upon the land by force, or show of force, and take possession of it, or exclude or remove Mrs. Goings or anyone else from the land; and if you find that the defendants went upon the land in the manner and for the ¹³³ purpose mentioned, their entry was unlawful, unless justified for other reasons, and the defendants would be liable for the consequences resulting therefrom.'

"Counsel for respondents suggest that the verdict being right upon the evidence, the judgment should not be reversed because of an erroneous instruction. That there are cases where the judgment should stand, notwithstanding an erroneous instruction, is not questioned; but where the erroneous instruction is such as to cut off a substantial defense on the merits the rule suggested can have no application. The case was not tried upon a theory which would justify this court in looking at the evidence to determine whether unnecessary force was used by defendants, and that became a vital question, assuming that the writ did not cover the premises upon which the entry was made by them."

It is clear from these authorities that one who is in possession of real property without right cannot maintain an action of trespass on his person—assault and battery—against the owner of the property, having a right to its possession, or against those, acting at his instance or in his behalf, who make a forcible entry thereon to dispossess him, where no more force than is necessary is used to make the entry effective.

The defense interposed by the defendants here was that the Mt. Diablo company had a right of entry upon the property in question as the owner thereof, and that they entered upon it on behalf of such owner in the exercise of such right. In support of the existence of this alleged right of entry and as a basis for its exercise, they were entitled to prove ownership of the property in the Mt. Diablo company if they could do so, and the trial court in refusing to permit them to do it prevented them from making a defense which they had pleaded, and which, if proven as pleaded, would have been a valid defense to the recovery of any damages by the plaintiff, either exemplary or actual.

It is claimed by the respondent that the principle of law declared by the authorities to apply to actions for assault

and battery for injuries growing out of the exercise of the right of entry by the owner of land to dispossess those who are trespassers upon it, applies only between conflicting claimants to land; that the rule can have no application in a case where a mere employé (such as it is claimed respondent was), ¹³⁴ who had no interest in a contest between the rival claimants to the possession of land and is simply on the premises by virtue of his employment, is injured by the owner in exercising the right of entry against his trespassing employer. We perceive no force in this contention. If the Mt. Diablo company had the right of entry on the lands in question, the defendants, acting for it, in the exercise of that right, were entitled to dispossess all persons who were on the premises, whether officers or employés of the Superior Sunset company, and to exercise all necessary force to do so. They owed no different duty to the employés of the Superior Sunset company who were upon the premises than they did to the officers of the company who were there. Their sole duty as to all occupants was to use no more force than was necessary to effectuate their removal and obtain full possession, and their responsibility to any of them injured thereby was only for any excessive use of force employed in doing so.

It is further insisted on behalf of respondent, as we understand his brief on rehearing, that the judgment should not be disturbed, as far as it awarded actual damages, for any error in the admission of evidence of ownership of the land by the Mt. Diablo company, because it clearly appears from the evidence that the force and violence used by defendants in making the entry upon the premises, and as a result of which plaintiff was injured, was so excessive, unnecessary and unreasonable that the judgment would have had to be the same, whether evidence of ownership had been admitted or not. This proposition is doubtless made upon the theory that this court might make the same alternative order on this appeal as did the district court of appeal. Undoubtedly this court could do so if a proper case was presented for such action. But, as was said in *Burnham v. Stone*, 101 Cal. 164, 35 Pac. 627 (as to a similar suggestion that the judgment there should be affirmed notwithstanding the error committed by the trial court), when the effect of the action of the trial court is to cut off a substantial defense upon the merits, the rule invoked has no application. The case at bar was tried on an erroneous theory which, as in the *Burnham* case, would not justify this court in looking into the evidence to determine whether unnecessary force was used by defendants.

Whether unnecessary force was used was a vital question under the pleadings in the ¹³⁵ case, and its solution depended largely on whether the Mt. Diablo company had a right of entry upon the premises or not. The defendants, acting for it, could only employ force to eject those in possession of it if it had. The court not only refused to permit defendants to show that the Mt. Diablo company was the owner of the property with a right of entry thereon, but while refusing to permit the proof, actually made a finding against defendants on these matters. The court further found that the defendants were trespassers ab initio on the property on the night of the conflict; that the "said defendants had no right or business on said lands and were there in violation of law." Of course, under such a view, the trial court must necessarily have concluded that the use of any force employed by the defendants was entirely unwarranted and illegal; that the question as to the degree of force used by the defendants was a false quantity in the case, as the defendants had no right to be upon the land at all or employ any force whatever against those in possession. It is apparent that under these circumstances the case was tried upon an entirely erroneous theory, under which the defendants were precluded from making a defense whereby it could be properly determined by the court whether the force employed by them was necessary only or excessive.

As to the last point made by appellants relative to the exclusion by the court of evidence that the Superior Sunset people were armed with deadly weapons when they came upon the property in question and were so armed while in possession and up to the night of the entry by defendants: We think such evidence should have been admitted in connection with all the other circumstances attending the dispute over the possession of the property. Under the authorities cited, even if the Mt. Diablo company had a right of entry to dispossess the Sunset people as trespassers, still the defendants, acting in its behalf, would be justified in using only necessary force for that purpose and liable for any damages, the result of the use of excessive force. If the officers and the employés of the Superior Sunset company entered into possession of the property armed, and remained armed, this fact would be proper to be taken into consideration in determining whether the defendants acted reasonably ¹³⁶ and in good faith and without malice in making their entry upon the premises also armed, and as bearing upon the question whether they were using only reasonable force in doing so.

This disposes of the only points on the appeal made before the district court of appeal or on rehearing here.

As the trial court erred in rejecting the evidence offered by the defendants on the matters we have discussed, the judgment and order appealed from are reversed and a new trial ordered.

Sloss, J., Shaw, J., Angellotti, J., McFarland, J., and Henshaw, J., concurred.

A Land Owner may Use All Reasonable and Necessary Force to expel a trespasser from his premises: Hannabalsen v. Sessions, 116 Iowa, 457, 93 Am. St. Rep. 250, and see the note thereto on the right to expel trespassers.

CARPENTER v. SIBLEY.

[153 Cal. 215, 94 Pac. 879.]

APPEAL AND ERROR—Objections to Evidence, Questions Proper to be Raised by.—If a complaint fails to disclose the facts requisite to sustain an action, the defendants may, at the trial, object that the complaint is so insufficient, notwithstanding a demurrer thereto has been overruled. (p. 79.)

MALICIOUS PROSECUTION.—A Conviction Procured by Fraud at the instance of the defendants is not a defense to an action against them for malicious prosecution. (p. 79.)

MALICIOUS PROSECUTION.—Fraud in Procuring Judgment of Conviction Need not be Extrinsic.—Though a suit to set aside or obtain relief in equity from a judgment on the ground of fraud in procuring it by false and prejudiced testimony cannot be maintained, this does not apply to an action for malicious prosecution where it is alleged that the prosecution was malicious and the conviction was procured by the defendants by the employment of testimony which they knew to be prejudiced. (pp. 79, 80.)

A. H. Carpenter, in pro. per., for the appellant.

Nicol & Orr, Louttit & Louttit and C. L. Neumiller, for the respondents.

²¹⁶ HENSHAW, J. Plaintiff filed his complaint against the defendants, the district attorney and the sheriff of San Joaquin county, with others, seeking a recovery for malicious prosecution. Defendants interposed a general demurrer to the complaint, which was overruled. Subsequently they joined issue by answering, a jury was impaneled at the request of the plaintiff, and defendants again interposed their general demurrer in the form of objection to the introduction of any evidence because of insufficient facts alleged in the

complaint. This objection was timely, since it may be interposed at any stage of the case: *Buckman v. Hatch*, 139 Cal. 53, 72 Pac. 445; *Bell v. Thompson*, 147 Cal. 689, 82 Pac. 327; *Hall v. Linn*, 8 Colo. 264, 5 Pac. 641. The court sustained this objection, and, plaintiff declining to amend, a judgment of dismissal was entered and plaintiff appeals.

Plaintiff charged in his complaint that the district attorney and the assistant district attorney and the sheriff and other persons maliciously and feloniously conspired and agreed to falsely charge and accuse the plaintiff of the crime of subornation of perjury, and to convict and punish him therefor; that in pursuance of this conspiracy the conspirators unlawfully procured false evidence to be given before the grand jury of the county, by means of which false evidence they caused plaintiff to be wrongfully and unlawfully indicted for the crime of subornation of perjury; that the indictment was insufficient in form and substance and did not state a public offense; that it was presented to the superior court. Plaintiff was arraigned thereon and pleaded not guilty. Subsequently his trial was had before a jury, and "the said conspirators then and there, during the trial of said case, made use of the false and perjured evidence of thieves and perjurers, which they had corruptly and maliciously procured by means of promises of immunity from crimes and other inducements, and offered and introduced such testimony, which they then and there knew to be false, in evidence at said trial against plaintiff." There then follow allegations of intimidation whereby the jury was ²¹⁷ coerced into bringing in a false verdict; that judgment of guilty was entered upon the verdict, and plaintiff was sentenced to a term of imprisonment; that he appealed to the supreme court of the state, making application for bail and for a certificate of probable cause pending his appeal, and that the granting of the one and the issuance of the other were opposed by defendants; that he suffered two hundred and sixty-one days of imprisonment; that the supreme court reversed the judgment, and the cause was remanded for a new trial, and subsequently, upon the application and motion of the district attorney made in open court, the superior court dismissed the action and ordered plaintiff released and his bondsmen discharged.

Respondents' argument in support of their contention as to the insufficiency of the complaint is, that in order to support an action for malicious prosecution, the plaintiff must allege malice and want of probable cause for instituting the action complained of, and this, of course, is well settled: *Hol-*

liday v. Holliday, 123 Cal. 26, 55 Pac. 703; Dowdell v. Carpy, 129 Cal. 168, 61 Pac. 948. They urge further that probable cause is shown by a judgment of conviction, even though that judgment be afterward reversed, and there is authority of much weight supporting this contention: Root v. Rose, 6 N. D. 575, 72 N. W. 1022; Nehr v. Dobbs, 47 Neb. 863, 66 N. W. 864. Respondents next contend that the complaint itself shows plaintiff's conviction, and thereby conclusively establishes, against his pleading, the presence of probable cause for his prosecution. Respondents recognize that the general principle that the conviction establishes probable cause is subject to the modification that the judgment of conviction has not been procured by fraud at the instance or instigation of the defendants. Such, of course, is the established rule: Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703; Crescent Livestock Co. v. Butchers' Union, 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30 L. ed. 614. Respondents then argue that the only fraud which will avail the plaintiff to overcome the presumption of probable cause established by the conviction is extrinsic fraud which would justify an action to set aside the judgment. Here respondents fall into error. The rule that only extrinsic fraud may be made the basis of an action to set aside a judgment is a rule founded in necessity. It is to the ²¹⁸ interest of the state that there should be an end to litigation. If it were permitted that a litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end: Pico v. Cohn, 91 Cal. 129, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336. But this is very far from saying that because the law denies to a litigant this particular form of redress for such an injury, it denies him any redress whatsoever. Certainly if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary. If that judgment is in the form of a judgment of criminal conviction, it would be obnoxious to everyone's sense of right and justice to say that because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged. Therefore, while it may be true that the fraud alleged in this complaint is not such a fraud as would support an action for the setting aside of a judgment, it is still a fraud which will support an action for a remedy for the private wrong thus committed. So we

find it laid down that the general rule now is, "that if the declaration or complaint shows a conviction of the plaintiff, yet if it be averred that the conviction was procured by fraud, perjury or subornation of perjury, or other unfair conduct on the part of the defendant, the presumption of probable cause is effectually rebutted: 13 Ency. of Pl. & Pr. 449, and note; Spring v. Besore, 12 B. Mon. (Ky.) 551; Ross v. Hixon, 46 Kan. 550, 26 Am. St. Rep. 123, 26 Pac. 995, 12 L. R. A. 760; Crescent Livestock Co. v. Butchers' Union, 120 U. S. 141, 7 Sup. Ct. Rep. 472, 30 L. ed. 614.

It follows from the foregoing that the court erred in sustaining defendants' objection to the introduction of evidence and in dismissing the action. Therefore, it is ordered that the judgment be reversed and the cause restored to the calendar of the trial court.

Shaw, J., Angellotti, J., Sloss, J., McFarland, J., and Lorigan, J., concurred.

Conviction is Generally Conclusive of Probable Cause in actions for malicious prosecution, yet it may be overcome by showing that it was procured by fraud, undue means, or the false testimony of the prosecution: Ross v. Hixon, 46 Kan. 550, 26 Am. St. Rep. 123, and see the note thereto on the malicious prosecution of criminal charges. The malicious prosecution of civil actions is the subject of a note to McCormick Harvesting etc. Co. v. Willan, 93 Am. St. Rep. 454.

WOOD, CURTIS & CO. v. EL DORADO LUMBER COMPANY.

[153 Cal. 230, 94 Pac. 877.]

MECHANIC'S LIEN for Sum Due for the Letting of Horses.—One who lets horses to a contractor to aid him in the construction of a railway does not become a subcontractor, nor entitled to a lien as such, nor as a person who bestows labor in the performance of such work. (pp. 81, 82.)

W. J. Bartnett, Charles A. Gray and Charles A. Swisler, for the appellants.

L. T. Hatfield, for the respondent.

231 HENSHAW, J. The facts involved in this appeal, briefly stated, are as follows: On February 17, 1904, the defendant and appellant herein, the El Dorado Lumber Company, entered into a contract with the defendants Carney,

Roy & Carney for the construction of a single-track railroad, upon a private right of way from North Placerville to its storage yards in El Dorado county. Thereafter, and during the progress of construction work upon said right of way, the plaintiff corporation let to the firm of Carney, Roy & Carney fifty-three head of horses, with their harness, at the rate of ten dollars per month for each horse and harness. An examination of the record shows that these horses were used by Messrs. Carney, Roy & Carney in the course of the construction work, and that the drivers of the horses were hired and paid for by them. Suit was brought in the superior court of El Dorado county, and on October 31, 1904, the default was entered of defendants Edward Carney, E. J. Roy and Edward Carney, Jr., and the case was tried as to the defendant corporation.

An examination of the record shows that there was no conflict of evidence upon the proposition that the transaction between plaintiff and the contractors, Carney, Roy & Carney ²³² was simply a letting by plaintiff of the horses and harness to the contractors for the doing of this work at a stipulated price per month for each horse. The contractors had full control of the horses during the time of the hiring, and employed and paid the drivers thereof. So far as the findings may be construed otherwise, they are unsupported by the evidence. Upon the theory that in the use by the contractors of plaintiff's horses and harness in the work of constructing the railroad plaintiff had performed labor upon the railroad, the trial court found it to be entitled to a lien on the railroad for the amount due from the contractors for such hiring.

The question, then, which the trial court answered in favor of plaintiff is: Did plaintiff by this letting of its horses at a stipulated price per month "bestow labor" upon the work so as to entitle it to a lien under section 1183 of the Code of Civil Procedure? Respondent contends that upon the reasoning, if not upon the direct authority, of *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312, the trial court was clearly right in its ruling. But in *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312, this court was construing the provisions of the mechanic's lien law with reference to the right of a lien of a subcontractor who had not actually labored himself upon the work, but had "bestowed" upon it the labor of his servants and employes, and it was held that such a subcontractor brought himself within the purview of the statute. So far, and no further, *Macomber v. Bigelow*, 126 Cal. 9, 58 Pac. 312, went. We are asked here to hold (since to uphold the

ruling of the trial court it must be so held) that one who merely lets, hires, or rents tools, implements, or machinery of any kind to one employed upon the work becomes thereby a subcontractor, and entitled to a lien for the value of the use of such tools, implements, and machinery as he has let or leased. Yet, certainly, the plaintiff was in no sense a subcontractor. He occupied no contractual position whatsoever touching the work. He had merely turned over to the contractor, under a contract of hiring, certain personal property which the contractor himself used upon the work. The fact that the personal property which was so turned over consisted of horses and their harness should not be allowed to cloud the issue. The horses, as horses, were no more entitled to liens than were the harnesses themselves. Each and both together were but convenient appliances for ²³³ the doing of specific work. In the ultimate analysis there is no difference in principle whether draying is done by horses and wagons or by automobile trucks; whether grading is done by horses and scrapers or by traction engines and steam paddies. One and all are in their essence but tools and machinery. This being so, if the ruling for which respondent contends is the correct one, it must result that if A leases to B a derrick or hoist for use upon the buildings which B is constructing, A will have a lien upon each of those buildings for the value of the use of the derrick. Or, in still simpler form, if a carpenter lets to a fellow-carpenter his chest of tools for fifty cents a day, the former will have a lien upon every building upon which the latter works and uses the rented tools. The illustration reduced to its simplicity shows the untenableness, if not the absurdity, of the contention. Giving to the law its broadest and most beneficent construction, it can never be said that one who merely rents appliances to another who labors upon a structure has himself bestowed labor upon that structure within the meaning of our law. In this, of course, there is no denial, but a distinct affirmance of the fact that, in proper cases, the value of labor may be enhanced by the use of tools and appliances, and, in such cases, a lien may be properly given for such value, as in *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231, and in *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622. Upon the other hand, reference may be made to *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640, where it was held that a teamster who had been employed by the brick men to haul brick for them, who had no contract with the contractor and owed him no liability, had not performed labor upon the building and

was not entitled to a lien. Unquestionably the brick men would have been allowed a lien in a proper case for this cartage as a part of the cost of the material.

The case of *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548, relied upon by appellant, has not been overlooked. *Clark v. Brown*, 141 Cal. 93, 74 Pac. 548, was an action for a lien upon a threshing-machine brought under the act which provided for a lien for the wages of persons employed as laborers. It was there held by the trial court, and its ruling approved by this court, that the law limited the lien to the wages of the persons employed, and did not and could not include the value of the services²³⁴ of horses rented to the owner of the machine and used by him in its work. In principle the case is identical with the one at bar. The distinction which is sought to be drawn between the two rests upon the broader language of the mechanic's lien law. But even that language, as we have said, does not warrant the award of a lien in such a case.

For the foregoing reasons the judgment and order denying a new trial are reversed and the cause remanded.

Angellotti, J., Shaw, J., Sloss, J., and Lorigan, J., concurred.

Rehearing denied.

A Mechanic's Lien Law will be Given a Liberal Construction to carry out its purpose and to secure and protect those entitled to the lien: Luttrell v. Knoxville etc. R. R. Co., 119 Tenn. 492, 123 Am. St. Rep. 737. A lien may be acquired against a railway corporation for materials furnished and used in the construction of its roadbed; Schaghticoke Powder Co. v. Greenwich etc. Ry. Co., 183 N. Y. 306, 111 Am. St. Rep. 751. But a statute giving a lien on railroads for materials furnished has reference to materials furnished for use in the construction of the road so as, in a sense, to become a part of it, and does not include hay, grain and straw furnished a contractor for keeping teams employed by him in working on the road: Pennsylvania Co. v. Mahaffey, 75 Ohio St. 432, 116 Am. St. Rep. 746.

MONTGOMERY v. DE PICOT.

[153 Cal. 509, 96 Pac. 305.]

CONTRACT for the Sale of Lands—Tender of a Promissory Note of a Person Other than the Original Contractor.—If a contract for the sale of lands calls for notes of the vendee for deferred payments of the purchase price, his personal liability enters as a controlling element into the contract. Hence, the offer of the notes of the assignee does not satisfy the contract nor warrant him in asserting the right to specific performance. (p. 86.)

ASSIGNMENT OF CONTRACT Providing for a Personal Obligation.—Notwithstanding a contract contains general provisions recognizing its assignability, they are not controlling on that subject, if, from its entire terms and tenor, the contract calls for the performance of a demand purely personal in its nature, and it cannot be assigned without the consent of the party benefited. (p. 87.)

ASSIGNMENT OF CONTRACT to Sell Real Property Where Payment is to be Secured by Mortgage Thereon.—If a contract for the sale of real property provides for certain cash payments and the payment of the residue in the promissory notes of the vendee, secured by a mortgage on the same property, such contract is assignable, and specific performance may be enforced at the suit of the assignee of the vendee on his tender of notes secured by a mortgage on such property. (p. 88.)

TENDER, Estoppel Arising from Refusal of.—If the assignee of a contract for the sale of real property tenders his own promissory note in payment of the residue of the purchase price, and offers to execute a mortgage on the property to secure its payment, and the tender is refused on the express ground that the vendors do not wish the money, and with a refusal to do anything in the matter, they are estopped in a suit for specific performance from defending on the ground that the obligation of the original vendee was personal, and his note should have been tendered instead of that of his assignee. (p. 88.)

Denis & Loewenthal, for the appellants.

W. R. Hervey, for the respondent.

510 LORIGAN, J. This an action for specific performance of a contract for the sale of real estate.

The contract which was the basis of the action related to a purchase by W. G. Bradshaw of a tract of land in Los Angeles county owned by defendants, and was executed by defendants and said Bradshaw on November 25, 1904, the defendants being designated therein as the parties of the first part and Bradshaw as party of the second part.

The portions of the contract material for consideration on this appeal are as follows: "That in consideration of the payment to them by the party of the second part of the sum of \$1,500.00, receipt whereof is hereby acknowledged, the said parties of the first part hereby agree to sell and convey . . . unto the said party of the second part, his heirs, executors and assigns, all that certain real property situated in the county of Los Angeles, state of California, described as fol-

lows, to wit: . . . upon the following terms and conditions: For the total price of \$45,000.00, \$1,500.00 of which has been paid by the party of the second part as above recited, \$10,000.00 to be paid by the said party of the second part, or his heirs, executors or assigns, on or before May 31st, 1905, . . . and the remainder of the said purchase price, to wit: the sum of \$33,500.00 on or before May 31, 1910, the said last mentioned sum to bear interest at the rate of 9 per cent per annum, interest to be paid quarterly. And the said last deferred payment, to wit: the sum of \$33,500.00 to be evidenced by a promissory note dated June 1st, 1905, bearing interest at the rate aforesaid, to wit: 9 per cent per annum until paid, payable on or before May 31st, 1910, secured by a mortgage upon the above-described property . . . deed of said property to be delivered by the first parties to the second or assigns concurrently with the said second payment of \$10,000.00."

Subsequent to the execution of this contract Bradshaw assigned nine-tenths of his interest therein to divers other parties, who, with himself, thereafter assigned the same to plaintiff. It is conceded that the plaintiff was a stenographer in the office of Mr. Hervey, an attorney at law, who in the transactions relative to said contract represented Bradshaw, his assignees, and plaintiff, and that the assignment to plaintiff of said contract was for the convenience of Bradshaw and ⁵¹¹ his assignees, and that plaintiff claimed no ownership or beneficial interest under the assignment, and was not financially responsible.

Some time before the date fixed in the contract therefor, Mr. Hervey, in the interest of the plaintiff and her assignors, and accompanied by the latter, went to the residence of defendants and there tendered the personal note of plaintiff, secured by a mortgage on the land, conditioned as and for the amount provided in the contract, and likewise tendered defendants at the same time the ten thousand dollars in coin which the contract provided should be paid. The defendants refused to accept either the note or the mortgage or the money tendered.

Thereafter, this action was commenced by plaintiff against the defendants to obtain a decree of specific performance. A demurrer to the complaint—general and special—was interposed by the defendants and overruled. They answered, and after trial, judgment was entered in favor of plaintiff for the relief prayed for.

The defendants appeal from the judgment and from an order denying their motion for a different judgment made under sections 663 and 663½ of the Code of Civil Procedure, and also from an order denying their motion for a new trial.

It is insisted by appellants that their demurrer to the complaint should have been sustained on the ground that the facts alleged showed that the plaintiff was not entitled to the relief prayed for. In other words, that the complaint does not show that the plaintiff offered to observe or comply with the terms of the contract upon which suit is brought. In support of this contention it is claimed that the contract did not provide that the note of plaintiff should be given in satisfaction of it as tendered; that the contract provided and meant that the note of Bradshaw and no other person should be given; that it called for the personal obligation and liability of Bradshaw himself, and that his assignee could not substitute her personal liability for that of Bradshaw and compel specific performance upon tender of her own note.

It is undoubtedly true that where a contract for the sale of land calls for the delivery of notes on the part of the vendee for deferred payments of the purchase price, the personal liability of the latter enters as a controlling element into the ⁵¹² contract, and the offer or tender of notes of an assignee of the original vendee does not satisfy the terms of the contract nor warrant such assignee in asserting a right of specific performance based upon such a tender. As said in *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. Rep. 1308, 32 L. ed. 854: "Everyone has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'you have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' " And, as declared in our code, the burden of an obligation may not be transferred without the consent of the party entitled to the benefit: Civ. Code, sec. 1457.

Whether a given contract is assignable or not is a question of construction. Now, as to the contract at bar. The reading of it discloses that by its terms it was assignable. It provides for a conveyance by defendants of the property to "said party of the second part (Bradshaw), his heirs, executors and assigns," upon the fulfillment of certain conditions by Bradshaw or his "heirs, executors or assigns." These, however, are general provisions of the contract, and are not conclusive upon the subject of assignability. The use of such

language in a contract is not in every case absolutely determinative of its character: *Swarts v. Narragansett Electric L. Co.*, 26 R. I. 436, 59 Atl. 111. Notwithstanding its use the intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract, and if upon such consideration it appears that the contract calls for the performance of an obligation purely personal in its nature, the rule in general is that the obligation, if personal, cannot be assigned without the consent of the party to be benefited: *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Arkansas Valley S. Co. v. Belden Min. Co.*, 127 U. S. 379, 8 Sup. Ct. Rep. 1308, 32 L. ed. 854.

In *Rice v. Gibbs*, 33 Neb. 460, 50 N. W. 436, an optional contract for the sale of land was involved, wherein it was provided that the covenants and agreements should extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties. The contract provided for a deed to be made by the vendor on the payment of a certain ⁵¹³ specified amount in money, other payments to be made within one and two years after the making of the deed, such deferred payments to bear interest. An assignee of the original vendee tendered the money in due time and notes for the deferred payments but not made by the original vendee. It was held that notwithstanding the language of the contract, an assignee financially irresponsible could not substitute his own personal liability for that of the original vendee; that in a contract of sale where payment of a portion of the purchase price is deferred and there is no provision for securing such payment, it is a necessary inference that the character and solvency of the vendee was an inducement of the contract; and the contract cannot be assigned so as to permit the assignee to enforce it and compel the vendor to substitute the obligation of any other person than the one with whom the contract was made. In that case, however, the notes for the deferred payments were not to be secured by any lien or mortgage upon the property to be conveyed. The contract did not so provide. The vendors obligated themselves to an absolute disposition of the property on the execution simply of promissory notes for the deferred payments, and obviously the financial responsibility of the original vendee must have entered as a controlling inducement to the contract. In this very essential respect that case differs from the case at bar. In the contract here, notwithstanding the provisions for assignability, if it appeared from a consideration of the whole

contract that the personal financial responsibility of Bradshaw was a distinctive feature of it, and appeared to be the material inducement to the contract, then, under the general rule, it would not be assignable without the consent of the vendors, and the assignee would have no right to enforce it. But it seems quite plain from an examination of the contract that the personal financial responsibility of Bradshaw was not a material inducement for its execution. What was really relied upon was a mortgage upon the property for the unpaid portion of the purchase price, and "a promissory note" evidencing this indebtedness was to be given. It is a matter of general knowledge that upon sales of real estate a mortgage back for a portion of the purchase price is one of the most common methods of dealing in such transactions. The mortgage is the main thing relied on when a substantial prior payment, as ⁵¹⁴ in this case, is made on the purchase price; the financial responsibility of the vendee on the note itself evidencing the debt for the balance is a matter of very little importance to the vendor. And in contracts for the sale of real property which in terms run in favor of assignees and which provide for a promissory note and mortgage to secure the balance of the purchase price, the general construction will be that the promissory note is a mere incident to the transaction, and that the principal thing relied on is the mortgage. It is a very easy matter, when reliance is intended to be placed on the financial responsibility of the original vendee, to specify in the contract that in addition to the mortgage his personal obligation shall be given. When this is not done and a mortgage to secure "a promissory note" is alone called for, as in the contract here, such provision will be construed as making the giving of a mortgage, not the giving of a note, the material inducement to the contract; that under such circumstances the obligation is not personal, and may be assigned and specific performance on proper tender had at the suit of the assignee.

Aside from this, however, it appears from the record that the defendants are estopped from questioning the sufficiency of the tender made by plaintiff. The evidence in that regard is that the agents and attorney of plaintiff within the time limited in the option—in fact, fully eight days before it would have expired—made a tender at the residence of defendants some miles outside of the city of Los Angeles, in which they complied in all respects with the conditions of the contract save that the note tendered was that of the plaintiff and not of Bradshaw. They not only made an actual tender, but de-

livered also to defendants a written offer, notice and demand covering the terms of the contract. When the actual tender was being made defendants said they did not want the money and did not want to hear the papers read—the note, mortgage and deed—but at last consented to have the matter explained to them. The upshot of the effort on the part of plaintiff to have the defendants accept the tender was that they flatly refused to accept anything or to do anything in the matter. After refusing to do so they requested Mr. Hervey, representing plaintiff, to take the papers to Mr. Denis, who was their attorney. On the following day Mr. Hervey⁵¹⁵ left the papers with the latter. Subsequently and during the eight days prior to the date limiting the exercise of the option no word was heard concerning the matter from either appellants or their attorney. When the tender was made to the defendants at their residence, no objection to it was made on account of any noncompliance with the terms of the contract; it was not claimed or intimated that the promissory note should have been signed by Bradshaw or that the defendants were entitled to or wanted Bradshaw's note, or that they refused the tender because the note offered was that of plaintiff and not Bradshaw. They simply refused to accept the note or mortgage or make the deed without assigning any other reason than that they did not want the money and would not do so.

It is provided that "The person to whom a tender is made must at the time specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or kind which he requires or be precluded from objecting afterward": Code Civ. Proc., sec. 2076. This section is applicable to the facts recited, and defendants were estopped from asserting any objection to the tender which they could or should have made at the time it was offered. Had the objection now urged been asserted then and the tender refused on that ground, it might have been possible for the plaintiff to have obtained a tender of the note of Bradshaw. There was ample time after the tender and before the option expired to have done so. It appears too as a certainty from the record that she could have done so had it been objected that she did not. No objection having been made on that score when it should have been made, the defendants were precluded from asserting it upon the trial or from insisting upon it now.

No other points urged for a reversal are, in our judgment, tenable.

The judgment and orders appealed from are affirmed.

Henshaw, J., and McFarland, J., concurred.

A hearing in bank was denied on June 4, 1908, when the following opinion was rendered:

516 THE COURT. The petition for rehearing is denied, but in disposing of it it may be said that the offer of the note of an insolvent person, made with design to escape personal responsibility, would perhaps make the contract unfair to the extent that equity would not enforce it. But this objection was fully removed by the tender of the note of Bradshaw, the original vendee, which was made at the trial, and the defendant having then refused to accept the same, the court below was fully justified in rendering the decree for performance upon making of the cash payment and giving the note of the plaintiff.

An Assignee of a Contract for the Purchase of Land is not personally liable for the unpaid purchase price, though the contract of sale and purchase provides that its stipulations shall apply to and bind the heirs, executors, administrators and assigns of the respective parties. The covenant on the part of the purchaser is personal, and hence the assignee cannot be charged with its performance: Lisenby v. Newton, 120 Cal. 571, 65 Am. St. Rep. 203. And if a contract for the purchase of property is assigned by the vendee, but the vendor refuses to accept the assignee as his debtor or to release the original vendee, the assignment nevertheless transfers to the assignee the duty to receive the property from his assignor, and to make payment therefor according to the terms of the original contract of sale: Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 21 Am. St. Rep. 63.

NILSON v. SARMENT.

[153 Cal. 524, 96 Pac. 315.]

HUSBAND AND WIFE—Presumption that Property Conveyed to Either is Community Estate.—Prior to the adoption of the amendment to section 164 of the Civil Code of California, property conveyed to either husband or wife, after their marriage, by a conveyance other than a gift was presumed to be community property. (p. 93.)

HUSBAND AND WIFE—Statute Relating to Community Property, When not Retroactive.—The amendment to the Civil Code of California declaring that property conveyed to a wife is presumed to vest the property in her as her separate estate is not retroactive and has no application to property conveyed to her prior to such amendment. (pp. 93, 94.)

HUSBAND AND WIFE—Gift not to be Presumed from the Fact that the Property was Conveyed to Her.—If real property is paid for out of the community estate, but the conveyance is taken in the name of the wife, no presumption can be indulged that it was purchased as a gift to her, when the only testimony on the subject is that of the husband to the effect that he purchased the property as a home for himself and family, and that he did not intend to make a gift. (p. 95.)

HUSBAND AND WIFE—Property Conveyed to Her Encumbered by a Mortgage Which the Deed Stipulates She shall Pay.—The fact that a conveyance to a married woman declares that the land is encumbered by a mortgage, to be paid by the grantee, does not show that the property is her separate estate, nor support a finding that it was given to her by her husband, if he paid all the consideration for the conveyance, including the sum required to satisfy the mortgage. (p. 95.)

HUSBAND AND WIFE—Taking Insurance in Her Name, Effect of as Evidence of a Gift.—The taking of insurance in the name of a wife on real property conveyed to her does not tend to show that it was her separate estate, or that her husband intended it as a gift to her. (p. 95.)

HUSBAND AND WIFE—Giving of a Trust Deed Providing for a Reconveyance to Her.—Though a conveyance is taken in the name of a wife, the subsequent giving of a trust deed on the property by the husband and wife to secure the payment of a note, with a stipulation that, on the payment of the note, a reconveyance is to be made to her, and, on the sale of the property, any surplus is to be paid to her, does not tend to prove that the property was her separate estate. (pp. 95, 96.)

TRUST DEED—Effect of the Payment of the Debt Which It was Given to Secure.—Upon the payment of a debt to secure which a deed of trust to real property was given, the property at once, without any reconveyance, reverts in the persons who owned it before. (p. 96.)

HUSBAND AND WIFE—Estoppel to Show that the Property was not Separate Estate.—The fact that husband and wife joined in a trust deed to secure a debt stipulating that on a sale of the property the proceeds over the payment of the debt should be paid to her, and that on the payment of the debt without sale, that the trustee should reconvey to her, does not estop him, in a subsequent controversy with her grantee, from showing that the property was not her separate estate, but belonged to the community, especially where it appears that the purchaser had not relied on the provisions of this

deed, but took a covenant of warranty to protect himself against her husband. (p. 97.)

HUSBAND AND WIFE—Duty of Purchaser to Inquire Whether Property Belongs to the Community.—One who knows that the person of whom he is about to purchase real property is a married woman is bound to inquire and ascertain at his peril whether the property is community estate, in the absence of a statute in force at the time of its acquisition making a conveyance to her presumptive evidence that it was her separate estate. (pp. 97, 98.)

Fred L. Stewart and C. E. Arnold, for the appellant.

Sam Bell McKee and F. L. De Freitas, for the respondent.

526 SLOSS, J. This is an action to quiet title to a parcel of land in the city of Oakland. The complaint alleges that plaintiff and Emma Christina Nilson were married in 1877, and ever since have been husband and wife; that in July, 1884, plaintiff purchased the land in question from one John Ziegenbein; that the deed from Ziegenbein named Emma Christina Nilson as sole grantee, but that the whole consideration for the conveyance was paid by plaintiff out of moneys earned by him during his marriage, and that the deed was taken in the name of Emma Christina Nilson, as grantee, for the marital community of plaintiff and his said wife. It is further alleged that in January, 1905, Emma Christina Nilson executed and delivered to defendant an instrument purporting to convey said land to him, and that defendant claims an interest in the land by virtue of said instrument.

The answer alleges that Emma Christina Nilson purchased the property with her separate funds, that the deed to her was made with plaintiff's consent, and that plaintiff, at the time of the purchase from Ziegenbein, gave to his wife whatever interest he had in the property. It is further averred that Emma Christina Nilson entered into the possession, and retained possession, of the property until her deed to defendant; that during all that time she, with plaintiff's knowledge, approval and consent, asserted her separate ownership of the land and dealt with it as her separate property; that she insured the building on the land, and had the loss mentioned in the policies made payable to her, and that, on various occasions, she borrowed money, giving as security therefor deeds of trust executed by herself and the plaintiff, such deeds of trust providing that, in the event of payment, the property should be reconveyed to her, and in case of default and sale, any surplus of the proceeds should be paid to her. The defendant alleges that the plaintiff's wife represented to him that the property was her separate property, that he caused

the title to be searched and was advised that the title was in her, and upon careful inquiry as to the ownership, learned that she had, with plaintiff's consent, claimed the property as her own and dealt with it as her separate property; whereupon ⁵²⁷ the defendant purchased it of her, paying her the sum of two thousand three hundred dollars. The defendant also filed a cross-complaint, asking judgment for the possession of the property and damages for its withholding.

The court found against plaintiff's allegation that the land was, or ever had been, the community property of himself and his wife. It found that the whole consideration was paid by plaintiff out of moneys earned by him during his marriage with his said wife, but that plaintiff directed Ziegenbein to execute the deed to Emma Christina Nilson, and gave to her whatever interest he had in said property. Judgment in favor of defendant, quieting his title against plaintiff and awarding him the possession of the premises, together with the value of their use and occupation, followed. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The principal point urged by appellant is that the evidence is insufficient to justify the finding that the property was not community property, but that it was separate property of plaintiff's wife. Sections 162 and 163 of the Civil Code define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterward by gift, bequest, devise or descent. By section 164 all other property acquired after marriage by husband or wife, or both, is declared to be community property. In 1889 this section was amended by the addition of the words, "but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Prior to the adoption of this amendment the presumption was just the opposite; that is to say, property conveyed to either husband or wife after their marriage by a conveyance (other than a deed of gift) was presumed to have vested the title in the marital community: *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538; *Ramsdell v. Fuller*, 28 Cal. 37, 87 Am. Dec. 103; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132. The property in question was acquired by the Nilsons (or one of them) in 1884. It ⁵²⁸ is

thoroughly settled that the amendment of 1889 is not retroactive and has no application to property acquired by husband or wife before its enactment: *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132. In *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95, the court, speaking of this amendment, said: "But the rule declared by the statute was more than a rule of evidence; it was a rule of property as well; and we do not think the legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested."

Was the finding as to the separate character of the property in question supported by any substantial evidence tending to overthrow the presumption resulting from the conveyance to a married person? To make the land the separate property of the wife, it was necessary, either that it should have been acquired with her separate funds or that it should have been given to her. It is to be remembered that the court finds, contrary to the averment of the answer, that the property was paid for with the community funds, and the conclusion that it became the separate property of the wife must, therefore, rest upon the further finding that plaintiff gave to his wife whatever interest he had in said property. There is nothing in the evidence before the court to show that any such gift was ever made. It appears that plaintiff's wife left his home about the time she made her deed to defendant, and she was not a witness at the trial. Nor was any testimony given by Ziegenbein, the original grantor. The only witnesses who could give direct testimony regarding the circumstances surrounding the making of the deed in 1884 were the plaintiff and his brother. Both testified that the deed was made to run to Emma Christina Nilson at the suggestion of Ziegenbein, who said that "it would make no difference," and that neither she nor the plaintiff could sell the land without the signature of the other. This explanation, which is not in itself improbable, was not contradicted, but, even if we disregard it, we are left with the deed itself, which, if unexplained, raises the presumption that the land became community property, notwithstanding the fact that the wife was named as grantee. The plaintiff testified that he bought the property for a home for himself and his family, and that it was not his ⁵²⁹ intention to make a gift of it to his wife. This clear and positive testimony regarding the transaction is not directly contradicted, and there is no support for the finding against it unless it can be found in some circumstances which are

claimed to justify the inference that the land became the separate property of the wife.

Much stress is laid on the fact that Ziegenbein's conveyance described the land as "encumbered by a mortgage on which there is now due the sum of two thousand nine hundred dollars to be paid the party of the second part." The party of the second part was the wife, and it is argued that this shows that the wife became bound to pay the mortgage, and thus tends to support the contention that the husband intended to make the property hers. It appears, however, that the entire purchase price was only two thousand nine hundred dollars. Nothing was to be paid over and above the face of the mortgage, and, in fact, twelve hundred dollars of this had been paid by plaintiff before he ever received the deed. The most that can be claimed for the clause quoted is that it shows that the consideration was to be paid by the wife from her separate property. In view of the uncontradicted evidence that no part of the consideration was so paid, but that the plaintiff paid part of it before the execution of the deed, and eventually paid it all with community property (as is found by the court), the insertion of this clause by the grantor cannot be regarded as supporting the finding that the land was the separate property of the wife. It certainly does not tend to show a gift, which alone can be contended for under the findings.

No greater force is to be attributed to the evidence that insurance was effected by the plaintiff, and that by the policies the loss was made payable to the wife. In view of the fact that the title stood of record in her name, this was the natural and ordinary course to pursue. If the house and lot, although standing in her name, were not her separate property, the circumstance that insurance money would have been payable to her in the event of loss by fire would not make that money her separate property any more than the burnt house was. In *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132, assessment lists, assessing certain lots to the wife, were sworn to by the husband. This was held not to be an admission that they were her separate property. The method of insuring in this case stands on the same ground.

⁵³⁰ The same reasoning applies to the deeds of trusts made by plaintiff and his wife to secure loans of money. The provision for reconveyance, or any reconveyance actually made, had no legal effect beyond that of making the record title clear, since, upon payment of the debt, the purposes of the trust ceased, and the property at once, without any reconvey-

ance, revested in the party or parties who had owned it before: *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 319; *MacLeod v. Moran* (Cal.), 94 Pac. 604. The provisions for reconveyance or payment of surplus, contained in these deeds of trust, like the mode of effecting insurance, merely indicated that it was not desired to change the record title. That title was in the wife, but these instruments are no evidence that she held it, or that her husband recognized her as holding it, as separate rather than as community property.

The only other circumstance relied on by respondent is that the wife claimed the land as her separate property. Her claims are, of course, in no way binding on the plaintiff except in so far as they may have been made with his knowledge and assented to by him. All that appears in this connection is that plaintiff's wife told him several times within a year or two before her sale to defendant that she would like or was about to sell the property, to which he had objected, saying that she could not sell it unless he signed the deed. This cannot be construed as an admission on his part that the land was her separate property or that she had the right to sell it.

It is not questioned that where a husband purchases property with community funds, and directs the conveyance to be made to his wife, with the intent to make it her separate property, the deed will operate to vest the property in her as her separate estate: *Peck v. Brummagim*, 31 Cal. 441, 89 Am. Dec. 195; *Woods v. Whitney*, 42 Cal. 358; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. But to have that effect, there must, in the case of a deed executed before the amendment of 1889, have been something more than the mere fact that the wife was named as grantee. There must be something, appearing either in the deed or elsewhere, to show an intent to make the property the separate estate of the wife. Here we find that the plaintiff, desiring to purchase a home for himself and his family, bought the land in question, there being a house upon it; that, at the suggestion of the vendor,⁵³¹ he took the deed in the name of his wife; that, with his family, he occupied the premises as his home continuously from the time of the purchase; that he paid, out of his earnings, the purchase price of the property, the premiums on insurance, and all loans secured by the property. He testifies that he never intended to make a gift to his wife. His dealings with the property were such as would, in the ordinary course of business, be dictated by the fact that the record title stood in his wife's name, and were in no way inconsistent with the community character of the property. There is no sub-

stantial evidence tending to show that he made a gift to his wife of his interest in the property, and the presumption that it was community property, aided, as it was, by the undisputed testimony of a party to the transaction, cannot, therefore, be said to have been overthrown.

It is urged that plaintiff is estopped, as against defendant, to show that the property is community property. This contention is based in part on the provision in the deeds of trust that in case of sale, the surplus, if any, should be paid to the wife. Such provision was said, in *Hoeck v. Grief*, 142 Cal. 119, 75 Pac. 670, to constitute an estoppel in favor of the wife. But this declaration was not necessary to the decision, and this court, in denying a rehearing in *Tyler v. Currier*, 147 Cal. 31, 81 Pac. 318, so stated, adding that in its opinion, what was said in this connection in *Hoeck v. Grief*, 142 Cal. 119, 75 Pac. 670, was "not a correct statement of the law." Indeed, it seems clear that neither the execution of the deed of trust, nor any of the other dealings of plaintiff with the property, should be held to estop him from asserting its character as community property. Apart from other considerations, two essential elements of an estoppel are: 1. That the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them; and 2. That he must have relied upon the statement or admission of the party whom he seeks to bind by such statement or admission: *Boggs v. Merced Min. Co.*, 14 Cal. 279. Neither of these elements existed in this case. The respondent knew from the *Ziegenbein* deed, which was of record, that his grantor was a woman. He had actual notice that she was a married woman. This was enough to put him on inquiry, and to compel him to ascertain, at his peril, whether the property was ⁵³² community property: *Ramsdell v. Fuller*, 28 Cal. 37, 87 Am. Dec. 103; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347. Furthermore, plaintiff was actually residing on the property, but defendant, before purchasing, made no inquiry of him as to the state of the title. Nor did the defendant in fact rely upon any supposed admission of plaintiff that the property belonged to his wife in her separate right. He took from Mrs. Nilson a deed containing a covenant of warranty of title. It is a matter of common knowledge that such deeds are unusual in this state. A real estate agent, who represented the defendant in the transaction with Mrs. Nilson, testified that he had drawn the deed, and that the reason he had made it in the form of a warranty deed was because Mr. Nilson did not sign it. There could be no

stronger proof that the defendant (who was bound by the knowledge and the acts of his agent) knew that Mrs. Nilson had a husband who might have some claim upon the property, and that, instead of relying upon any representation that she was the sole owner of the property, he tried to protect himself against a possible claim on the part of her husband by taking a warranty deed. Under these circumstances there is no ground for a claim of estoppel.

It is unnecessary to consider the other points made by appellant.

The judgment and order appealed from are reversed.

Angellotti, J., concurred.

SHAW, J., Concurring. I concur solely because, under the decision in *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743, and other cases cited in the opinion of Judge Sloss, it had become settled law that the presumption was that property conveyed to the wife with the knowledge and consent of the husband was community property, that the fact that the conveyance was so made to her with his consent did not raise an inference that it was intended by him as a gift to her, or, at all events, that such inference was not sufficient to overcome the said presumption, that this had become a rule of property and that the amendment of 1889 (Stats. 1889, p. 328) to section 164 of the Civil Code, declaring that a conveyance to the wife should be presumptive ⁵³³ evidence that the property conveyed is her separate estate, is not retroactive, and does not apply to conveyances previously made. Were it an original question, I should say the rule, prior to the amendment, should have been that such conveyance to the wife with the husband's consent was *prima facie* evidence that he intended the property to be a gift to her, and that the property thereby vested in her as her separate estate, that this was a rule of evidence, and that the effect and purpose of the amendment of 1889 was to declare the correct rule of evidence and abrogate the false rule previously followed by the courts, and hence that said amendment was applicable to prior transactions and was so intended. If the law had not thus been settled, it seems clear that the natural inference that a gift was intended, arising from the conveyance to the wife in this case, would be presumptive evidence thereof, and would support the conclusion of the trial court, notwithstanding the testimony of the husband, manifestly to his interest, that it was not so intended.

WHAT IS COMMUNITY PROPERTY.

- I. Introductory Statements.**
 - a. As to Theory of Community System, 100.
 - b. As to Tests for Determining What is Common Property, 100.
 - c. As to Intermingling of Separate and Community Property, 101.
- II. Property Acquired Before Marriage.**
 - a. In General, 101.
 - b. In Case Title is not Consummated Until After Marriage, 101.
 - c. Property Held by Adverse Possession, 102.
- III. Property Acquired After Marriage.**
 - a. By Efforts of Either or Both Spouses, 102.
 - b. By Conveyance to Husband and Wife, 103.
 - c. By Exchange or Purchase with Common Property, 104.
 - d. By Purchase with Community and Separate Funds, 104.
 - e. By Exchange or Purchase with Separate Property, 105.
 - f. By Deed to Wife by Husband or at His Direction, 106.
 - g. By Intermingling Separate and Community Funds, 107.
 - h. By Mortgage or Credit of Separate Estate, 107.
 - i. By Separate Funds and in Part on Credit, 108.
- IV. Property Acquired by Gift, Devise or Succession.**
 - a. Property Acquired by Devise or Descent, 110.
 - b. Property Acquired by Gift Other than Testamentary, 110.
 - c. Property Perfected by Adverse Possession, 111.
 - d. Pension Money Received by Veteran, 111.
- V. Rents, Issues and Profits of Separate Property.**
 - a. In Some States are Separate Property, 112.
 - b. In Some States are Community Property, 112.
 - c. Rents and Crops from the Separate Real Property, 112.
 - d. Increase of Animals, 113.
 - e. Interest on Funds Belonging to Separate Estate, 113.
 - f. Profits Arising from the Investment, 113.
 - g. Profits Arising from Business, 114.
 - h. Prize Drawn on a Lottery Ticket, 114.
 - i. Proceeds from Sale or Exchange of Separate Property, 114.
- VI. Earnings of Husband or Wife.**
 - a. In General, 114.
 - b. In Case of Separation, 115.
 - c. In Case of Express Agreement, 115.
- VII. Property Acquired from Government.**
 - a. By Gift or Donation, 116.
 - b. For Valuable Consideration, 116.
 - c. By Title Initiated Before Marriage, 116.
 - d. By Title Initiated During Coverture, 117.
 - e. By Acquisition of Timber Lands, 118.
 - f. By Acquisition of Mining Property, 118.
 - g. By Acquisition Under Colonization Law, 118.
- VIII. Proceeds of Life Insurance Policy, 119.**
- IX. Damages Recovered for Personal Injuries, 119.**
- X. Presumption for or Against Community Property.**
 - a. In General, 120.
 - b. In Case of Separate Conveyance to Husband or Wife, 121.
 - c. In Case of Joint Conveyance to Husband and Wife, 122.
 - d. Evidence to Overcome Presumption, 122.
 - e. Effect of Recitals in Deed, 124.
 - f. Constructive Notice to Purchasers, 124.

I. Introductory Statements.

a. **As to Theory of Community System.**—The doctrine of community property, whatever may have been its origin, has, so far as it has been adopted in the United States, been borrowed directly from the French and the Spanish law. It prevails, with more or less variation, in Louisiana, Texas, New Mexico, California and several other of the western and southwestern commonwealths. The community system recognizes a relation between husband and wife, respecting their property, comparable to a partnership. Its avowed purpose is to place husband and wife on an equal footing in regard to their property rights, which the common law confessedly does not do: *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538; *Saul v. His Creditors*, 5 Mart., N. S., 569, 16 Am. Dec. 212; *Burr v. Wilson*, 18 Tex. 367; *Wilkinson's Heirs v. Wilkinson*, 20 Tex. 237; *Hall v. Hall*, 41 Wash. 186, 116 Am. St. Rep. 1016, 83 Pac. 108. This laudable purpose, however, it has, as enacted and interpreted in most of the states, failed to accomplish. Thus in California the husband has practically absolute dominion over the property of the community; he can sell, mortgage, or otherwise dispose of it at pleasure, except that he may not give it away without the consent of his wife, nor dispose of more than one-half of it by will. Upon her death he takes the entire common property without administration. This leaves the wife nothing more than a mere expectancy in the common property. During the lifetime of the husband she has no protection against his disposing of or squandering the entire community estate; and upon his death she takes only one-half of the property of the community, and that as his heir, subject to the inheritance tax: Cal. Civ. Code, secs. 162-164, 1401, 1402; *Spreckels v. Spreckels*, 116 Cal. 339, 58 Am. St. Rep. 170, 48 Pac. 228, 36 L. R. A. 497; *Cunha v. Hughes*, 122 Cal. 111, 68 Am. St. Rep. 27, 54 Pac. 536; *Estate of Lux*, 149 Cal. 200, 85 Pac. 147; *Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025; 1 Ross on Probate Law and Practice, 152-158. Manifestly the community law as thus interpreted recognizes no equality in property rights between husband and wife, and requires substantial alteration by the legislature and a more liberal interpretation than it has yet received from the courts before it can fulfill the promise which its name implies—a real marital community in property.

b. **As to Tests for Determining What is Common Property.**—The law declares what is community property by first stating what is separate property and then declaring that all other property belongs to the community. And, with slight modifications in some jurisdictions which presently will be considered, it may be said that property owned by either spouse at the time of the marriage, together with the rents, profits, income and increase therefrom after marriage, is and remains his or her separate estate. Moreover, all property which comes to either spouse during coverture by gift, devise, bequest, or succession is his or her separate estate. All other property, coming to either or both husband or wife during marriage, becomes their common estate.

The authorities on these propositions will be cited in their proper places in subsequent paragraphs. "During the marriage relation, the community of the spouses is, and, in the nature of things, must be, the superior and controlling entity. Its interests are paramount, and whatever tends to reduce its position must be exceptional": *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398.

c. As to Intermingling of Separate and Community Property.—

Where the separate property or funds of either spouse is so intermingled with the community that its identity is lost, the entire mass ordinarily becomes community property, since the latter is the paramount interest; but if the separate property can be traced and segregated from the community with which it has been commingled, it does not lose its character as separate estate; and when the community is inconsiderable in amount as compared with the separate property confused and blended with it, it does not draw the separate property to it: *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *In re Cudworth's Estate*, 133 Cal. 462, 65 Pac. 1041; *Robb v. Robb* (Tex. Civ. App.), 41 S. W. 92; *Reid v. Rochereau*, Fed. Cas. No. 11,669, 2 Woods, 151. On the other hand, community property can be allowed by the husband to be so mingled with the profits of his wife's separate estate as to indicate an intention that it shall be her separate property: *Diefendorff v. Hopkins*, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549. Where she deposits her money with him, and he mingles it with other moneys which he holds, and then at her request purchases land which he pays for out of the fund in his hands and has it conveyed to her, the land becomes her separate estate: *Moore v. Jones*, 63 Cal. 12.

II. Property Acquired Before Marriage.

a. In General.—The first exception to the general rule in favor of the community is, that property acquired by a man or woman before marriage remains his or her separate property after marriage: Cal. Civ. Code, secs. 162, 163; *Selover v. American Russian Commercial Co.*, 7 Cal. 266; *Spalding v. Godard*, 15 La. Ann. 277; *Imhof v. Imhof*, 45 La. Ann. 706, 13 South. 90; *Cartwright v. Cartwright*, 18 Tex. 626; *Akin v. Jefferson*, 65 Tex. 137; *Welder v. Lambert*, 91 Tex. 510, 44 S. W. 281; *Hillen v. Williams*, 25 Tex. Civ. App. 268, 60 S. W. 997. The increase, income, profits and rents from such property during coverture are, in most of the states, also separate property: See post, pp. 112-114. And property acquired by the exchange of separate property, or by purchase with funds belonging to the separate estate of one of the spouses, continues to be separate estate: See post, p. 104.

b. In Case Title is not Consummated Until After Marriage.—Where an unmarried person acquires the equitable title to property, it does not lose its character as his or her separate estate by the fact that the legal title is not acquired or the conveyance consummated until after marriage: *Lawson v. Ripley*, 17 La. 238; *Barbet v. Langlois*, 5 La. Ann. 212; *Succession of Wade*, 21 La. Ann. 343; *Medlenka v. Downing*, 59 Tex. 32. This rule has been applied in a number of cases

where the acquisition of property was from the United States government: See post, pp. 116-118. Land conveyed to a woman before her marriage is her separate property, although a quitclaim deed thereof reciting a money consideration is executed to her after her marriage by the same grantor. Such deed does not affect the title previously conveyed nor change the character of the property from separate to community: *Maguire v. De Fremery*, 76 Cal. 401, 18 Pac. 410. But where a man, before his marriage, was in possession without right of a tract of land, and after marriage he conveyed a part thereof to the rightful owners, to whom he gave up possession, and they, induced thereby, conveyed a portion of the land to him, the property so acquired was community: *Pancoast v. Pancoast*, 57 Cal. 320. A naked right of partnership possession in land before marriage is not such a right as to give one of the partners an equity to which the subsequently acquired title to a part of the land could attach, as his separate estate, after marriage: *Estate of Boody*, 113 Cal. 682, 45 Pac. 858. In this case the court in the course of its opinion said: "The doctrine of *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274, and *In re Lamb*, 95 Cal. 397, 30 Pac. 568, has no application to the circumstances of this case. In both those cases legal steps had been initiated by the filing of application, prior to the marriage, to procure title to the land from the government. This fact was held to create an equity to which the legal title, when acquired, would relate back, and constitute the land separate estate, although the title was not actually acquired until after marriage. Here no such fact exists. Nothing but the naked right of possession, and that a joint one in the partnership of *Boody & Heath*, existed in any of the lands here involved. This certainly was not such a right as to give one of the partners an equity to which the subsequently acquired title to a portion of the land so held could attach." Where after marriage a man purchased with the common funds and took a deed of land which he had occupied without title before marriage, it was held in *Johnson v. Johnson*, 11 Cal. 200, 70 Am. Dec. 774, that the property became community.

c. **Property Held by Adverse Possession** in Texas without paper title is not "acquired" until the limitation period has run; and, in case the wife of the occupant dies before that time, there is no community in the land: *Bishop v. Lusk*, 8 Tex. Civ. App. 30, 27 S. W. 306; *Gafford v. Foster*, 36 Tex. Civ. App. 56, 81 S. W. 63.

III. Property Acquired After Marriage.

a. **By Efforts of Either or Both Spouses.**—The fruits of the industry of husband and wife fall into the community. Indeed, it is the basic principle of the community system that whatever is acquired through the efforts of the husband and wife shall be their common property. All property acquired during marriage by the efforts of the wife alone or of the husband alone, or by their joint efforts, is community and not separate property, unless it has come by gift, devise, bequest or succession, or unless it has sprung from the rents, profits,

or increase of the separate property of one of the spouses: *Fennell v. Drinkhouse*, 131 Cal. 447, 82 Am. St. Rep. 361, 63 Pac. 734; *Otto v. Long*, 144 Cal. 144, 77 Pac. 885; *Succession of Manning*, 107 La. 456, 31 South. 862; *Picotte v. Cooley*, 10 Mo. 312; *White v. Lynch*, 26 Tex. 195; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Abbott v. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176, 33 Pac. 1070. Said the supreme court of Nevada in *Lake v. Lake*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 774: "We are satisfied it is not necessary to prove that property is, in fact, the product of the joint efforts of the husband and wife in order that it may be declared community estate. If it is acquired after marriage by the efforts of the husband alone, but not by gift, devise or descent, or by exchange of his individual property, or from the rents, issues or profits of his separate estate, it belongs to the community. Such property is common, although the wife neither lifts a finger nor advances an idea in aid of her husband. She may be a burden and a detriment in every way, or she may absent herself from the scene of his labors, know nothing of his business, and do nothing for him; still it is common. On the other hand, property acquired by either spouse in any one of the ways mentioned in the statute—that is to say, by gift, devise or descent, or by exchange of individual property, or coming from the rents, issues or profits of separate property—belongs to him or her, as the case may be, and the other has no more right to share it than a total stranger."

b. By Conveyance to Husband or Wife.—Property acquired by purchase during coverture is ordinarily presumed to vest in the community: *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538; *Scott v. Ward*, 13 Cal. 458; *Fisher v. Gordy*, 2 La. Ann. 762; *Johns v. Race*, 18 La. Ann. 105; *Succession of Planchet*, 29 La. Ann. 520; *Parker v. Chance*, 11 Tex. 513; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Cox v. Miller*, 54 Tex. 16. This is true regardless of whether the conveyance is made to the wife or to the husband. When a conveyance is made to her, it is presumed that the consideration is paid from the community and that the property becomes a part of the common estate: *Hart v. Robertson*, 21 Cal. 346; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; *Andrew v. Bradley*, 10 La. Ann. 606; *Forbes v. Forbes*, 11 La. Ann. 326; *State v. Gaffery*, 12 La. Ann. 265; *Clark v. Norwood*, 12 La. Ann. 598; *Shaw v. Hill*, 20 La. Ann. 531, 96 Am. Dec. 420; *Pope v. Foster*, 24 La. Ann. 521; *Richardson v. Chevalley*, 26 La. Ann. 551; *Burns v. Thompson*, 39 La. Ann. 377, 1 South. 913; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626; *Zorn v. Tarver*, 45 Tex. 519; *Augustine v. State* (Tex. Cr. App.), 23 S. W. 794. When a deed is made to a married woman, the presumption that the property is community is not rebutted by the fact that the consideration named is nominal: *Wedel v. Herman*, 59 Cal. 507; *Swink v. League*, 6 Tex. Civ. App. 309, 25 S. W. 807. And when a conveyance is made to her for a money consideration,

as well as love and affection, the estate is presumed to belong to the community: *Tustin v. Faught*, 23 Cal. 237. When a conveyance is made to a married man, the presumption is also indulged that the property becomes community and not his separate estate: *Rowley v. Rowley*, 19 La. 557; *Succession of Fortin*, 10 La. Ann. 739; *Breaux v. Carmouche*, 15 La. Ann. 588; *Hanover Fire Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; *Short v. Short*, 12 Tex. Civ. App. 86, 33 S. W. 682. This is true where land is conveyed to a husband on the consideration that he support the grantor for life: *Byars v. Byars*, 11 Tex. Civ. App. 565, 32 S. W. 925; but in case of land conveyed to him by his parents without consideration to enable him to qualify on his father's bond, his wife acquires no community interest: *Crenshaw v. Harris*, 16 Tex. Civ. App. 263, 41 S. W. 391.

These presumptions, as will be more fully considered in a subsequent part of this note, are not conclusive and may be overthrown by competent proof; they are indulged only in the absence of evidence to the contrary. And in California the rule of presumption in the case of the wife has been modified, as will be hereafter pointed out.

c. By Exchange or Purchase with Common Property.—Property purchased with community funds, or procured in exchange for common property, of course belongs to the community; and the fact that it is taken in the name of one only of the spouses raises no presumption that it is his or her separate estate: *Sharp v. Zeller*, 110 La. 61, 34 South. 129; *Presidio Min. Co. v. Bullis*, 68 Tex. 581, 4 S. W. 860; *Schwartzman v. Cabell* (Tex. Civ. App.), 49 S. W. 113. That property is taken in the name of the wife, and is paid from her personal earnings after marriage, does not take it out of the community: *Knight v. Kaufman*, 105 La. 35, 29 South. 711. Land acquired during the existence of a second marriage, through the exchange of community property of the first marriage, does not become community property of the second marriage: *Haring v. Shelton* (Tex. Civ. App.), 114 S. W. 389.

d. By Purchase with Community and Separate Funds.—Since property purchased with separate funds is separate property, and property purchased with community funds is common property, it would seem to follow that property purchased in part with community and in part with separate funds is community property to the extent it is paid for from common funds, and separate property to the extent it is paid for from separate funds: *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Braden v. Gose*, 57 Tex. 37; *Parker v. Coop*, 60 Tex. 111; *Cleveland v. Cole*, 65 Tex. 402; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627; *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *Letot v. Peacock* (Tex. Civ. App.), 94 S. W. 1121; *Heintz v. Brown*, 46 Wash. 387, 123 Am. St. Rep. 937, 90 Pac. 211. But in Louisiana it is held that land purchased in the name of the wife, and partly paid for with her paraphernal funds under her administration, and partly with community funds,

falls into the community: *Burns v. Thompson*, 39 La. Ann. 377, 1 South. 913; although it is said that she becomes a creditor of the community for the amount she invests: *Reid v. Rochereau*, 2 Woods, 151, Fed. Cas. No. 11,669.

e. By Exchange or Purchase with Separate Property.—Property acquired in exchange for the separate property of the husband or the wife, or property acquired by purchase from the separate funds of either of them, becomes the separate property of the spouse whose separate money or separate property was used to acquire the same. The change or transmutation does not destroy the separate character of the property so long as it can be identified. This rule is applied to an exchange of lands in *Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2; *Newsom v. Adams*, 3 La. 231; and to a purchase of property by a wife in *Oaks v. Oaks*, 94 Cal. 66, 29 Pac. 330; *Stokes v. Bailey*, 62 Tex. 299; *Hall v. Levy*, 31 Tex. Civ. App. 360, 72 S. W. 263; *Sparks v. Taylor* (Tex. Civ. App.), 87 S. W. 740; *Schneider v. Fowler*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 856; *Ratto v. Holland*, 2 Wills. Civ. Cas. Ct. App. (Tex.), sec. 469; *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732; *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677; *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594; and to a purchase of property by a married man in *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389; *Estate of Boody*, 119 Cal. 402, 51 Pac. 634; *In re Burrow's Estate*, 136 Cal. 113, 68 Pac. 488; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41.

A somewhat different rule prevails in Louisiana, for it seems (although some of the early cases appear to lend themselves to a different interpretation: *Stroud v. Humble*, 2 La. Ann. 930; *Succession of Vanrensellæer*, 6 La. Ann. 803; *Metcalf v. Clark*, 8 La. Ann. 286; *Buys v. Babin*, 14 La. Ann. 95; *Fleytus v. Fleytus*, 15 La. Ann. 62; *Succession of Pinard v. Holton*, 30 La. Ann. 167; *Miller v. Handy*, 33 La. Ann. 160) that property purchased in that state with separate funds ordinarily falls into the community (*Comeau v. Fontenot*, 19 La. 406; *Tally v. Heffner*, 29 La. Ann. 583; *Drumm v. Kleinman*, 31 La. Ann. 124; *Durham v. Williams*, 32 La. Ann. 162), but a charge will exist in favor of the separate estate against the community for the amount of the purchase: *Joffrion v. Bordelon*, 14 La. Ann. 618; *Succession of Merrick*, 35 La. Ann. 296; *Moore v. Stancel*, 36 La. Ann. 819. Property in that state bought by the husband and paid for out of his own funds, under circumstances showing a clear intention to buy for his separate account, is regarded as exclusively his: *Tanner v. Robert*, 5 Mart., N. S., 255; *Young v. Young*, 5 La. Ann. 611; *Bass v. Larche*, 7 La. Ann. 104; but it has been held that when he buys property in his name, intending it as an investment of his separate funds, to be held for his individual account rather than that of the community, it is essential that some indication of this intention and of the character of the funds used should be given in the act of purchase: *Succession of Burke*, 107 La. 82, 31 South. 391. A wife or widow in Louisiana, claiming

as her separate estate, property purchased during the community, must prove the paraphernal character of the funds used in the purchase, her separate administration of those funds, and their investment in the property in question: *Stauffer v. Morgan*, 39 La. Ann. 632, 2 South. 98; *Succession of Lewis*, 45 La. Ann. 833, 12 South. 952; *Rouyer v. Carroll*, 47 La. Ann. 76, 17 South. 292; *Succession of Burke*, 107 La. 82, 31 South. 391. But where a woman who has been deserted by her husband, purchases land with her paraphernal funds, it is held her separate property, to which she can convey title after the dissolution of the marriage: *Reinach v. Levy*, 47 La. Ann. 963, 17 South. 426.

Where a man purchases real estate with the separate funds of his wife, but takes the conveyance to himself, the land becomes, as between him and her, the separate property of the wife: *Rich v. Tubbs*, 41 Cal. 34; *Hunt v. Matthews* (Tex. Civ. App.), 60 S. W. 674; *Oaks v. West* (Tex. Civ. App.), 64 S. W. 1033; but in Louisiana, property purchased by the husband in his own name, and paid for with the separate funds of his wife, falls into the community, but she retains a claim against it for the funds so paid: *Brown v. Cobb*, 10 La. 172; *Stokes v. Shackelford*, 12 La. 170; *Dominguez v. Lee*, 17 La. 295; *Comeau v. Fontenot*, 19 La. 406; *Rousse v. Wheeler*, 4 Rob. 114; *Wood v. Harrell*, 14 La. Ann. 61; *Le Blanc v. Le Blanc*, 20 La. Ann. 206. This Louisiana rule, that if a purchase is made by a man in his own name, the property, though purchased with his wife's money, belongs to the community, has been applied to an exchange of properties: *United States v. Bouligny*, 42 Fed. 111.

In Texas, where a deed is made to a married woman and deferred payments are made by her, the property will be her separate estate; but if a deed is made to the husband, a payment made by her at the time of the purchase raises a resulting trust in her favor and vests the equitable title in her: *Strnad v. Strnad*, 29 Tex. Civ. App. 124, 68 S. W. 69. Where real estate is either paid for by the husband with the separate funds of his wife, or is purchased for her by him in order to discharge a debt which he owes her, the property becomes her separate estate: *Mitchell v. Mitchell*, 84 Tex. 303, 19 S. W. 477; *Parker v. Fogarty*, 4 Tex. Civ. App. 615, 23 S. W. 700.

f. By Deed to Wife by Husband or at His Direction.—A deed from a husband to his wife, whether of his own or of community property, vests the land in her as her separate estate: *Swain v. Duane*, 48 Cal. 358; *Hamilton v. Hubbard*, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 Pac. 657; *Jones v. Humphreys*, 39 Tex. Civ. App. 644, 88 S. W. 403; *Stewart v. Kleinschmidt* (Wash.), 97 Pac. 1105. And where a deed is made by a third person to a married woman at her husband's request, the property is presumed to go to her separate estate: *Hamilton v. Hubbard*, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 Pac. 657. Said the court in the last case: "All presumptions are in favor of the conveyances to the wife. They are

presumed to have been made for a consideration paid by the wife, or, if we concede that the consideration was paid by the husband, it will be presumed that the property was intended as a gift to the wife as her separate property." "Where property purchased with community funds was conveyed to the wife by direction of the husband, and with the intent that it should become her separate property, it has many times been held that the conveyance operated as a gift from him to her: *Peck v. Brummagin*, 31 Cal. 440, 89 Am. Dec. 195; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259; *Read v. Rahm*, 65 Cal. 343, 4 Pac. 111; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. In the case last cited it is said: 'There is no evidence that he [the husband] was indebted to anyone at the time, and if he was free from debt he had the right to give her [his wife] the property, and could make the gift effectual by simply directing the conveyance to be made to her.' So, also, it has been held that when a husband himself conveys property to his wife, whether it is his separate property or community property, the conveyance operates to vest the title in the wife as her separate estate: *Burkett v. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. 715, 3 L. R. A. 781; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Oaks v. Oaks*, 94 Cal. 66, 29 Pac. 330; *In re Lamb's Estate*, 95 Cal. 397, 30 Pac. 568."

g. By Intermingling Separate and Community Funds.—Where separate property has, by investment, or otherwise, undergone changes and mutations, it is indispensable, in order to maintain its separate character, that the spouse so claiming shall trace and identify it, and rebut the presumption that property acquired during marriage belongs to the community. If the identity of the property has been lost, then it loses its character as separate estate: *Brown v. Lockhart*, 12 N. M. 10, 71 Pac. 1086; *Glassecock v. Hamilton*, 62 Tex. 143; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627; *Hamilton-Brown Shoe Co. v. Lastinger* (Tex. Civ. App.), 26 S. W. 924.

h. By Mortgage or Credit of Separate Estate.—Money borrowed or property purchased with it during coverture, by either spouse, ordinarily belongs to the community: *Northwestern & P. Hypotheek Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516; *Strong v. Eakin*, 11 N. M. 107, 66 Pac. 536; *Main v. Scholl* (Wash.), 57 Pac. 800. In Texas it has been affirmed that money borrowed by a married woman to pay taxes on her separate estate is not her separate property: *Grevils v. Smith*, 29 Tex. Civ. App. 150, 68 S. W. 291; that money borrowed on a mortgage of her separate estate belongs to the community: *Canfield v. Moore*, 16 Tex. Civ. App. 472, 41 S. W. 718; that merchandise purchased by her with money borrowed on the security of her separate estate is community property: *Heidenheimer v. McKeen*, 63 Tex. 229; that property purchased by her on credit belongs to the community: *Epperson v. Jones*, 65 Tex. 425; that property purchased by her to be paid for out of the proceeds of crops grown on her land (which in that state are common property) be-

longs to the community: *Cleveland v. Cole*, 65 Tex. 402; that land purchased partly in funds of the community and partly on credit is common property: *Moore v. Moore*, 28 Tex. Civ. App. 600, 68 S. W. 59; that where money procured by a mortgage in which the husband joined, on her separate estate, is loaned and a note taken therefor, the note and money are presumed to be community: *Somes v. Ainsworth* (Tex. Civ. App.), 67 S. W. 468; that when a wife contributes separate funds to the original capital stock of a mercantile firm, and the stock of goods is replenished from time to time, purchases being made for cash and on credit, the interest in the partnership held in her name becomes common property: *Middlebrook v. Zapp*, 73 Tex. 29, 10 S. W. 732; that a conveyance to her in consideration of her assuming a debt secured by a vendor's lien on the land does not make the property her separate estate, since she cannot acquire a separate interest on credit: *Harrison v. Mansur-Tibbetts Impl. Co.*, 16 Tex. Civ. App. 630, 41 S. W. 842.

1. By Separate Funds and in Part on Credit.—But in this last case it is said: "No case has been cited by appellants, nor have we been able to find any, where the wife can acquire an interest in land on a credit when no part of the purchase money has been paid therefor out of her separate means. There are several cases by our supreme court holding that where the consideration for land purchased is in part paid out of the separate means of the wife, and the balance to be paid at some future date, the wife acquires an interest in said land to the extent of the cash paid therefor, and, if the deferred payments are made out of her separate means she acquires a title to all of said land; but if the deferred payments should be paid out of the property other than that of her separate means, to that extent it would be community property, subject to the payment of the husband's debts: *Ullman v. Jasper*, 70 Tex. 446, 7 S. W. 763; *Parker v. Fogarty*, 4 Tex. Civ. App. 615, 23 S. W. 700; *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179, 23 Am. St. Rep. 327, 15 S. W. 259. In the last-named case Judge Gaines, in discussing the rights of the wife under such circumstances, says: 'A wife's equity in such cases arises from the actual investment of her separate money, or the transfer of her separate property': *Harrison v. Mansur-Tibbetts Impl. Co.*, 16 Tex. Civ. App. 630, 41 S. W. 842. The equities of the wife in such cases are recognized in *Goddard v. Reagan*, 8 Tex. Civ. App. 272, 28 S. W. 352.

And in *Parker v. Fogarty*, 4 Tex. Civ. App. 615, 23 S. W. 700, where it is held that when the price of land is paid partly from the wife's separate funds and partly by notes in which her husband joins pro forma, with the intention that they are to be paid from her estate, the deed being made to her but not disclosing that the land is her separate estate, the land so acquired is not subject to levy by creditors of the husband with notice, the court said: "In the case of *Ullmann v. Jasper*, 70 Tex. 446, 7 S. W. 763, it was held that where land is purchased for the separate estate of his wife, partly

on time, even though the note of the husband was given for the deferred payment, if it was understood that payment was to be made out of the separate means of the wife, and the transaction was in good faith, the land became her separate estate. We might multiply authorities upon this point, but we deem it unnecessary. The right of a married woman to buy property for part cash and part notes, where the payments are to be made out of her separate estate, is now too firmly established to be called in question": *Parker v. Fogarty*, 4 Tex. Civ. App. 615, 23 S. W. 700.

Generally, where land is purchased in the name of the wife during coverture, partly by borrowed money and partly by her separate funds, it should be considered community property to the extent to which borrowed money is used and separate property to the extent her separate funds are employed: *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719; *Northwestern etc. Bank v. Rauch*, 7 Idaho, 152, 61 Pac. 516. But in Washington real estate purchased with money borrowed by a married woman and secured by a mortgage on her separate estate, but paid by a sale of part of the land purchased, has been held community property: *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398. In deciding this case the Washington court used this language: "In *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719, it was held that where the purchase price of land conveyed to the wife was paid by her in part from her separate funds and in part with money borrowed upon a mortgage of the same land, that proportion of the land paid for with the borrowed money was community property and the remainder was her separate property. The opinion by McKee, Judge, implied that if the mortgage had been upon existing separate property of the wife, the decision might have been different. But in *Heidenheimer v. McKeen*, 63 Tex. 229, the precise point was at issue, and was decided, as we think, according to the better rule. There merchandise was bought with money borrowed by the wife upon a deed of trust of her real estate, and it was said: 'Suppose that the debt incurred in securing the loan had been paid without any resort whatever to the deed of trust, it would not be insisted, we apprehend, that the money or merchandise either became the separate property of the wife, simply because her real estate had been used as a security for the debt. If the money had been borrowed upon the faith of a deed of trust given upon the separate property of the husband, certainly neither the money nor the merchandise would for that reason become his separate property. In either case the status of the property is to be determined at the time the loan is secured.' In this case (continued the Washington court referring to the case before it for decision), the land purchased with the borrowed money paid for itself, and a large profit in land and money besides. It was a speculation purely personal, in which the energy, skill and business prudence of Mrs. Yesler certainly were greater factors than the credit given by the mortgage of her land. But these mental forces, whether of husband

or wife, are servants of the community, and their products are its property, to be shared in equally by the members of the community": *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398.

The case of *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719, is commented upon in the subsequent case of *Flournoy v. Flournoy*, 86 Cal. 286, 21 Am. St. Rep. 29, 24 Pac. 1012, where it is decided that if a married woman purchases property which is at the time intended to be her separate estate, and her husband loans her money to make a partial payment, he does not, nor does the community, acquire an interest in the property proportionate to the money so loaned by him, nor to any other extent, but he is simply a creditor of his wife to the amount of the loan; and if a married woman purchases property, paying therefor partly out of her separate estate and partly with moneys borrowed on the faith of her existing property, and secured by a mortgage thereon in which and the note which it is given to secure the husband also joins, the whole is her separate estate.

IV. Property Acquired by Gift, Devise or Succession.

a. Property Acquired by Devise or Descent.—All property acquired by a husband or wife during coverture by devise, bequest or descent, since it cannot be said to result from their joint efforts, becomes his or her separate property: Cal. Civ. Code, secs. 162, 163; *Dickenson v. Owen*, 11 Cal. 71; *Racouillat v. Sansevain*, 32 Cal. 376; *Savenat v. Le Breton*, 1 La. 520; *Allen v. Allen*, 6 Rob. 104, 39 Am. Dec. 553; *Robin v. Castille*, 7 La. 292; *Hicks v. Pope*, 8 La. 554, 28 Am. Dec. 142; *Turnbull v. Towles' Exr.*, 10 La. 254; *Dominguez v. Lee*, 17 La. 295; *Gravenberg v. Savoie*, 8 La. Ann. 499; *Decuir v. Lejeune*, 15 La. Ann. 569; *Troxler v. Colley*, 33 La. Ann. 425; *Vavasseur v. Mouton*, 34 La. Ann. 1044; *Hershberger v. Blewett*, 46 Fed. 704. Land inherited by a widow from her husband is separate property as against the creditors of her second husband: *Nelson v. Frey* (Tex. Civ. App.), 16 S. W. 250.

b. Property Acquired by Gift Other than Testamentary.—Likewise, all property, whether real or personal, acquired by gift other than testamentary by a husband or wife during the existence of the marriage relation is his or her separate estate: Cal. Civ. Code, secs. 162, 163; *Bessie v. Earle*, 4 Cal. 200; *Hamilton v. Hubbard*, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; *Savenat v. Le Breton*, 1 La. 520; *Gates v. Legendre*, 10 Rob. 74; *Lemmon v. Clark*, 36 La. Ann. 744; *Owen v. Tankersley*, 12 Tex. 405; *Bradley v. Love*, 60 Tex. 472; *McClelland v. McClelland* (Tex. Civ. App.), 37 S. W. 350. The fact that there are restrictions and qualifications in a grant to a husband does not deprive it of its character as a donation: *Scott v. Ward*, 13 Cal. 458; *Noe v. Card*, 14 Cal. 576. And land conveyed to a married person as a gift does not become community, although the donor intended it as a gift to both husband and wife: *Stockstill v. Bart*, 47 Fed. 231. But a deed of gift to a husband and wife, intended

as a joint gift, invests each with an undivided one-half of the land as their separate property: *King v. Summerville* (Tex. Civ. App.), 80 S. W. 1050, affirmed in *Summerville v. King*, 98 Tex. 332, 83 S. W. 680. Where a husband gives his wife the proceeds of their dairy, property purchased therewith becomes her separate estate: *Dority v. Dority*, 30 Tex. 216, 70 S. W. 338, judgment affirmed 71 S. W. 950.

Property paid for by a husband out of community funds, and directed to be conveyed to his wife as a gift, becomes her separate property: *Peck v. Brumagim*, 31 Cal. 441, 89 Am. Dec. 195; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695; or, as expressed in *Arkle v. Beedie*, 141 Cal. 459, 74 Pac. 1033, property purchased with community funds with the express purpose on the husband's part of making a gift to the wife, and deeded to her alone as her separate property, vests in her as such.

Where a wife gave the income of her separate property to her husband "to do what he pleased with," the gift became his separate estate: *Estate of Cudworth*, 133 Cal. 462, 65 Pac. 1041; and a deed to a married woman "to have and to hold and enjoy and dispose of the said land in any and every manner she may think proper for her own use, benefit and behoof," conveys the property to her as her separate estate: *Laufer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549.

Where a deed by husband to wife shows on its face that the land is a gift, this is sufficient to make it her separate property: *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; and where a mother made a deed to her children "for and in consideration of the natural love and affection which I have and bear to my said children, and for the further sum of five dollars, to me in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed," it was held that the deed upon its face imported a gift, and conveyed a separate estate to the grantees: *Peck v. Vandenberg*, 30 Cal. 11. Judge Sawyer took the view in this case that parol evidence was admissible to show that the deed was a gift. In *Mahon v. Barnett* (Tex. Civ. App.), 45 S. W. 24, it is affirmed a deed to a husband, reciting a consideration, may be shown to be a gift to him, and therefore a part of his separate estate.

c. Property Perfected by Adverse Possession.—A married woman may perfect in herself a title by adverse possession which originated in a gift or devise to her. Hence an executed parol gift made to her by her sisters who put her in possession of the property, and her adverse possession thereof, with payment of taxes thereon, for more than five years, and a judgment in her favor quieting her title against the administrators of the deceased sisters, are sufficient to prove title in her to the premises as her separate property: *Siddall v. Haight*, 132 Cal. 320, 64 Pac. 410.

d. Pension Money Received by a Veteran of the Civil War is regarded as a donation from the government, and as belonging to his

separate estate, although not received until after his marriage; and its character is not changed into community property by the fact that he invests it in land: *Johnson v. Johnson* (Tex. Civ. App.), 23 S. W. 1022.

V. Rents, Issues and Profits of Separate Property.

a. **In Some States are Separate Property.**—The rents, issues, profits, income and increase of separate property, in some of the states where the community law prevails, are separate property also; they do not, whether the separate property from which they arise belongs to the husband or wife, fall into the community: Civ. Code, secs. 162, 163; *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; *Harris v. Van De Vanter*, 17 Wash. 489, 50 Pac. 50. In the last case cited this rule was applied to the increase of cattle. To the same effect see *Thorn v. Anderson*, 7 Idaho, 421, 63 Pac. 592. In Arizona property purchased by a married woman with the rents and profits of her separate estate are not subject to any of the husband's marital rights: *Woffenden v. Charauleau*, 2 Ariz. 91, 11 Pac. 117. "All the property which can be shown by satisfactory testimony to belong to the separate estate of the wife, whether real, personal or mixed, and all the rents, issues, profits and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband": *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49.

b. **In Some States are Community Property.**—In some states, as a general rule, the rents, profits and issues of the separate property of a married person fall into the community, on the theory that they are acquired by the joint efforts of the husband and wife: *Lambert v. Franchebois*, 16 La. 1; *Rowley v. Rowley*, 19 La. 557; *Webb v. Peet*, 7 La. Ann. 92; *Fisher v. Gordy*, 2 La. Ann. 762; *Glenn v. Elam*, 3 La. Ann. 611; *Trezevant v. Holmes*, 38 La. Ann. 146; *Succession of Webre*, 49 La. Ann. 1491, 22 South. 390; *De Barrera v. Frost*, 39 Tex. Civ. App. 544, 88 S. W. 476. This rule appears not to have applied to profits derived from the use of paraphernal funds under the control of the wife: *Pinard v. Holten*, 30 La. Ann. 167; nor to the increase of slaves: *Frederic v. Frederic*, 10 Mart., N. S., 188; *Gonor v. Gonor*, 11 Rob. 526; *Deshautels v. Fontenot*, 6 La. Ann. 689; *McIntyre v. Chappell*, 4 Tex. 187. And where a man, before marrying, conveys property on the condition that there shall be paid to him annually a specified amount from the income, the annuity is his separate estate: *Krohn v. Krohn*, 5 Tex. Civ. App. 125, 23 S. W. 848.

c. **Rents and Crops from the Separate Real Property of a married woman in Texas** have been held to belong to the community, notwithstanding the expenses incident thereto were not borne by the

husband or his separate estate; they are not regarded as "increase of land": *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Tex. 611; *Cleveland v. Cole*, 65 Tex. 402; *Seligson v. Staples*, 1 White & W. Civ. Cas. Ct. App. (Tex.), sec. 1071; *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *Hayden v. McMillan*, 4 Tex. Civ. App. 479, 23 S. W. 430; *Schepflin v. Small*, 4 Tex. Civ. App. 493, 23 S. W. 432; *De Barrera v. Frost*, 39 Tex. Civ. App. 544, 88 S. W. 476. So has lumber sawed at a mill out of logs from land by slaves owned by her as separate property: *White v. Lynch*, 26 Tex. 195; and so has brick made from her separate land and without expense to her husband: *Craxton v. Ryan*, 3 Wills. Civ. Cas. Ct. App., sec. 367.

d. **The Increase of Animals Belongs**, in Texas and Louisiana, to the community: *Bonner v. Gill*, 5 La. Ann. 629; *Howard v. York*, 20 Tex. 670; *Bateman v. Bateman*, 25 Tex. 270; although the animals are the separate property of the husband or wife: *Blum v. Light*, 81 Tex. 414, 16 S. W. 1090; *Wolford v. Melton*, 26 Tex. Civ. App. 486, 63 S. W. 543. In other states the rule is different: *Thorn v. Anderson*, 7 Idaho, 421, 63 Pac. 592; *Harris v. Van De Vanter*, 17 Wash. 489, 50 Pac. 50. But the enhancement of the value of animals owned by a woman at the time of her marriage, by reason of a natural growth, their care by the husband, and sustenance from the community property, is not an increase, within the meaning of the foregoing rule, which falls into the community. The word "increase," as used in this connection, has reference to an increase of progeny: *Stringfellow v. Sorrells*, 82 Tex. 277, 18 S. W. 689.

e. **Interest on Funds Belonging to the Separate Estate** of a married woman, in those jurisdictions where the rents, issues and income of separate property fall into the community, is regarded as community property: *Braden v. Gose*, 57 Tex. 37; *Cabell v. Menezzer* (Tex. Civ. App.), 35 S. W. 206; *Parrish v. Williams* (Tex. Civ. App.), 53 S. W. 79; although it seems that interest due from the husband on money borrowed from his wife and agreed to be paid to her for its use belongs to her separate estate: *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380, 23 S. W. 520; *Hamilton-Brown Shoe Co. v. Kellum* (Tex. Civ. App.), 23 S. W. 524.

f. **Profits Arising from the Investment of a wife's separate funds** in a commercial or mercantile business are community property in those states where the rents and profits of the separate estate of a married person fall into the community: *Epperson v. Jones*, 65 Tex. 425; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627; *Clafin v. Pfeiffer*, 76 Tex. 469, 13 S. W. 483. But the courts announcing this rule have refused to extend it to cases where profits have accrued through the sale or exchange by a husband of land belonging to the separate estate of the wife, and have held that such profits are "increase of land," and hence her separate property: *Evans v. Purrinton*, 12 Tex. Civ. App. 158, 34 S. W. 350. Said the court in *Cabell v. Menezzer* (Tex. Civ. App.), 35 S. W. 206: "Profits arising from the investment of money in a mercantile business are community property: *Epperson*

v. Jones, 65 Tex. 425; **Smith v. Bailey**, 66 Tex. 553, 1 S. W. 627. While these principles are well settled by our decisions, we have been unable to find any decision of our supreme court, nor have counsel for appellants cited any, which goes to the extent of holding, as contended for, that the profits made in the sale or exchange of land in the manner as shown by the facts in this case become community property. When the separate property is invested in real estate, and the same is sold at a profit, and the proceeds arising therefrom are reinvested in real estate, which is also resold, the same is separate property; and it is immaterial how often mutations take place, as its changed condition can be traced and identified by clear and satisfactory proof. The term 'increase of land,' as used in the statute, evidently must include the profits arising from the sale of land. If not, it is meaningless": **Cabel v. Menezzer** (Tex. Civ. App.), 35 S. W. 206.

g. Profits Arising from a Business carried on during coverture ordinarily belongs to the community: **Lewis v. Lewis**, 18 Cal. 654; **Youngworth v. Jewell**, 15 Nev. 45; **Heidenheimer v. Felker**, 1 White & W. Civ. Cas. Tex. App., sec. 362; and in Louisiana and Texas this is true, although the business belonged to the wife before marriage (**Mehnert v. Dietrich**, 36 La. Ann. 390), or although the capital is her separate estate: **Middlebrook v. Zapp**, 73 Tex. 29, 10 S. W. 732; **Mitchell v. Mitchell**, 80 Tex. 101, 15 S. W. 705.

h. A Prize Drawn on a Lottery Ticket bought by a wife with her separate money has in Texas been held not acquired by gift, devise or descent, and therefore not her separate property, but the community property of herself and husband: **Dixon v. Sanderson**, 72 Tex. 359, 13 Am. St. Rep. 801, 10 S. W. 535.

i. The Proceeds Arising from the Sale or Exchange of Separate Property becomes the separate property of the spouse whose property is sold or exchanged: **Beaudry v. Felch**, 47 Cal. 183; **Stewart v. Pickard**, 10 Rob. (La.) 18; **Succession of Hale**, 26 La. Ann. 195; **Chappell v. McIntyre**, 9 Tex. 161; **German Ins. Co. v. Hunter** (Tex. Civ. App.), 32 S. W. 344; **Cabell v. Menezzer** (Tex. Civ. App.), 35 S. W. 206. A note given to a married woman in payment of land of her separate estate is her separate property: **Hamilton v. Brooks**, 51 Tex. 142; **Morris v. Edwards**, 1 White & W. Tex. Civ. Cas., sec. 548; and if the note is delivered up to the maker by her husband and another taken to his order, this second note is also her separate property: **Rose v. Houston**, 11 Tex. 524, 62 Am. Dec. 478. It is not essential that separate property be preserved in specie or in kind to maintain its character as such; it will remain separate property, although it undergoes mutations and changes, so long as it can be traced and identified: **Rose v. Houston**, 11 Tex. 324, 62 Am. Dec. 478.

VI. Earnings of Husband or Wife.

a. In General.—The earnings of both spouses while living together, the wife's as well as the husband's, are, as a rule, community property.

This, indeed, is according to the fundamental principles of the community law: *Washburn v. Washburn*, 9 Cal. 475; *Finnigan v. Hibernia Savings & Loan Soc.*, 63 Cal. 390; *Martin v. Southern Pac. Co.*, 130 Cal. 285, 62 Pac. 515; *Fennell v. Drinkhouse*, 131 Cal. 447, 82 Am. St. Rep. 361, 63 Pac. 734; *Knight v. Kaufman*, 105 La. 35, 29 South. 711; *Succession of Manning*, 107 La. 456, 31 South. 862; *Adams v. Baker*, 24 Nev. 375, 55 Pac. 362; *Cline v. Hackbarth*, 27 Tex. Civ. App. 391, 65 S. W. 1086; *Abbott v. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176, 33 Pac. 1070; *Yake v. Pugh*, 13 Wash. 78, 52 Am. St. Rep. 17, 42 Pac. 528. Thus it has been affirmed that a claim by a married woman for services rendered a decedent as nurse constitutes community property: *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392. And property purchased by a married woman with her earnings becomes community, unless the husband intended to give her the proceeds of her earnings, in which case it would be her separate estate: *Johnson v. Burford*, 39 Tex. 242. If articles of personalty are purchased with money earned by a wife under an agreement with her husband, that such money should be her separate property, and such articles are brought into the house and taken possession of by her as her separate property with the consent of her husband, such acts amount to a gift from the husband to the wife, and constitute such articles her separate property: *Yake v. Pugh*, 13 Wash. 78, 52 Am. St. Rep. 17, 42 Pac. 528. A donation in remuneration for services rendered by a married woman to the donor is not a part of the community, nor can real property so received be disposed of by the husband: *Fisk v. Flores*, 43 Tex. 340. Where a husband gives his wife the proceeds of her dairy, property purchased therewith may be set aside as her separate estate: *Dority v. Dority*, 30 Tex. Civ. App. 216, 70 S. W. 950, affirmed in 96 Tex. 215, 71 S. W. 950, 60 L. R. A. 941.

b. In Case of Separation.—The earnings of a wife while living apart from her husband are her separate property: *Loring v. Stuart*, 79 Cal. 201, 21 Pac. 651; *Greve v. Echo Oil Co.* (Cal. App.), 96 Pac. 904; *Queen Ins. Co. v. May* (Tex. Civ. App.), 35 S. W. 829. When he leaves her and lives in another county on account of domestic infelicity, without expressing any intention to return, property acquired by her earnings while continuing to reside at their former place of residence is acquired while she is living separate from him, within the meaning of the foregoing rule: *Boring v. Stuart*, 79 Cal. 201, 21 Pac. 651.

c. In Case of Express Agreement.—The earnings of a married woman may be her separate property by agreement with her husband: *Greve v. Echo Oil Co.* (Cal. App.), 96 Pac. 904; *Vansickle v. Wells, Fargo & Co.*, 105 Fed. 16. Thus the personal earnings acquired by a woman in keeping boarders and in doing work as a dressmaker, under an agreement with her husband that the money so acquired should belong to her alone, are her separate property as against his creditors; and if articles of personalty are purchased therewith, they too belong to her separate estate: *Yake v. Pugh*, 13 Wash. 78,

52 Am. St. Rep. 17, 42 Pac. 528. But a mere general agreement between husband and wife that whatever she earns shall belong to her, which has no reference to any particular business or employment, has been held insufficient to impress her earnings with the character of separate property: *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452.

VII. Property Acquired from the Government.

a. **By Gift or Donation.**—Land granted by the government as a gift or donation to a married person becomes his or her separate estate: *Wilson v. Castro*, 31 Cal. 420; *Rouquier's Heirs v. Rouquier's Exrs.*, 5 Mart., N. S., 98, 16 Am. Dec. 186, and note; *Wilkinson v. American Iron Mountain Co.*, 20 Mo. 122. Thus a donation under the act of 1837, granting to soldiers who served at the battle of San Jacinto, when made to a married man, does not fall into the community but becomes his separate property: *Ames v. Hubby*, 49 Tex. 705. Land patented under a warrant for military service is regarded as a gift, and does not become community property, under the Washington statutes: *Hatch v. Ferguson*, 68 Fed. 43, 15 C. C. A. 201, 29 U. S. App. 651, 33 L. R. A. 759. Land granted by virtue of a bounty certificate for services rendered by the patentee in the Texan army before his marriage is, notwithstanding the certificate is not issued until after the marriage, his separate property: *Parker v. Newberry*, 83 Tex. 428, 18 S. W. 815. See, further, the note to *Ahern v. Ahern*, 96 Am. St. Rep. 922.

b. **For Valuable Consideration.**—But where a land certificate is issued to a volunteer for services rendered in the Texas war for independence under a contract with the government, the property belongs to the community, for it is acquired by onerous title—that is, a title created by valuable consideration: *Barrett v. Spence*, 28 Tex. Civ. App. 349, 67 S. W. 921; *Kircher v. Murray*, 54 Fed. 617, affirmed 60 Fed. 48, 8 C. C. A. 448. And the general rule is that property acquired from the government for a valuable consideration by a husband is presumed to belong to the community: *Lake v. Lake*, 52 Cal. 428; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248; *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612; *Duncan v. Bickford*, 83 Tex. 322, 18 S. W. 598; *Booth v. Clark*, 34 Tex. Civ. App. 315, 78 S. W. 392; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671. See, further, the note to *Ahern v. Ahern*, 96 Am. St. Rep. 916.

c. **By Title Initiated Before Marriage.**—Where an unmarried person acquires the equitable title to a tract of public land, the land does not lose its character as separate property by the fact that the patent is not issued to him until after his marriage: *Barbet v. Langlois*, 5 La. Ann. 212; *Lawson v. Ripley*, 17 La. 238; *Gardner v. Burkhart*, 4 Tex. Civ. App. 590, 23 S. W. 709. Hence it is that where a woman files a homestead claim under the laws of the United States, settles upon and improves the property for four years, and then marries, the land is her separate property, notwithstanding the patent is not issued

until after her marriage, since the patent is only the legal evidence of the title already vested in her: *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; and an unmarried woman who is an occupant of land under the "townsite act" has an equitable interest which is her separate property, although the patent is not issued until after her marriage and the necessary funds to obtain the title are advanced by her husband: *Morgan v. Lones*, 80 Cal. 317, 22 Pac. 253. Where an unmarried woman, after acquiring an initiatory right to pre-empt public land, marries, and during her marriage pays the government price for the land and receives a patent therefor, the property thus acquired becomes her separate estate; and this result follows whether the money paid to the government belongs to the community or is acquired by her in consideration of the sale of a part of the land: *Harris v. Harris*, 71 Cal. 314, 12 Pac. 274. See, also, the note to *Ahern v. Ahern*, 96 Am. St. Rep. 920.

d. By Title Initiated During Coverture.—From the rule of the preceding paragraph that if either spouse prior to the marriage acquired an equitable right to property which was perfected after marriage, the status of the property follows the right of the spouse who had the equitable interest before marriage, it follows that title initiated during coverture may be community estate although not perfected until after the dissolution of the marriage. Thus where a man during marriage enters a homestead under the United States law and conforms to the prescribed requirements, the property is regarded as belonging to the community although he does not make final proof or obtain a patent until after the death of his wife: *Brown v. Fry*, 52 La. Ann. 58, 26 South. 748; *Creamer v. Briscoe* (Tex. Civ. App.), 109 S. W. 911; *Ahern v. Ahern*, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005. Said the court in *Crochet v. McCamant*, 116 La. 1, 114 Am. St. Rep. 538, 40 South. 474: "The acquisition of the land by the homesteader under the federal homestead law dates from the entry. The occupying and cultivating of the land for five years, and the making of the final proofs, are merely conditions imposed upon the title; and the accomplishment of these conditions has a retroactive effect to the date of the entry. Consequently the homestead becomes the joint property of the husband and the wife, if the community of acquets and gains existed between them at the time of the entry, even though the proofs were made, and the certificate and the patent issued, only after the dissolution of the community by the death of the wife": See, also, the note to *Ahern v. Ahern*, 96 Am. St. Rep. 919.

But in order that a right to public land, initiated during coverture but not consummated until the dissolution of the marriage, shall fall into the community, it is necessary that the right should have proceeded beyond a mere occupancy of the land or possessory right, and arisen to the dignity of ownership: *Labish v. Hardy*, 77 Cal. 327, 19 Pac. 531; *Richard v. Moore*, 110 La. 435, 34 South. 593; *Simpson v. Otis* (Tex. Civ. App.), 109 S. W. 940. And in Washington, when one

makes a homestead entry and dies before completing the full residence period necessary under the homestead law, leaving a widow who completes the period of residence, makes proof and procures a patent, the land becomes her separate property: *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A., N. S., 967. This decision perhaps modifies the law of that state as declared in the decisions cited in the preceding paragraph. In Louisiana, if land is entered in the name of the wife during marriage, but the patent is issued after the community is dissolved by a judgment, the land is presumed to be an acquisition of the community, since the title to government land dates from the certificate and not from the patent: *Simiem v. Perrodin*, 35 La. Ann. 931.

e. By Acquisition of Timber Lands.—In *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402, the supreme court of Washington decided that land acquired by a married man under the act of Congress providing for the sale of timber lands is his separate property, which can be alienated without the consent of his wife. The reasons assigned for this conclusion were that husband and wife are each permitted to make an entry of one hundred and sixty acres under the provisions of the act, and that the entryman is required to make oath that he has made no other application under the act, that he does not apply to purchase the same on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he has not directly or indirectly made any agreement with any person by which the title should inure in whole or in part to the benefit of any person except himself. It has subsequently been held that the fact that community funds are used to purchase a timber claim which is the husband's separate property does not give the wife an interest in or lien upon the property itself: *James v. James* (Wash.), 97 Pac. 1113.

f. By Acquisition of Mining Property.—According to *Jacobson v. Bunker Hill etc. Min. Co.*, 3 Idaho, 126, 28 Pac. 396, it is held that mining property acquired by a married man, under the laws of the United States is community property. But the supreme court of Washington has disapproved the Idaho decision, and held that a locator's interest in a mining claim is his separate property: *Phoenix Min. etc. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777, citing *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 16 Sup. Ct. Rep. 1101, 41 L. ed. 221, which was decided subsequently to the Idaho case. A locator of a mining claim has no such interest therein after a conveyance and abandonment thereof that the community interest of his wife attaches: *McAllister v. Hutchinson*, 12 N. M. 111, 75 Pac. 41.

g. By Acquisition Under Colonization Law.—According to *Hood v. Hamilton*, 33 Cal. 698, land granted under the Mexican colonization laws to married men became their separate property. But according to the Texas decisions lands granted to married men or married women under the colonization laws of 1823 and 1839, and subsequent enactments, became community property, on the theory that they were acquired by onerous title: *Yates v. Houston*, 3 Tex. 433; *Burris v. Wideman*,

6 Tex. 231; *Edwards v. James*, 7 Tex. 372; *Parker v. Chance*, 11 Tex. 513; *Wilkinson's Heirs v. Wilkinson*, 20 Tex. 237; *Babb v. Carroll*, 21 Tex. 765; *Simmons v. Blanchard*, 46 Tex. 266; *Rudd v. Johnson*, 60 Tex. 91; *Manhaca v. Field*, 62 Tex. 135. As to the effect of the death of the wife before the issuance of a patent, see *Webb v. Webb*, 15 Tex. 274; *Cannon v. Murphy*, 31 Tex. 405; *Caudle v. Welden*, 32 Tex. 355; *Porter v. Chronister*, 58 Tex. 53; *Norton v. Cantagrel*, 60 Tex. 538.

VIII. Proceeds of Life Insurance Policy.

Where premiums on a policy of insurance on the life of a married man are paid out of the community funds, the proceeds of the policy belong to the community: *In re Stans' Estate* (Cal.), Myr. Prob. 5; *Succession of Buddig*, 108 La. 406, 32 South. 361; *Martin v. Moran*, 11 Tex. Civ. App. 509, 32 S. W. 904. And where a man pays the first one-third of the amount of the premiums on his life insurance policy out of his earnings before marriage, and the remainder from his earnings after marriage, one-third of the policy belongs to the separate estate and the remainder to the community property: *In re Webb's Estate* (Cal.), Myr. Prob. 93. The rights under a policy of life insurance taken out by an unmarried man belong to his separate estate, and do not fall into the community on his subsequent marriage; but the community arising under his marriage is entitled to have payments of the premiums thereon made by it reimbursed as expenditures for such separate estate: *In re Moseman's Estate*, 38 La. Ann. 219. The proceeds of a policy taken out by a husband on his life in favor of his wife does not become a part of the community but belongs to her: *Succession of Bofenschen*, 29 La. Ann. 711; *Succession of Hearing*, 26 La. Ann. 326. In *Crowe v. Dobbel*, 105 Cal. 350, 38 Pac. 957, it is decided that an insurance policy on the life of a man payable to his wife, her executors, administrators or assigns, is her separate property, and, upon her death before his, he becomes entitled thereto only as her heir. The proceeds of a policy on the life of a wife in favor of the husband has been held to belong to his separate estate, although the premiums thereon were paid from the community: *Martin v. McAllister* 94 Tex. 567, 63 S. W. 624, 56 L. R. A. 585. Where a benefit certificate of the brother of a married woman was made payable to her, not as a gift, but in consideration of the care and support by the woman and her husband of the brother's children, and in satisfaction of an indebtedness of the brother to the husband, and on the payment of future assessments by the husband upon the certificate, and the proceeds of the certificate were invested in real estate in her name, the property so acquired became community: *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108.

IX. Damages Recovered for Personal Injuries.

The right to recover damages for personal injuries sustained by either spouse, and the damages recovered therefor, as a general rule, belong to the community property: *McFadden v. Santa Ana etc. R. R.*

Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. 954; *Martin v. Southern Pac. Co.*, 130 Cal. 285, 62 Pac. 515; *Fournet v. Morgan's etc. Steamship Co.*, 43 La. Ann. 1202, 11 South. 541; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *Loper v. Western Union Tel. Co.*, 70 Tex. 689, 8 S. W. 600; *Bohan v. Bohan* (Tex. Civ. App.), 56 S. W. 959; *San Antonio v. Wildenstein* (Tex. Civ. App.), 109 S. W. 231. But in Louisiana, owing to a change in the statute, a claim for damages for personal injuries to a married woman does not now fall into the community: *Martin v. Derenbecker*, 116 La. 495, 40 South. 849. Damages for personal injuries sustained by a man after he has separated from his wife with the intention not to live with her again are community property: *Ligon v. Ligon*, 39 Tex. Civ. App. 392, 87 S. W. 838.

A claim for unliquidated damages against a carrier for indignities suffered by a woman before marriage is her separate property, and it does not fall into the community on her subsequent marriage: *St. Louis etc. Ry. Co. v. Wright*, 33 Tex. Civ. App. 80, 75 S. W. 565.

Damages which a wife recovers against a saloon-keeper for an illegal sale of liquor to her husband, under the civil damage act, is her separate property and belongs exclusively to her: *Hahn v. Goings*, 22 Tex. Civ. App. 576, 56 S. W. 217.

Damages recovered by parents for the death of their child are a part of the community property: *Galveston etc. Ry. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264. But the damages allowed to heirs for the death of a wife and mother have no existence prior to the death, and are not community property: *Redfield v. Oakland etc. Ry. Co.*, 110 Cal. 277, 42 Pac. 822.

X. Presumption for or Against Community Property.

a. In General.—As a general rule, property acquired during coverture by either the husband or the wife, and property in their possession during marriage (*Schuler v. Savings & Loan Soc.*, 64 Cal. 397, 1 Pac. 479; *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547; *In re Boody's Estate*, 113 Cal. 682, 45 Pac. 858; *Repplier v. Gow's Syndics*, 1 La. 474; *Bostwick v. Gasquet*, 11 La. 534; *Succession of Pratt*, 12 La. Ann. 457; *Grayson v. Sandford*, 12 La. Ann. 646; *Lacroix v. Derbigny*, 18 La. Ann. 27; *Van Wickle v. Violet*, 30 La. Ann. 1106; *Stauffer v. Morgan*, 39 La. Ann. 632, 2 South. 98; *Duruty v. Musacchia*, 42 La. Ann. 357, 7 South. 555; *Succession of Barry*, 48 La. Ann. 1143, 20 South. 656; *Succession of Manning*, 107 La. 456, 31 South. 862; *Strong v. Eakin*, 11 N. M. 107, 66 Pac. 539; *Brown v. Lockhart*, 12 N. M. 10, 71 Pac. 1086; *Huston v. Curl*, 8 Tex. 239, 58 Am. Dec. 110; *Smith v. Boquet*, 27 Tex. 507; *Box v. Word*, 65 Tex. 159; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516; *Allardyce v. Hambleton*, 96 Tex. 30, 70 S. W. 76; *Blackwell v. Mayfield* (Tex. Civ. App.), 69 S. W. 659; *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050, affirmed, *Clark v. Thayer*, 98 Tex. 142, 81 S. W. 1274; *Hoopes v. Mathias*, 40 Tex. Civ. App. 121, 89 S.

W. 36; Keyser v. Clifton (Tex. Civ. App.), 50 S. W. 957; Woodland Lumber Co. v. Link, 16 Wash. 72, 47 Pac. 222; Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62; Allen v. Chambers, 22 Wash. 304, 60 Pac. 1128; Hill v. Gardner, 35 Wash. 529, 77 Pac. 808; O'Sullivan v. O'Sullivan, 35 Wash. 481, 77 Pac. 806), or in their possession at the time of its dissolution by death or divorce (Montegut v. Trouart, 7 Mart., O. S., 361; Nores v. Carraby, 5 Rob. 292; Babin v. Nolan, 6 Rob. 508; Succession of Baum, 11 Rob. 314; Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S. W. 99; Bryn v. Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980; McCelvey v. Cryer (Tex. Civ. App.), 37 S. W. 175; Edelstein v. Brown (Tex. Civ. App.), 95 S. W. 1126; Stein v. Mentz, 42 Tex. Civ. App. 38, 94 S. W. 477; Smith v. Smith (Tex. Civ. App.), 91 S. W. 815; Cope v. Blount (Tex. Civ. App.), 91 S. W. 615), is presumed to belong to the community.

b. In Case of Separate Conveyance to Husband or Wife.—This presumption applies where property is purchased by or conveyed to the husband (Bass v. Larche, 7 La. Ann. 104; Murphy's Heirs v. Jury, 39 La. Ann. 785, 2 South. 575; Hall v. Toussaint, 52 La. Ann. 1763, 28 South. 304; Succession of Muller, 106 La. 89, 30 South. 329; Osborn v. Osborn, 62 Tex. 495; Nixon v. Wichita Land & Cattle Co., 84 Tex. 408, 19 S. W. 560; Schneider v. Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541; Burleson v. Alvis, 28 Tex. Civ. App. 51, 66 S. W. 235; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862); and it also applies where property is purchased or conveyed to the wife (Alverson v. Jones, 10 Cal. 9, 70 Am. Dec. 689; Pixley v. Hugins, 15 Cal. 127; Mott v. Smith, 16 Cal. 533; Adams v. Knowlton, 22 Cal. 283; McDonald v. Badger, 23 Cal. 393, 83 Am. Dec. 123; Peck v. Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Ingersoll v. Truebody, 40 Cal. 603; Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657; Stowell v. Tucker, 7 Idaho, 312, 62 Pac. 1033; Fisher v. Gordy, 1 La. Ann. 762; Provost v. Delahoussaye, 5 La. Ann. 610; De Young v. De Young, 6 La. Ann. 786; Webb v. Peet, 7 La. Ann. 92; Huntington v. Legros, 18 La. Ann. 126; Block v. Melville, 22 La. Ann. 147; Sulstrang v. Betz, 24 La. Ann. 295; De Sentmanat v. Soule, 33 La. Ann. 609; Gogreve v. Dehon, 41 La. Ann. 244, 6 South. 31; Pior v. Gideens, 50 La. Ann. 216, 23 South. 337; Jordy v. Muir, 51 La. Ann. 55, 25 South. 550; Parker v. Chance, 11 Tex. 513; Moffatt v. Sydnor, 13 Tex. 628; Wells v. Cockrum, 13 Tex. 127; Smith v. Strahan, 16 Tex. 314, 67 Am. Dec. 622; Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277; Coats v. Elliott, 23 Tex. 606; Cooke v. Bremond, 27 Tex. 457, 86 Am. Dec. 626; Stanley v. Epperson, 45 Tex. 644; Epperson v. Jones, 65 Tex. 425; Clafin v. Pfeiffer, 76 Tex. 469, 13 S. W. 483; Oppenheimer v. Robinson, 87 Tex. 174, 27 S. W. 95; Collins v. Turner, 1 White & W. Civ. Cas. Ct. App., sec. 517; Stephenson v. Chappell, 12 Tex. Civ. App. 296, 33 S. W. 880, 36 S. W. 482; Ballew v. Casey (Tex. Civ.), 9 S. W. 189; Swink v. League, 6 Tex. Civ. App. 309, 25 S. W. 807; Sinsheimer v. Kahn, 6 Tex. Civ. App. 143, 24 S. W. 533; Tompkins v.

Williams, 7 Tex. Civ. App. 602, 25 S. W. 158; Sweeney v. Taylor Bros., 41 Tex. Civ. App. 365, 92 S. W. 442; Flannery v. Chidgey, 33 Tex. Civ. App. 638, 77 S. W. 1034; Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398); although the presumption is probably stronger where the conveyance is made to the husband than where it is made to the wife: See the note to Cooke v. Bremond, 86 Am. Dec. 637.

In California the statute was amended in 1889 so as to change the presumption in favor of married women; and the law now provides in this state that "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property": Cal. Civ. Code, sec. 164; Nilson v. Sarment, 153 Cal. 524, ante, p. 91, 96 Pac. 315. This amendment to the statutory law is not retrospective in its operation: Lewis v. Burns, 122 Cal. 358, 55 Pac. 132; Booker v. Castillo (Cal.), 98 Pac. 1067.

c. In Case of Joint Conveyance to Husband and Wife.—Where property is conveyed jointly to a husband and wife, it is, unless the statute provides otherwise, presumed to be community estate, the same as where it is conveyed to the husband or to the wife separately: Jordan v. Fay, 98 Cal. 264, 33 Pac. 95. "All property acquired during the marriage is presumed to belong to the community, whether the conveyance is to the husband or wife, or both, and the onus of proving that it is separate property of either is on the party asserting it": Wallace v. Campbell, 54 Tex. 87; Morris v. Hastings, 70 Tex. 26, 8 Am. St. Rep. 570, 7 S. W. 649; King v. Summerville (Tex. Civ. App.), 80 S. W. 1050; Summerville v. King, 98 Tex. 332, 83 S. W. 680. But in California the statute was amended in 1889, and now provides: "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration": Cal. Civ. Code, sec. 164. As to other persons, the presumption may be rebutted by evidence that the entire property is community: Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108. This amendment to the California statute the supreme court has refused to give a retrospective operation so as to disturb titles already vested: Jordan v. Fay, 98 Cal. 264, 33 Pac. 95.

d. Evidence to Overcome Presumption.—Presumptions in favor of the community property are indulged only in the absence of direct evidence on the question: Letot v. Peacock (Tex. Civ. App.), 94 S. W. 1121. And when indulged they are ordinarily not conclusive, but yield to satisfactory evidence that the property is in fact the separate estate of one of the spouses by reason of having been acquired by him or her in one of the ways which impress it with the character of

separate property: See the note to *Cooke v. Bremond*, 86 Am. Dec. 636-640; *Hoeck v. Greif*, 142 Cal. 119, 75 Pac. 670; *Succession of Rogge*, 50 La. Ann. 1220, 23 South. 933; *Fortier v. Barry*, 111 La. 776, 35 South. 900; *Baker v. Baker*, 55 Tex. 577; *Hames v. State*, 46 Tex. Cr. 562, 81 S. W. 708; *York v. Hilger* (Tex. Civ. App.), 84 S. W. 1117; *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109. "This invariable presumption," said Justice Field, "which attends the possession of property by either spouse during the existence of the community, can be overcome only by clear and certain proof that it was owned by the claimant before marriage, or acquired afterward in one of the particular ways specified in the statutes, or that it is property taken in exchange for or in the investment or as the price of the property so originally owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion and fraud": *Meyer v. Kinzer*, 12 Cal. 247, 73 Am. Dec. 538.

Courts have said that the presumption in favor of community property can be overcome only by "clear and convincing," or by "clear and cogent," or by "clear and conclusive" proof: *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132; *Rowe v. Hibernia etc. Loan Soc.*, 134 Cal. 403, 66 Pac. 569; *Riebli v. Husler* (Cal.), 69 Pac. 1061; *Bachino v. Coste*, 35 La. Ann. 570; *Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Coats v. Elliott*, 23 Tex. 606. These expressions, however, are misleading, in that they imply more cogent proof than the law demands. It would be more accurate to say that the presumption may be overcome "by a preponderance of evidence": *Strong v. Eakin*, 11 N. M. 107, 66 Pac. 539; *Blackwell v. Mayfield* (Tex. Civ. App.), 69 S. W. 659. "The assertion of an exception (to the rule that property purchased during marriage is community) merely requires the production of proof either that the conveyance was in fact a lawful gift, or that the consideration was furnished by husband or wife individually out of funds or property which he or she was entitled, under the law, to hold as separate property. Whatever satisfies the court or the jury of the truth of one or the other of these probative facts will authorize the finding of the ultimate fact that the subject of the conveyance was separate, and not common, property; and thus the presumption will be overcome": *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109. "Clearly it was never intended by this court," to quote from *Freese v. Hibernia Loan etc. Soc.*, 139 Cal. 392, 73 Pac. 172, "to lay down a rule requiring demonstration in such matters—that is, such a degree of proof as, excluding possibility of error, produces absolute certainty. Such proof is never required. Generally moral certainty is required, or that degree of proof which produces conviction in an unprejudiced mind, and evidence which ordinarily produces such conviction is satisfactory. . . . We are of the opinion that it is incumbent on the party seeking to overthrow the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the

particular case, would ordinarily produce conviction in an unprejudiced mind, and that in the face of such evidence the naked presumption, unsupported by any testimony, must fall. In considering whether or not such a degree of proof has been attained, we have the right to consider such presumptions and inferences as are authorized by the law of evidence." To the same effect see *Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705.

e. Effect of Recitals in Deed.—A recital in a deed to a married woman that the consideration is paid out of her separate funds, or that the land is conveyed to her as her separate estate, ordinarily rebuts the presumption that the property falls into the community, and prima facie makes it her separate estate. Such recitals, however, are not conclusive, but only prima facie of the separate character of the estate: *Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347; *Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2; *McCutcheon v. Purinton*, 84 Tex. 603, 19 S. W. 710; *Evans v. Purinton*, 12 Tex. Civ. App. 158, 34 S. W. 350; *Kahn v. Kahn* (Tex.), 58 S. W. 825; *Clardy v. Wilson*, 27 Tex. Civ. App. 49, 64 S. W. 489; *Newman v. Newman* (Tex. Civ. App.), 86 S. W. 635; *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398; except where the statute otherwise provides, as apparently it now does in California in the case of bona fide purchasers and encumbrancers: Cal. Civ. Code, sec. 164. And in Louisiana it seems that such recitals alone do not even prima facie make the property the separate estate of the wife as against creditors and forced heirs: See the note to *Shaw v. Hill*, 96 Am. Dec. 424; *Kerwin v. Hibernia Ins. Co.*, 35 La. Ann. 33; *Bartels v. Souchon*, 48 La. Ann. 783, 19 South. 941. But a husband who has been a party to an authentic act by which it is declared that the wife purchases with her separate paraphernal funds, and for her separate benefit, is estopped from contradicting the verity of such recitals unless he first prove that such recitals were embodied in the act through fraud, error, or violence: *Maguire v. Maguire*, 40 La. Ann. 579, 4 South. 492; *Succession of Bellande*, 42 La. Ann. 241, 7 South. 535; *Jordy v. Muir*, 51 La. Ann. 55, 25 South. 550.

f. Constructive Notice to Purchasers.—In Texas the fact that a conveyance expressing a valuable consideration was taken in the name of a married woman imposes no burden upon a purchaser from the husband of inquiring as to equities which she may have in the land, but he is protected if he buys in ignorance of her claim to it as her separate property, though the rule would be otherwise in the event of recitals in the deed showing that the consideration was paid from her separate estate, or that the purchase was designed for her separate use and benefit: *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626, and note; *French v. Strumburg*, 52 Tex. 92; *Parker v. Coop*, 60 Tex. 111. In California, however, persons who purchase from a married man real estate deeded to his wife for a money consideration, during coverture, do so at their peril. The record of the deed to the wife is notice to all the world that the land may be her separate es-

tate, and is sufficient to put purchasers on inquiry: *Ramsdell v. Fuller*, 28 Cal. 37, 87 Am. Dec. 103; *Peck v. Vandenberg*, 30 Cal. 11; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695. By a parity of reasoning, persons purchasing from a married woman real estate deeded to her for a money consideration do so at their peril, notwithstanding the deed recites that the property is for her separate use and benefit, for such recital makes the property only prima facie her separate estate: *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347. The California statute now provides "that all other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. In case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration": Cal. Civ. Code, sec. 164.

AMERICAN DE FOREST WIRELESS TELEGRAPH COMPANY v. SUPERIOR COURT.

[153 Cal. 533, 96 Pac. 15.]

CONSTITUTIONAL LAW.—A Corporation, Though Formed Under the Laws of Another State, is a person within the meaning of the fourteenth amendment to the constitution of the United States, providing that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. (p. 127.)

CORPORATIONS, Foreign, Right to Defend Actions.—The general comity existing between the states permits a foreign corporation which has entered a state and done business therein to maintain and defend actions arising out of such business, in the absence of any statute to the contrary. (p. 127.)

CORPORATIONS, Foreign, When not Denied the Right to Maintain Actions.—A statute requiring foreign corporations to file in the office of the Secretary of State and in that of the county clerk or county recorder where its principal place of business is conducted and where it owns property a certified copy of its articles of incorporation, and declaring that no corporation failing to do so can maintain any suit or action in the courts of the state, does not prohibit it from defending actions brought against it. (p. 128.)

A JUDGMENT RENDERED Against a Corporation on the Striking Out of Its Answer in a case where the court was not authorized to take that action is void, and will be annulled on certiorari. (p. 128.)

JUDGMENT ENTERED upon One Ground cannot be Supported on Another.—The rendition of judgment against a foreign corporation on the ground that it had not filed a certified copy of its articles of incorporation with the Secretary of State or the county clerk cannot be sustained on the ground that it had not filed with such secretary a designation of a person residing within the state upon whom process against it might be served. (p. 128.)

C. M. Fickert, for the petitioner.

G. H. Perry, for the respondent.

534 SHAW, J. This is a proceeding in certiorari to review a judgment of the superior court of the city and county of San Francisco for the sum of two hundred and fifty-seven dollars and seventy-five cents and costs, in favor of the San Francisco Commercial Agency, a corporation. The action in which the judgment was rendered was originally begun in the justice's court and the judgment sought to be reviewed was rendered in the superior court on appeal.

535 The defendant in the action, petitioner here, is a corporation organized under the laws of the state of New Jersey. The complaint stated a cause of action to recover money due on contract. Summons was duly issued and the defendant appeared and filed an answer. The plaintiff therein then moved the court to strike the answer from the files, the motion was granted, and thereupon judgment was given in favor of the plaintiff therein against the petitioner as above mentioned. The motion to strike the answer from the files was made upon the ground that the defendant was a corporation of another state; that the demand sued on arose out of business transactions in this state, and that said defendant corporation had failed and neglected to comply with the statute of this state requiring a foreign corporation doing business in this state to file a certified copy of its articles of incorporation with the Secretary of State. No other ground was assigned as cause for the motion, and it appears to have been granted upon the ground that a corporation so failing cannot be allowed to defend an action brought against it in the courts of this state.

The statutory provisions in question are found in sections 408 and 410 of the Civil Code. Section 408 provides that "Every corporation organized under the laws of another state, territory, or of a foreign country, . . . which shall hereafter do business in this state or maintain an office herein, or which shall enter this state for the purpose of doing business herein, must file in the office of the Secretary of State of the state of California a certified copy of its articles of incorporation, . . . and a certified copy thereof, duly certified by

the Secretary of State of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property." Section 410 declares that "No foreign corporation which shall fail to comply with section four hundred and eight . . . of this code can maintain any suit or action in any of the courts of this state until it has complied with said section."

It will not be disputed that a corporation, although organized under the laws of another state, is a "person" within the meaning of the fourteenth amendment of the constitution of the United States providing that no state shall deprive any person of property without due process of law, nor deny any person within its jurisdiction the equal protection of the ⁵³⁶ laws: *Gulf etc. Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. ed. 666; *Railway Tax Cases*, 118 U. S. 396, 6 Sup. Ct. Rep. 1132, 30 L. ed. 118. It may also be conceded, as contended by counsel for respondent, that foreign corporations have no legal existence beyond the bounds of the state or sovereignty by which they are created, and can exercise none of the functions and privileges conferred by their charters in any other state or country except by comity and consent of the latter (19 Cyc. 1222), and that one of the privileges which a corporation receives by its charter is the privilege of maintaining or defending actions in its corporate name and as a body corporate; in other words, the privilege of being a "person" within the cognizance of the law. There is, however, no rule of the common law which forbids a corporation organized and empowered to do business in one state from doing such business in another state. In the absence of any statutory inhibition there can be no doubt that the general comity existing between the states would permit a foreign corporation which had entered this state and had done business therein to maintain and defend actions arising out of such business: 19 Cyc. 1211, 1212. A statute of this state which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes. The sections above quoted do not purport to forbid a foreign corporation which has failed to comply with its provisions from defending an action brought against it in the courts of this state. They are only forbidden to maintain actions. The order of the court, striking out the answer because of the failure of the defendant to comply

with the provisions of section 408, was not authorized by the statute. Notwithstanding the provisions of that section and of section 410 imposing a penalty for violation thereof, the foreign corporation doing business in this state was entitled to defend any action brought against it. To prevent it from doing so would be to deny it the equal protection of the laws and to deprive it of its property without due process of law. It appearing from the record that the judgment was rendered upon default and that the default was entered for this cause alone, it follows that the judgment is void.

⁵³⁷ Sections 405 and 406 of the Civil Code purport to declare that any corporation of another state doing business within this state must file in the office of the Secretary of State a designation of some person residing within the state who may be served with process issued in this state against such corporation, and that such foreign corporation cannot maintain or defend any action or proceeding in any court of this state until it has complied with this provision. The motion in the case before us was not based upon the ground that the corporation had failed to comply with this provision, and, hence, no authority for the action taken can be predicated upon this statute.

It is ordered that the judgment of the superior court in the action above mentioned, and the order striking out the answer therein, be annulled, and that the petitioner be allowed to defend the said action.

Angellotti, J., and Sloss, J., concurred.

The Right of a Foreign Corporation to maintain an action in the courts of a state with whose laws it has not complied is considered in *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852; *Tri-State Amusement Co. v. Forest Park etc. Co.*, 192 Mo. 404, 111 Am. St. Rep. 511; *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 203, 113 Am. St. Rep. 139; *Allen v. City of Milwaukee*, 128 Wis. 678, 116 Am. St. Rep. 54. It has been held that the purpose of a statute requiring foreign corporations doing business within the state to file and register their charters is to enable them to do business, own or acquire property, and be enabled to sue, but not to exempt them from suit if they disregard the statute or to estop them from making defense if so sued: *Turcott v. Railroad*, 101 Tenn. 102, 70 Am. St. Rep. 661.

HIBERNIA SAVINGS AND LOAN SOCIETY v. FARNHAM.

[153 Cal. 578, 96 Pac. 9.]

LIMITATION OF ACTIONS Against the Estates of Decedents.

The statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued. As against the estate, the statute of limitations does not begin to run until the letters of administration issued. (p. 131.)

LIMITATION OF ACTIONS When One of the Comakers of a Note Secured by a Mortgage Dies.—If a husband and wife execute their joint note and a mortgage of real property to secure its payment, and she afterward dies, there is no doubt that the statute of limitations runs against the husband, notwithstanding there is no administration of the wife's estate, but if he is her grantee and joined in the execution of the mortgage, it may, nevertheless, be foreclosed against him or his successor in interest, provided the judgment does not undertake to fix any judgment against him. (pp. 131, 132.)

LIMITATION OF ACTION to Foreclose Mortgage Against Grantee in an Unrecorded Conveyance.—By the Civil Code of California, a conveyance of real property is void as against any subsequent purchaser or mortgagee of the same property in good faith and for valuable consideration whose conveyance is first duly recorded, and the statute of limitations in favor of the grantee under such unrecorded conveyance does not begin to run against an action to foreclose the mortgage until a conveyance is recorded or the mortgagee has actual notice of it. (p. 133.)

LAW OF THE CASE, Effect of on a Second Appeal.—A decision in favor of the appellant on the ground that there was no finding on the plea of the statute of limitations nor of facts from which such finding might be inferred is not conclusive in his favor on a subsequent appeal, where there was a finding of facts from which the inference must be drawn that such statute has not operated in his favor. (pp. 133, 134.)

APPEAL AND ERROR—Questions not Raised on the Original Brief.—Points made for the first time in the closing or reply brief of the appellant will not be considered if no good reason appears for their omission from the original brief and it does not appear that the appellant would be unjustly affected by the refusal to consider them. (p. 134.)

NOTICE of Unrecorded Conveyance—Evidence of Proof.—The burden of proof must be assumed by one who claims to be a subsequent purchaser or mortgagee without notice of a prior unrecorded conveyance. (p. 134.)

James H. Boyer, for the appellants.

Tobin & Tobin, for the respondent.

579 **ANGELLOTTI, J.** This is an action to foreclose the lien of a mortgage executed on February 21, 1893, by Annie F. Lennon and her husband, James H. Lennon, to plaintiff, to secure the payment of a promissory note of the same date for four hundred dollars, and the interest that accrued thereon. The appeal is from the decree of foreclosure, which fixes

the amount due, directs the sale of the mortgaged premises to pay such amount, costs and expenses of sale, orders judgment against the administrator for any deficiency remaining after such sale, and bars and forecloses the defendants, from the delivery of the commissioner's deed, of and from all equity of redemption and claim in said mortgaged premises. Boland having died, John Farnham has been appointed administrator of said estate, and substituted in place of Boland as defendant.

The note was due and payable, by its terms, one year after its date—that is, on February 21, 1894. The mortgage was acknowledged and certified so as to entitle it to be recorded, and it was recorded on February 23, 1893. Prior to the maturity of the note, and on or about March 29, 1893, said Annie F. Lennon died intestate. No proceeding for administration of her estate was commenced until the year 1900, when, on March 1, 1900, letters of administration of such estate were issued to P. Boland. Thereupon plaintiff presented for allowance the claim based on said mortgage, and the administrator having rejected the same, commenced this ⁵⁸⁰ action for foreclosure on May 10, 1900. Prior to the execution of said note and mortgage—viz., on January 9, 1892—said Annie F. Lennon had executed and delivered to said James H. Lennon a deed conveying to him the property covered by the mortgage, and on January 27, 1900, said J. H. Lennon executed and delivered to defendant James H. Boyer a deed of the same property. Neither of these deeds was recorded until January 31, 1900, when they were placed on record. Plaintiff had no knowledge or notice whatever of such deed from Annie F. Lennon to James H. Lennon or the deed from James H. Lennon to James H. Boyer, or that either of them ever claimed any interest in the property, until the date of such recordation. The record in this action establishes that at the time of the execution of the note and mortgage, the mortgaged property was, except for the deed of January 9, 1892, the separate property of Annie F. Lennon, and the title stood of record in her name until January 31, 1900. J. H. Lennon's only interest in such property was such as he acquired by said deed of January 9, 1892. The foregoing facts were alleged in the amended complaint and are established by the findings of the trial court. The defendants demurred to such complaint on the ground that the alleged cause of action was barred by the provisions of section 337 of the Code of Civil Procedure, and their de-

murrer having been overruled, pleaded such section as a defense in their answer. The trial court further found that said action is not barred by the provisions of any statute of limitations.

No claim is made by defendants that the action is barred as to the estate of Annie F. Lennon, the rule being well settled in this state that the statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued: *Smith v. Hall*, 19 Cal. 85; *In re Bullard*, 116 Cal. 355, 48 Pac. 219. As against the estate, the statute of limitations did not begin to run until the issuance of letters of administration, March 1, 1900, and this action was commenced May 10, 1900. So far as the estate was concerned, therefore, the judgment was clearly correct.

1. It is insisted that, on the admitted facts, plaintiff's cause of action is barred by the statute of limitations as to ⁵⁸¹ the defendant Boyer, whose rights in the property are based solely on the deed of conveyance made by J. H. Lennon to him in January, 1900.

The statute providing that an action upon any contract in writing executed in this state must be brought within four years from the time the cause of action accrues (Code Civ. Proc., sec. 337), there can be no doubt that defendants' claim that plaintiff's cause of action against J. H. Lennon as a joint maker of the note and a comortgagor with Annie F. Lennon became barred on February 21, 1898, is well founded. But this is an immaterial matter in this case. No recovery was sought or given against J. H. Lennon or his grantee, Boyer, based upon any liability of said Lennon as a maker of the note or mortgagor. They were made parties defendant solely upon the theory that they were subsequent grantees, claiming under a conveyance from the mortgagor, Annie F. Lennon, recorded subsequent to the recording of plaintiff's mortgage and prior to the commencement of action to foreclose the same, the sole object being to foreclose their rights under such conveyance. At the trial, the action was dismissed as to said J. H. Lennon, because of his conveyance to Boyer and the fact that he no longer claimed any interest in the property. If he had not conveyed the property and had remained a party defendant, the effect of the statute of limitations, if pleaded by him, would have been simply to protect him against personal judgment for any deficiency remaining due after sale of the premises, unless the plaintiff's cause of action

against him as a subsequent grantee was barred by the statute. And whatever protection the statute of limitations would have afforded him, purely as a subsequent grantee, his successors in interest are also entitled to. But they are entitled to nothing more.

Section 1214 of the Civil Code provides: "Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of the action." The term "conveyance," as used in this section, embraces every instrument ⁵⁸² in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered: Civ. Code, sec. 1215. Under the plain terms of section 1214 of the Civil Code, the conveyance of January 9, 1892, by Annie F. Lennon to James H. Lennon, which was not recorded until the year 1900, was void as against plaintiff's mortgage, recorded February 23, 1893, plaintiff being, as the findings establish, a mortgagee in good faith and for a valuable consideration. Such invalidity of the conveyance as to plaintiff continued certainly until it had notice thereof, which was not until the date of its record, January 31, 1900. In view of the explicit language of section 1214 of the Civil Code, the utmost that Boyer can reasonably claim is that the conveyance to James H. Lennon became effectual, so far as plaintiff's mortgage was concerned, on the day when such conveyance was recorded, plaintiff not having acquired actual knowledge thereof before such record. Then, if at all, he became a subsequent grantee, and the statute of limitations commenced to run in his favor as such. A conclusion that would import validity to such a conveyance, as against such mortgagee, prior to actual knowledge of the mortgagee thereof and prior to recordation, would be in the very teeth of the statute. The case of *Filipini v. Trobock*, 134 Cal. 441, 66 Pac. 587, is authority for the proposition that the recording of such conveyance from Annie F. Lennon on January 31, 1900, gave to it, as against the mortgagee, who had no prior actual notice thereof, the effect of a conveyance executed by the grantor on that day. Speaking of a deed executed prior to the mortgage, and recorded thereafter, the court said: "But we think there can be as little doubt that after she had recorded the

deed from Antonio to her deceased husband, her position as successor to her husband became, and continued to be, no better and no worse than if the deed had been made the day it was recorded. By recording the deed she gave the same notice to the mortgagee of her rights that would have been given by the record of a deed of that date to her, or to any other person, and whatever rights accrued to any purchaser of mortgaged premises by the recording of his deed accrued to her." The opinion in this case clearly indicates the conclusion compelled by the express terms of section 1214 of the Civil Code, viz., that the statute of limitations ⁵⁸³ cannot begin to run in favor of one claiming under an unrecorded conveyance as against a mortgage given subsequent to the execution and delivery of the conveyance, for a valuable consideration, which is first duly recorded, in the absence of actual notice of such conveyance to the holder of the mortgage, until such conveyance is recorded. We are, of course, not speaking of a case where the cause of action for the debt secured is barred as to the debtor, but only of a case where the cause of action is not barred as to the debtor, in this case Annie F. Lennon, and the protection of the statute is sought by one whose only claim is ownership of the land subject to the mortgage, under a conveyance executed by such debtor prior to the mortgage. In such a case, actual notice of his claim or the constructive notice afforded by the recording of his conveyance or other instrument forming the basis thereof, is essential to bring him within the rule of *Wood v. Goodfellow*, 43 Cal. 185, *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91, *Filipini v. Trobock*, 134 Cal. 441, 66 Pac. 587, *Brandenstein v. Johnson*, 140 Cal. 29, 73 Pac. 744, *Vandall v. Teague*, 142 Cal. 471, 76 Pac. 35, and *California Title Ins. etc. Co. v. Miller*, 3 Cal. App. 54, 84 Pac. 453. We are satisfied that the action was not barred by the statute as against Boyer. We have discussed this question upon the assumption that the general finding that the cause of action was not barred is a mere conclusion based on the specific facts found, which fully dispose of the issues as to the statute raised by defendants' answer.

2. Defendant Boyer contends that the doctrine of the law of the case is applicable on the question of the statute of limitations, and requires a ruling in his favor thereon. This contention is based on a decision of this court on a former appeal in this case from a judgment against him: *Hibernia etc. Soc. v. Boland*, 145 Cal. 626, 79 Pac. 365. The judg-

ment against Boyer was there reversed for the reason that there was no finding upon his plea of the statute of limitations, "nor of facts from which such finding may be inferred." It was said that a finding in plaintiff's favor on sufficient evidence upon the issue of the statute would have been sufficient to support the judgment. The all-important distinction between that appeal and this is that we now have findings, based on appropriate allegations of the amended complaint, of want ⁵⁸⁴ of notice on the part of plaintiff of the conveyance from Annie F. Lennon to James H. Lennon until the date of its recordation, January 31, 1900, a date within three months of the commencement of this action. This was essential under section 1214 of the Civil Code to meet the plea of the statute, and this element was lacking in the facts found by the trial court on the former trial. The former decision, therefore, does not assist Boyer on this appeal.

These are the only points made for reversal in the opinion brief of defendants. Some additional points are made for the first time in their closing brief. We are not disposed to look with favor upon a point so made, unless good reason appears for the failure to make it in the opening brief. This practice is not fair to a respondent, and tends to delay the final disposition of appeals. This court has heretofore said, that while it is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not, an appellant should, under the rules, make the points on which he relies in his opening brief, and not reserve them for his reply, and that the court may properly consider them as waived unless so made: *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048. This should undoubtedly be the rule where no good reason appears for the omission to make the point in the opening brief, and it does not appear that the appellant would be unjustly affected by a refusal to consider it. We think that it is properly applicable here. One of the points so made is that the evidence is insufficient to support the finding that the plaintiff was without notice of the prior deed from Annie F. Lennon to J. H. Lennon at the time it took the mortgage and loaned the money secured thereby, and that the trial court improperly refused to strike out certain evidence given on behalf of plaintiff on that issue. It is true, as contended by defendants, that the burden of proof was on plaintiff to show the negative fact of want of notice (*Bell v. Pleasant*, 145 Cal. 410, 104 Am. St. Rep. 61,

78 Pac. 957, and cases there cited), and it is also true that the evidence on this point is not as full and complete as it might have been. But there was competent evidence showing want of notice on the part of officers of plaintiff having to do with the passing of the title and the paying to ⁵⁸⁵ the mortgagors of the money loaned, and there was no pretense of an attempt on the part of the defendants to show knowledge by or notice to any officer or employé of plaintiff of the unrecorded conveyance. The record is such as to make it practically certain that there was no knowledge by plaintiff of the unrecorded conveyance until it was placed of record, and this is so even if the incompetent evidence quoted in the closing brief be disregarded. Under these circumstances, we believe the objections should be considered as waived by the failure of defendants to make them in their opening brief. The other point so made was that the court failed to specifically find on the issue raised by the denial of the allegations that James H. Lennon "joined in the execution of said note and mortgage as the husband of said Annie F. Lennon, solely, and not as the owner of any interest in said real property." It is sufficient to say that the findings on other issues fully cover this matter.

The judgment is affirmed.

Shaw, J., and Sloss, J., concurred.

Hearing in bank denied.

The Statute of Limitations does not Begin to Run against the estate of a decedent until an executor or administrator has been appointed, though the creditor might have petitioned for and procured such appointment if the next of kin unreasonably neglected to do so: Hoiles v. Riddle, 74 Ohio St. 173, 113 Am. St. Rep. 946, and see the cases cited in the cross-reference note thereto.

An Unrecorded Deed, while good as between the parties thereto, is ineffectual as against bona fide purchasers and encumbrancers: Bates & Co. v. Cobb, 29 S. C. 395, 13 Am. St. Rep. 742; Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250; Marling v. Nommensen, 127 Wis. 363, 115 Am. St. Rep. 1017. As to the burden of proof between prior and subsequent grantees in the case of an unrecorded deed, see Bell v. Pleasant, 145 Cal. 410, 104 Am. St. Rep. 61, and cases cited in the cross-reference note thereto.

DAUPHINY v. BUHNE.

[153 Cal. 757, 96 Pac. 880.]

LIBEL of Candidate for Office.—One may not assail the character of a candidate for office by charging him with criminal misconduct, and then escape liability on the ground that the charge was made with good intention and for justifiable ends, without malice and under the honest belief that it was true, and that the occasion of his candidacy called for the publication. (p. 140.)

LIBEL.—**Libelous Statement of Facts Respecting Candidates for Office** can be justified only by proving their truth. (p. 140.)

LIBEL is No More Justifiable when published about a candidate for public office than if published about him on any other occasion. (p. 140.)

LIBEL, Claim of Privilege, When a Question of Law.—When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged or not. (p. 141.)

LIBEL.—**An Article is Libelous on Its Face** if it charges the plaintiff with official corruption and with dishonestly agreeing to accept personal benefits as a consideration to use his official office upon a matter before a legislative body of which he was a member. (p. 141.)

LIBEL—Charge, When Libelous Per Se.—A charge against a public officer imputing want of integrity or corruption in the discharge of his official duties is actionable of itself. (p. 141.)

LIBEL, Justification, When may be Considered in Aggravation of Damages.—The court should instruct the jury that if defendant in an action for libel reiterated the alleged libel in his answer, but offered no evidence to prove the truth of his charge, and the jury are satisfied that it was made with a knowledge of its falsity, and malicious, and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff and may be considered in assessing the damages. (p. 142.)

LIBEL, Instruction Respecting Damages, When Improper.—The court, on the trial of an action for slander, should not instruct the jury that an honest mistake made in an honest attempt to enlighten the public must reduce the damages to the minimum if the fault itself is not serious. It is not the province of the court to say to the jury that the damages shall be so reduced in a case where more than the minimum may be awarded as actual damages. (p. 142.)

APPEAL AND ERROR—Duty of Counsel to Specify Where Errors may be Found.—It is the duty of counsel to specify where the alleged errors on which they rely may be found in the transcript, and if they do not see fit to do so, the court will not assume that burden. (p. 143.)

A. W. Hill, for the appellant.

Henry L. Ford, L. M. Burrell and A. J. Monroe, for the respondent.

759 LORIGAN, J. This is an action for libel. In the early part of 1901 plaintiff was a member of the firm of A. C.

Dauphiny & Company, doing a general merchandise business in the city of Eureka, and both he and defendant were members of the common council of said city. At that time there was presented to the council petitions by various railroad companies for franchises to operate their roads across the city front of the city. Among these petitioning companies was the California and Northern Railroad Company. Diverse views were held by members of the council as to the terms and conditions upon which these several franchises should be granted, plaintiff opposing for a long time the granting of the franchise to the California and Northern Railroad Company, defendant favoring it. Ultimately this franchise was passed, plaintiff and defendant both voting in favor of it, and it developed from the evidence on the trial that it was concerning the action of plaintiff relative to the passage of the ordinance granting this franchise that the article published by defendant of plaintiff had reference. Subsequently, and in the month of June, 1901, plaintiff and defendant were both candidates for re-election as councilmen from their respective wards in the city of Eureka. They were not opposing candidates, but each openly opposed the re-election of the other. It was during this period that the defendant caused to be published in the "Daily Humboldt Standard," a newspaper published in the city of Eureka, an article entitled: "From Councilman Buhne of the First Ward," signed in the same way and containing the following: "Now, Mr. Dauphiny, . . . did you have the city's interest at heart when, after fighting a certain franchise, you went to the company seeking it, or its representatives, ⁷⁶⁰ and told them that if they would buy groceries from you you would vote for the franchise? I know you did this and can prove it, and you voted for the franchise." Plaintiff thereupon brought this action for damages grounded upon the portion of the article just quoted, which was set forth in the complaint, accompanied by proper allegations that it was intended by defendant, and understood by the citizens who read the article, to charge that plaintiff had violated his official oath and been guilty of official corruption; that he had solicited personal benefits and had dishonestly accepted them for the purpose of influencing his official action as a member of the council of the city, and had corruptly bartered and legislated away the rights and privileges of said city; with the further allegation that said article so published was false and malicious.

Defendant answered, admitting the publication, and as a first defense averred that it was true, and, as a second defense: "That at the time the defendant published the alleged defamatory article in the 'Daily Humboldt Standard,' to wit, on June 15, 1901, the said plaintiff was the member of the city council from the fourth ward, and this defendant was the member of said city council from the first ward of said city of Eureka. That at the said time, to wit, June 15, 1901, both plaintiff and defendant were candidates for the same offices, to wit, as members of the city council of the city of Eureka to be elected at the general election which was held in the said city of Eureka on or about the 16th of June, 1901.

"That defendant wrote and published said article, without malice, of and concerning the character and motives of a candidate for a public office, and for the promotion of public interests and public welfare; that this defendant and all other people, citizens and electors of said city of Eureka, were interested in the character and motives of all candidates for public offices and public trusts, which said candidates were seeking at the hands of said electors."

The case was tried and a verdict rendered by the jury in favor of the defendant, and from the judgment entered thereon, and from an order denying his motion for a new trial, plaintiff appeals.

It is insisted on this appeal that the evidence was insufficient to warrant the verdict against plaintiff, and that a new ⁷⁶¹ trial should have been granted by the lower court on that ground; also, that the court erred in refusing instructions asked by appellant, and in giving some requested by the respondent.

As a new trial must be had for error as to instructions, it is unnecessary to embarrass future consideration of the case by discussing the sufficiency of the evidence. Different or other evidence may be presented upon the new trial which must be ordered.

It will be observed that two defenses were interposed by defendant: 1. A justification on the ground that the charge as published was true; 2. That the article published by him, under the circumstances alleged, constituted a privileged publication under section 47 of the Civil Code, which relieved him from responsibility to plaintiff.

As the jury, while satisfied that the charge published was untrue, might yet have found it to be privileged under the instructions of the court and based their verdict upon that

ground, it becomes important to consider the instructions as to the law on that subject.

Section 47 of the Civil Code, relating to privileged publications, declares that, "A privileged publication is one made 3. In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent, or who is requested by the person interested to give the information."

The defense of privilege which the defendant pleaded and under the evidence introduced by him sought to sustain was made and offered with a view of bringing the publication within the operation of subdivision 3 of said section.

As to the evidence, it was conceded that the plaintiff was a candidate for councilman when this publication was made, and the defendant testified in his own behalf that he entertained no malice against the plaintiff when he caused the charge to be published; that he published the article, as he said, with the intention of stating things concerning plaintiff which he believed to be true, and because he believed the public generally should know what kind of a man the plaintiff was.

⁷⁶² This was the only evidence upon which the claim of privilege was based. The theory of defendant, both under his pleading and this evidence, was that because the plaintiff was a candidate for public office, he had a right, as a member of the community, to call the attention of the public to the character and motives of plaintiff as such candidate; that these were matters in which the public had a direct interest; that under these circumstances, as long as the publication was made without actual malice, and in a belief that the charges were true, it was a privileged publication under the subdivision of the section referred to, even though, in fact, the charge was false.

The trial court accepted this theory and claim of the defendant, and upon the assumption that there was evidence which would support a finding by a jury that the publication was privileged, instructed them upon the law as to that subject. The court read to the jury that particular portion of the section of the Civil Code which we have quoted, and, having done so, immediately proceeded further to instruct as follows:

"I therefore instruct you that if you find from the evidence in this cause that the alleged publication was made by the

defendant without malice, upon a matter in which he was interested to a person or persons who was or were also interested therein, or who being interested therein, requested him to give such information, then I instruct you that such communication to such person or persons was and is a privileged communication. If you find such to be the fact, then such communication forms no basis for an action, and you will find a verdict for the defendant, unless you can also say that the defendant, in making the publication, was actuated by malicious motives independent of the mere publication of the article in question."

It was error to give this instruction, because there was no evidence in the case at all warranting it. All the evidence relied on by the defendant in support of his claim that the publication was privileged had no tendency to support it. There was no evidence under which this instruction was applicable.

It is not the law that a person may assail the character of a candidate for office by charging him with criminal misconduct ⁷⁶³ and then escape liability on the ground that the charge was made with good intentions and for justifiable ends without malice, and under even an honest belief that the charge is true, and that the occasion of his candidacy called for its publication. While the privilege of electors to comment and criticise the acts and conduct of candidates for public places is very large, this privilege must be confined to statements of the truth. There is no privilege of publication under the code, or general law, which will exempt one from responsibility for falsehood. The only justification one can make who publishes criminal accusations against a candidate is, when he is called to account, to prove the truth of the accusation. Libel is no more justifiable when published about a candidate for public office than if published of him on any other occasion. His reputation and character are as much entitled to protection against false accusation when he is a candidate for office as at any other time. It is true that when a person becomes a candidate for a public office his talents and qualifications for the office to which he aspires may be freely commented on and criticised by any member of the community by publication or otherwise. His faults or his vices, in so far as they may affect his official character, may be freely discussed. He does not, however, by becoming a candidate surrender his private character as a subject for false accusation. That character is only put in issue as far

as his fitness or qualification for the office he seeks may be affected by it. The public have an interest in knowing the truth about those who occupy or seek public office, but it has no interest in having falsehoods concerning them disseminated. Hence, publication of the truth, with an honest intention of giving information to the public of a candidate, furnishes no ground for complaint. But it is one thing to publish the truth and quite another to publish falsehoods; the publication of the truth is justifiable, but the publication of a falsehood finds no justification whatever under the law. While facts may be published, falsehoods may not, and he who would justify a charge of specific acts of misconduct against a candidate for office must do so by proof of the truth of the charge or he does not justify at all. The law does not permit the character of those seeking position to be destroyed by libelous charges under any guise ⁷⁶⁴ of privileged publication. One can justify the publication of a libel against a candidate for office upon privilege only by proof that the accusation is true. This is the rule unqualifiedly laid down by this court in *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216, where the subject will be found fully discussed.

It may be said, too, while considering this instruction, that had the plaintiff requested it, it would have been the duty of the court to have instructed the jury that the publication made by the defendant, under the circumstances disclosed by the evidence, was not privileged. When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged or not. In the case at bar, the facts and circumstances under which the alleged libelous publication was made were not disputed. They showed that the publication was not privileged, and had the court been requested, it should have so instructed the jury: *Carpenter v. Ashley*, 148 Cal. 422, 83 Pac. 444. The fact, however, that no such instruction was asked did not make it any the less error to give the jury an instruction on the theory that there was evidence upon which they might find the publication was privileged when in fact there was not.

It is also insisted by appellant that the court erred in refusing to instruct the jury, as requested by him, that the article set forth in the complaint was libelous on its face. This point is well taken, as the court should have given that instruction. The article charged the plaintiff with official corruption; with dishonestly agreeing to accept personal ben-

efits as a consideration to influence his official acts upon the matter which was before the legislative body of the city of Eureka of which he was a member. A charge against a public official importing want of integrity or corruption in the discharge of his official duties is actionable of itself: *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216.

The court should have likewise given another instruction asked by plaintiff, but which was refused. This instruction was to the effect that where a defendant reiterates the alleged libelous charges in his answer and offers no evidence to prove their truth, and the jury are satisfied that it is made with a ⁷⁶⁶ knowledge of its falsity and maliciously, and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff, and may be considered by the jury in assessing damages. This instruction was correct and should have been given: *Chamberlain v. Vance*, 51 Cal. 75; *Westerfield v. Scripps*, 119 Cal. 607, 51 Pac. 958.

It is further insisted by appellant that one of the instructions given at the request of respondent was erroneous. In that instruction, the court told the jury that: "The public are interested in knowing the character of candidates for office; and while no man can willfully destroy the reputation of a candidate by falsehood, yet, if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum if the fault itself is not serious, and there should be no reasonable responsibility where there is no malice."

This instruction was undoubtedly taken from language used by the court in *Baily v. Kalamazoo Publishing Co.*, 40 Mich. 251, where the court was discussing the right to criticise the conduct of a candidate for office and the responsibility therefor. At least, we find the language used there, although inaccurately copied in the instruction as to the latter part of it. In that case the words used are: "There should be no unreasonable responsibility where there is not actual malice," instead of "no reasonable responsibility where there is no malice," as the instruction has it. It is always injudicious to take the language of a court in discussing a proposition of law as correct instruction to be given to a jury. General language is often there used which would be inappropriate as an instruction, and this instruction is an illustration of it. The particularly objectionable part of the instruction is found in the use of the language "it must reduce the damages to a

minimum." It is not the province of a trial court to say to a jury "if an honest mistake is made in an honest attempt to enlighten the public, it must reduce the damages to a minimum." This does not at all follow. Minimum as applied to damages means the least possible amount that may be awarded by a jury, but under the circumstances such as the court referred to in its instruction, the jury might award much more than the minimum as actual damages. This is too clear for comment. Of course, as to the rest of the instruction 766 which was incorrectly copied, it is hardly worth discussing it, on account of the emasculated condition in which it was given. There could be, however, no necessity or propriety in giving it if it had been correctly copied. What the responsibility should be is a question purely for the jury, to be determined by them under instructions explicitly declaring the rule under which it should be ascertained. There is responsibility for substantive damages—damages for loss of reputation and so forth—even where there is no actual malice in the mind of the accuser when he makes the defamatory charge. There is no necessity on a new trial for giving this instruction at all, even if modified by omitting the objectionable features we have pointed out. As it stood, it only had application to the matter of mitigation of damages, and the rule in that respect, as laid down in other instructions, seems to be full enough, or, at least, is not challenged by appellant as being incorrect in law.

Some alleged errors in rulings upon the admissibility of evidence are claimed to have been committed by the court. The transcript embodies a bill of exceptions containing all the evidence set out by question and answer, and is quite lengthy. But the transcript itself does not contain any index of where the testimony of any witness may be found. Neither in the briefs of counsel for appellant is it indicated where, nor in what part of the bill, the questions objected to, and the rulings of the court upon them, may be discovered. He contents himself with setting forth in a page or so in his brief a lot of questions which he claims the court erred in overruling his objections to. We are not even enlightened on the subject as to whether the questions were answered or not. It is the duty of counsel to point out specifically where alleged errors, upon which they rely, may be found in the transcript, and if counsel do not see fit to do so, it will be assumed that they have not deemed them of sufficient merit or importance to undertake the task. In any event, under such circumstances, this court will not assume the burden of doing it.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Henshaw, J., and McFarland, J., concurred.

Libelous Statements Concerning Candidates for Office are discussed in the notes to *Holmes v. Clisby*, 104 Am. St. Rep. 133; *Aldrich v. Press Printing Co.*, 86 Am. Dec. 88. The fact that one is a candidate for office affords in many instances a legal excuse for publishing language concerning him as such, for which publication there could be no legal excuse if he did not occupy that position: *Nichols v. Daily Reporter Co.*, 30 Utah, 74, 116 Am. St. Rep. 796.

As to What Words are Libelous Per Se, see the note to *Nichols v. Daily Reporter Co.*, 116 Am. St. Rep. 802.

Newspaper Libel is the subject of a note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333.

Justification in Actions for Libel and slander is the subject of a note to *Rutherford v. Paddock*, 180 Mass. 289, 91 Am. St. Rep. 285.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

**UNION DEPOT AND RAILWAY COMPANY v. MEEK-
ING.**

[42 Colo. 89, 94 Pac. 16.]

RAILROADS—Discrimination Against Hackmen.—A railroad or depot company owning a passenger station for the accommodation of railway travelers may lawfully exclude hackmen or carriers of baggage from entering thereon to ply their vocation, while it gives to others permission so to do. (p. 149.)

Wolcott, Vaile & Waterman and Dorsey & Hodges, for the plaintiff in error.

No appearance for the defendants in error.

90 CAMPBELL, J. The defendant corporation was organized under the laws of this state for the accomplished purpose of acquiring and maintaining in the city of Denver a union depot or passenger station, which is situate near the terminal points of several railroads to which defendant furnishes the usual facilities of a depot or passenger station for the accommodation of the traveling public. The plaintiffs are licensed hackmen, conducting in this city the business of carrying passengers and baggage for hire, particularly to and from this union depot.

About twenty-five years before the beginning of this action, the fire and police board of the city of Denver, and defendant's grantor, designated a certain strip of land leading from Wynkoop and Seventeenth streets into the union depot as a hack stand, and permitted plaintiffs and other hackmen in the city of Denver to occupy it for such purpose. Shortly

before this action was begun plaintiffs were ordered by defendant no longer to occupy this strip of ground as a stand for their hacks, and immediately to vacate the same, and not to enter thereon to receive or discharge passengers destined to or leaving the union depot.

⁹¹ In the complaint in which the foregoing facts are alleged, plaintiffs say that this strip of ground is a part of the public highway, and belongs to the city and county of Denver, and the defendant has no control over it, or interest in it. It is further averred that if defendant carries out its threats to exclude plaintiffs therefrom while awaiting the arrival of travelers, or ejects them from these premises, or impedes or annoys them in the conduct of their business as they have theretofore conducted it for a long time, they and the public at large, particularly such portion of the public as are from time to time traveling on trains running into the depot, will suffer great loss, inconvenience and damage which is incapable of being estimated. Therefore, they pray for an injunction to restrain defendant from excluding them from occupying the premises, or ejecting them therefrom, or preventing them from using the same as they had theretofore been accustomed to do.

Defendant filed an answer and plaintiffs a replication, and upon issues thus joined hearing was by the court without a jury. Special findings of fact were made, from which the court concluded that the equities were with plaintiffs, and upon such findings rendered a decree enjoining defendant from discriminating against plaintiffs in favor of a corporation to which defendant had granted the privilege, which plaintiffs claimed as a legal right, of entering upon defendant's grounds, and there soliciting patronage.

It would seem that the case, as made by the complaint, was not, in all respects, proved by the evidence or upheld by the findings. No objection was made by defendant at the trial to the departure, and no error is assigned or argued to the variance between the allegations of the complaint and the proofs. Both parties apparently consented to have the law applied to the facts as found by the court, though ⁹² they are not the facts which the plaintiffs allege in their complaint as their cause of action. We mention this, not because our decision is in any way affected by it, but as a reminder that we have not overlooked it.

We proceed, therefore, to dispose of the cause on the special findings of fact. So far as they are material to the question of law involved, these findings are that this strip of land

which plaintiffs and other hackmen have for a long time been accustomed to use as a hack stand, and from which the complaint alleges that defendant has ordered them to withdraw, and threatened to eject them from the same if they occupied it, is not, as the complaint alleges, a public highway, but, as the answer says, the private property of defendant. There was a finding that the chief of police of the city of Denver, with the license and consent of defendant's grantor, designated this strip as a hack stand, and that it had been so used by plaintiffs and others in the conduct of their business in carrying passengers to and from the depot, and that defendant had notified the hackmen, including plaintiffs, that they could no longer use this strip of land for the purpose of a hack stand, or to solicit patronage thereon. The important finding of fact, on which it based the decree, was stated by the court in the following language:

"The court further finds that the defendant, the Union Depot and Railway Company, has entered into a certain contract between itself, the defendant company, and the Denver, Omnibus and Cab Company, conferring upon and granting to the said the Denver Omnibus and Cab Company, the exclusive privilege of entering with its hacks upon the grounds of the defendant company, and using the same, and particularly the strip of land above referred to, for the purpose of carrying on its business as an omnibus ⁹³ and cab company, and there soliciting the patronage of incoming passengers, to the exclusion of the plaintiffs from the right to a similar entry upon and use of the premises of the said defendant company."

The court also made a finding—which seems to be rather a conclusion of law—that the exclusive right to solicit business from incoming passengers, and standing their hacks or vehicles on this strip of land, would give to the one who enjoyed the same an advantage over other hackmen or busmen who were excluded therefrom, and that such exclusive contract operated as a discrimination in favor of the Denver Omnibus and Cab Company against the plaintiffs, and tended to create a monopoly in its favor.

It was upon this supposed unlawful discrimination against plaintiffs in favor of the cab company, to which the exclusive privilege was given, that the court concluded, as a matter of law, that the equities were with plaintiff, and rendered a decree prohibiting defendant company from enforcing the contract that purported to confer the privilege.

The finding above quoted may be ambiguous, since it might be inferred therefrom that the purpose of defendant was to exclude plaintiffs from entering upon the depot grounds, or into the passenger station, while engaged in carrying passengers and baggage to and from the same. The answer, however, expressly denies that such was its purpose or intention, and there is an express averment therein that plaintiffs, and each of them, were notified that they might at all reasonable hours and times enter the depot and upon the depot grounds as the agents or representatives of persons whom they, or any of them, had contracted to deliver at, or carry from, the depot. The finding evidently meant that defendant's purpose was and is to prevent plaintiffs from using its grounds as a place for standing their vehicles,⁹⁴ or as a place whereon to solicit patronage, while it conferred upon, and granted such rights to, the Denver Omnibus and Cab Company.

But we think the court did not intend to find that defendant had ordered, or threatened to order, plaintiffs not to enter upon its premises to deliver or receive passengers. The plaintiffs made such an allegation in the complaint, but they produced no evidence whatever to prove it, while defendant's superintendent positively testified that no such order of exclusion had ever been made or threatened; but, on the contrary, plaintiffs were specifically told they might enter upon its premises freely at all reasonable hours, both to receive incoming and to deliver outgoing passengers. And that this is so becomes plain when it is considered that there is no clause in the decree which restrains defendant from refusing plaintiffs free access to its grounds to carry passengers to and fro, obviously because there was no evidence that such was its intention, while the only acts it is enjoined from doing are such as tend to obstruct plaintiffs in their claim of right to use the designated strip of land as a hack stand, and as a place where they might freely ply their vocation. The question of the right of plaintiffs to free access to the depot for taking thereto departing or receiving arriving passengers with whom plaintiffs might have a contract of carriage is not in this case. Such right is not questioned, but directly recognized by defendant.

The vital question, then, in the case, and the only one determined below, may thus be stated, May defendant lawfully permit the Denver Omnibus and Cab Company to have the sole right to stand and solicit patronage upon the premises of the defendant, and exclude all other hackmen from standing and soliciting thereon?

⁹⁵ The question is one of first impression in this jurisdiction. It has been ruled differently by different courts. Some of the earlier cases, apparently based upon the ruling of the supreme court of New Hampshire in *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, hold that such a contract as that which the defendant here made with the Denver Omnibus and Cab Company, and the purpose of defendant to exclude plaintiffs from soliciting patronage in or upon the depot building and grounds, are in violation of the legal rights of plaintiffs, and in disregard of the supposed public duty of a railroad or depot company to furnish equal facilities to all having business with it.

The later and better reasoned cases hold that, as the owner of property, in the exercise of his dominion over it, may invite one to enter upon and occupy it and exclude all others, so a railroad or depot company owning a passenger station or depot for the accommodation of travelers upon railroads may lawfully exclude some hackmen or carriers of baggage from entering thereon for the purpose of there plying their vocation, while it gives to others permission so to do.

The supreme court of New Hampshire, though at first holding that such public corporations might not thus exclude common carriers from their premises, or discriminate in favor of one, in a late case (*Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811) has taken the opposite view, and in an instructive opinion by Walker, J., has reviewed the leading authorities pro and con, and settled the law for that state in favor of such action as the depot company here is charged with.

After the decree of the lower court was entered herein, the precise question which is now before us was decided in *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. Rep. 91, 50 L. ed. 192, in a writ of certiorari to the judgment of the United ⁹⁶ States circuit court of appeals for the seventh circuit, the opinion in which is reported in 120 Fed. 215. We forbear citing other authorities which sustain our conclusion, since in the opinions of the courts in these cases just referred to all of the cases upon this subject are collated, and many of them are exhaustively reviewed. The opinion of Mr. Justice Harlan, of the supreme court of the United States, is so entirely in point and conclusive upon every feature of the case in hand that it would be presumptuous upon our part to enter upon an independent discussion of the law of the case. The decision of that august tribunal is controlling with us, not merely because of the reasoning of the opinion, but because

the question determined is the same there as here. The entire opinion is pertinent, but one or two excerpts will show the grounds for the decision. In answer to the argument of counsel for the excluded hackmen, based upon the public functions and duties of railroad companies which are said to forbid them to discriminate in favor of one hackman against another, and after stating that a railroad or depot company must devote its property primarily to public use to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway, the court said:

“It by no means follows, however, that the company may not establish such reasonable rules, in respect to the use of its property, as the public convenience and its interests may suggest; provided, only, that such rules are consistent with the ends for which the corporation was created and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ⁹⁷ ownership it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.

“Applying these principles to the case before us, it would seem to be clear that the Pennsylvania company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers. It was, therefore, its duty to see to it that passengers were not annoyed, disturbed or obstructed in the use either of its station house or

of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily as we may assume from the record—that the Pennsylvania company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable or arbitrary; on the contrary, it is easy to see how, in a great city and in ⁹⁸ a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business."

There was no finding here that defendant's arrangement with the cab company was inadequate for the accommodation of passengers arriving at or departing from the union depot, and there is nothing in the record to show that it was. Neither was there any such showing in the Donovan case (199 U. S. 279, 26 Sup. Ct. Rep. 91, 50 L. ed. 192), but Mr. Justice Harlan, in response to the argument of counsel for the complaining hackmen in that case that the traveling public were inconvenienced by a similar arrangement, and this constituted a part of their grievance against the railway company, said, what is pertinent to the precise contention of the hackmen here as well as to the particular argument there:

"The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of passengers was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in no wise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its station or cars for the ⁹⁹ purpose simply of soliciting the custom of passengers; but, of course, a passenger upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary."

The judgment of the district court being in conflict with the conclusion which we have reached, it is reversed and the cause remanded, with instructions to the district court to vacate the decree heretofore rendered and dismiss the action.

Chief Justice Steele and Mr. Justice Gabbert concur.

The Question Whether a Railroad Company may Grant an Exclusive Privilege to certain hackmen to enter its premises in order to ply their vocation is discussed in the note to *Kalamazoo Hack & Bus Co. v. Sootsma*, 22 Am. St. Rep. 699. Some authorities answer this question, as did the Colorado court in the principal case, in the affirmative: *New York etc. R. R. Co. v. Seoville*, 71 Conn. 136, 71 Am. St. Rep. 159. Other authorities, however, answer it in the negative: *State v. Reed*, 76 Miss. 211, 71 Am. St. Rep. 528; *Hedding v. Gallagher*, 69 N. H. 650, 76 Am. St. Rep. 204.

WOLFE v. CHILDS.

[42 Colo. 121, 94 Pac. 292.]

VENDOR AND VENDEE.—A Grantee in a Bond for a Deed who assigns his interest in the bond to third persons becomes a trustee of such interest in their favor, and on the conveyance of the legal title he holds it for their benefit. (p. 155.)

VENDOR AND VENDEE—*Bona Fide Purchaser.*—Where one of the tenants in common in a mining claim executes a bond for a deed to a person who thereafter assigns a half interest in the bond, the bond and assignment being recorded, and subsequently the grantee in the bond obtains a conveyance of the legal title, his successor takes subject to the rights of his assignees and holds the legal title in trust for them. (p. 156.)

TENANTS IN COMMON—*Right to Contribution.*—A tenant in common of a mining claim who, without the consent of his co-tenants, incurs expense in prospecting, cannot demand contribution from them; but a tenant operating mining property may, when called upon to account for profits, set off as against a nonoperating tenant the cost of improvements which were necessary and enhanced the value of the common property. (p. 157.)

COTENANCY—*Compensation for Care of Property.*—Tenants in common are not entitled to compensation from one another for services rendered in the care and management of the common property, in the absence of an agreement to that effect. (p. 157.)

Hodges, Wilson & Hodges, for the plaintiffs in error.

John F. Mail, for the defendants in error.

122 **GODDARD, J.** This action was commenced by Minnie B. Childs, administratrix of the estate of Charles D. May, deceased, against the other defendants in error, alleging a tenancy in common in the St. Louis lode mining claim, and

that defendants Zobel, Sullivan and other defendants had wrongfully extracted ore therefrom, and prayed for an accounting. Plaintiffs ¹²³ in error intervened, claiming ownership of an undivided one-eighth interest in said claim through conveyance by James M. Patrick, one of the original locators, and the ownership in equity of an undivided one-eighth interest acquired through an assignment of a one-half interest in a certain bond for a deed executed by Daniel Smullen, another of the original locators, to W. F. Patrick; and alleged that defendant in error Zobel had, through operating and leasing said property, received a large amount of money which he had applied to his own use, and which he refused to account for; prayed for a determination of their interest in the claim, and an accounting for the moneys received.

In answer to the petition of intervention, the defendants in error admit that interveners own the one-eighth interest in the property derived from J. M. Patrick, but deny their ownership of the one-eighth interest alleged to have been derived through William F. Patrick from Daniel Smullen. Defendant in error Zobel denies that he has wrongfully worked the property, and avers that he rightfully extracted ores therefrom, and that his expenditures upon the property in so doing exceeded the amount received from ores so extracted, and claims a large balance due him for such expenditures; prays an accounting and judgment against interveners for their proportionate part of such expenses.

A referee was appointed to take testimony and report findings of fact and conclusions of law. In lieu of the findings and conclusions of the referee the court made findings of fact and rendered a decree thereon adjudging that interveners were the owners of an undivided one-eighth interest in the property, instead of an undivided one-fourth interest, as claimed by them. The facts upon which the court based its conclusion that they were not the equitable ¹²⁴ owners of the one-eighth interest claimed by virtue of the assignment to Chase of the one-half interest in the bond for a deed executed by Daniel Smullen to W. F. Patrick, are set forth by the court in its findings as follows:

“4. That on or about the fifth day of September, A. D. 1879, one Daniel Smullen, being then and there the owner of an undivided one-fourth interest in and to said lode mining claim, executed and delivered to said W. F. Patrick a certain bond for deed, wherein and whereby the said Daniel Smullen agreed to convey by good and sufficient deed an un-

divided one-fourth interest in and to the said St. Louis lode mining claim upon condition that the said W. F. Patrick should within one year from the date hereof pay to the said Smullen the sum of \$850, which said bond contained the following provisions, to wit:

“ ‘I hereby agree that the said W. F. Patrick shall, on the expiration of this bond, have the privilege of renewing it for a further term of one year, or until the title of the claim is settled by law, on payment to me of \$100 on or before the fifth day of September, 1880,’ which bond was duly recorded on the seventeenth day of September, A. D. 1879.

“5. That on or about the twenty-third day of September, A. D. 1879, the said W. F. Patrick, in consideration of \$50 paid to him, receipt of which was acknowledged, did assign and set over to one Henry J. Chase, trustee, a one-half interest in and to said bond, which said assignment was evidenced by an instrument in writing executed on the day last aforesaid, and duly recorded on the twenty-third day of September, A. D. 1879.

“6. The court further finds that on the twenty-third day of August, A. D. 1880, the sum of \$100 was paid by J. M. Patrick, as agent for W. F. Patrick, to the said Smullen; that said payment is evidenced ¹²⁵ by a certain receipt in writing given by the said Smullen to the said J. M. Patrick on the twenty-third day of August, A. D. 1880; that the same was duly recorded on the seventh day of September, A. D. 1880; which said receipt is in words and figures as follows, to wit:

“ ‘ST. LOUIS, August 23, 1880.

“ ‘Received of William F. Patrick, by the hands of James M. Patrick, the sum of \$100 in full for the sum to be paid by him to entitle him to an extension of one year from September 5th, 1880, of a certain bond executed by me to him for the conveyance of a one-fourth interest in the St. Louis mining claim, situated in Lake county, state of Colorado, and described in said bond. Said bond bears date September 5th, 1879.

DANIEL SMULLEN.’

“That there is no evidence concerning any contract made on the date of said payment, or at all, with reference to said payment or the effect thereof.

“7. The court doth find that on or about the twenty-sixth day of November, A. D. 1881, the said Daniel Smullen conveyed to said W. F. Patrick the said undivided one-fourth interest in and to the said St. Louis lode mining claim for a

consideration of \$850, and that the mining deed evidencing such conveyance was duly recorded on the first day of December, A. D. 1881, . . . and there is no evidence of the date when said consideration was paid other than the instrument itself.

"8. That the litigation involving the title to said St. Louis lode mining claim, which had been initiated before the giving of said bond, was not settled until after the twenty-sixth day of November, A. D. 1881.

"9. That said W. F. Patrick retained the legal ¹²⁶ title to said Smullen interest from the said twenty-sixth day of November, A. D. 1881, until, to wit, the seventh day of May, A. D. 1889, upon which date said W. F. Patrick, for and in consideration of the sum of one dollar, executed his mining deed conveying all of said interest to one Charles D. May; that said Charles D. May purchased said interest with actual and constructive notice of the execution of the aforesaid bond, the assignment of a one-half interest to Henry J. Chase, trustee, the payment of \$100 by James M. Patrick for W. F. Patrick on the twenty-third day of August, A. D. 1880, and the language of the said receipt; that said May conveyed a one-third of said interest to said August Zobel, which is still retained by him, and one-third of said interest to said A. B. Sullivan, which interest is now vested in said the Julia L. Real Estate, Loan and Investment Company, and the interest retained by said May was included in the conveyance from said May to the Julia L. Real Estate, Loan and Investment Company, hereinafter referred to."

1. We do not think that in this state of facts the conclusion reached by the court as to the ownership of the one-eighth interest derived by Patrick from Smullen is correct. By the assignment of the one-half interest in the Smullen bond, Chase became the equitable owner of that interest, and was entitled to receive the legal title thereto in the event that Patrick acquired the legal title to the undivided one-fourth interest from Smullen through and in pursuance of the terms of the bond. In other words, Patrick, by his partial assignment of the bond to Chase, became trustee of the interest so assigned, and upon the conveyance of the legal title to him by ¹²⁷ Smullen under and by virtue of the bond, he was vested with, and became trustee of, such title for the benefit of Chase to the extent of the interest acquired by him through such assignment, and continued to hold the legal title in trust until he parted with the same on the seventh of May, A. D. 1889, and, therefore, the defendants in error that succeeded

to Patrick's title with actual and constructive notice of Chase's rights, took the same subject to such rights, and held the legal title in trust for him and his associates.

This conclusion, of course, is based upon the condition that Patrick acquired the title to the undivided one-fourth interest under and by virtue of the terms of the bond. That he did so acquire it, and that Smullen executed a deed on the 26th of November, 1881, in pursuance of, and to carry out, the obligation of his bond, which he recognized as in force at that time, are manifest from the consideration paid, and all the circumstances attending the transaction.

Assignments of error Nos. 2, 5 and 6 are, therefore, well taken.

2. Zobel, as owner of an undivided interest in the mine, under an agreement with A. B. Sullivan and the Julia L. Real Estate, Loan and Investment Company, but without the consent and after the refusal of interveners to join with him therein, operated the mine from the 1st of May, 1898, until October 31, 1902, and leased parts of the property containing ore bodies to certain lessees. As to the character of the work done by him, and the amount expended therefor, and the value of the ore extracted by him, and the amounts received as royalties, the court finds as follows:

"14. That said Zobel, prior to the first day of September, A. D. 1901, did considerable development work upon said property in the way of driving ¹²⁸ drifts, tunnels and winzes for the purpose of exploiting and developing the same. . . .

"15. That subsequent to the twelfth day of April, 1898, the said Zobel had expended upon said property for development work, as aforesaid, the sum of \$4,969.50; that part of said expenditure was for necessary work to the actual mining of ore aforesaid; that part of said work was nonproductive and done on a part of the property remote from where the ore sold was mined, but was legitimate development and prospecting work in a part of said property that has yielded no income; that said Zobel performed personal services, expended labor and time in the course of said work of a reasonable value of two thousand one hundred and eighty dollars and ninety cents (\$2,180.90)."

And further finds that Zobel received from the ore extracted by himself and in royalties the sum of \$9,953.06, and finds, as a conclusion of law, that he, Zobel, is entitled to retain the proceeds of the ore taken from the mine to the amount of \$4,969.50 expended as aforesaid, and \$2,180.90 for his personal services, and that the balance of \$2,847.70 only

should be credited and paid to the respective interests in the mine, the amount so credited to the interveners being the sum of \$355.97.

The interveners contend that the conclusion of law announced by the court upon the facts as found by it is erroneous, for two reasons:

1. That a portion of the work, as the court expressly finds, for which such expenditure was made, was "nonproductive and done on a part of the property remote from where the ore sold was mined"; that it was simply prospecting, that resulted in no improvement of the property or benefit to the interveners, and was a character of work for which Zobel was entitled to no credit.

- ¹²⁹ 2. That it erroneously allows Zobel compensation for his personal services.

We think it is clear, from the finding of the court below, that a portion of the expenditure for which Zobel was allowed credit was made in doing work for which he was not entitled to contribution from these interveners. As was said in *Stickle v. Mulrooney*, 36 Colo. 242, 87 Pac. 847: "It appears to be well settled that one co-owner, without the consent of the other co-owners, cannot demand from the co-owners, who have not joined with him or in some way given their consent to the development or prospecting in mining property, remuneration for expenses incurred in so prospecting or developing the common property."

While the operating tenant may, in case he is called upon to account for profits, set off as against a nonoperating tenant the cost of the necessary improvements, he must show that such improvements were necessary, and added to and enhanced the value of the common property. A portion of the expenditure for which credit was allowed Zobel was, we have seen, not of this character. What portion it is impossible to determine from the findings of the court, it appearing therefrom that part of the expenditure was for work which resulted in the development of the ore body which was opened at the time interveners acquired title, and in extracting such ore, which would be a legitimate offset, and a part was for prospecting and developing other parts of the mine, for which he was entitled to no contribution from the interveners.

It is also well settled that tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a special agreement or mutual understanding to that effect: 17 Am. ¹³⁰ & Eng. Ency. of Law, p. 688, subd.

6; *Gay v. Berkey*, 137 Mich. 658, 100 N. W. 920; *Dunavant v. Fields*, 68 Ark. 534, 60 S. W. 420; *Sharp v. Zeller*, 114 La. 549, 38 South. 449.

It is manifest, therefore, that the court erred in allowing Zobel the full amount of his expenditures for work and development, and compensation for his personal services. For the foregoing reasons, the judgment is reversed and the cause remanded.

Chief Justice Steele and Mr. Justice Bailey concur.

Cotenancy in Mines is the subject of a note to *Cedar Canyon Con. Min. Co. v. Yarwood*, 91 Am. St. Rep. 851.

The Right of a Cotenant to Contribution where he makes improvements upon the common property is discussed in the notes to *Cleland v. Clark*, 81 Am. St. Rep. 185; *Ward v. Ward*, 52 Am. St. Rep. 924.

A Cotenant is not Entitled to Compensation for his services in managing or taking care of the common property, except as the result of an express or clearly implied agreement to that effect between the parties: *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889.

FARRIER v. COLORADO SPRINGS RAPID TRANSIT RAILWAY COMPANY.

[42 Colo. 331, 95 Pac. 294.]

NEGLIGENCE—Whether a Question for Jury.—Negligence or contributory negligence is ordinarily a question of fact for the jury; it may, however, become a question of law for the court. (p. 161.)

NEGLIGENCE—When a Question for Jury.—The question of negligence is for the jury when it depends on inference to be drawn from acts and circumstances of a character that different intelligent minds may honestly reach different conclusions. (p. 161.)

CARRIERS—Injury Through Negligence of Fellow-passenger.—Where a passenger in a street railway carried a hoe so that its handle caught under the hood of the forward car as it rocked up and down, and broke, throwing a piece back into the car and striking another passenger, the question whether the failure of the conductor to require the passenger to carry his hoe in some other position was negligence is for the jury. (p. 162.)

CARRIERS—Protection from Fellow-passenger.—A common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of fellow-passengers that it is to carry him safely. (pp. 162, 163.)

CARRIERS—Injury Caused by Negligence of Fellow-passenger. Where a passenger on a street railway carried a hoe so that its handle caught under the hood of the forward car as it rocked up and down, and broke, throwing a piece back into the car against another passenger, the test of the negligence of the carrier, in view of the condition of the roadbed, the position of the trucks, the rocking of the cars and all the surrounding conditions, is, ought the conductor,

as a reasonable man, to have anticipated or foreseen, as a natural and probable result of the way in which the passenger held his hoe, that this or a similar accident would likely happen? (p. 164.)

George Gardner, for the appellant.

McAllister & Gandy, for the appellee.

333 CAMPBELL, J. Action for damages for personal injuries, alleged to have been caused by defendant's negligence. From a judgment for defendant, plaintiff appeals.

The defendant company owns and operates a street railway between Colorado Springs and Manitou, with electricity as the motive power. On the day of the accident, the defendant was running from Colorado Springs to Manitou a train of cars consisting of a motor and an open trailer car, with seats in the latter running from side to side and about twelve in number, in which trailer plaintiff, as a passenger for hire, occupied a seat near the center. The attachment between the two cars was an automatic coupler, in good order, which allowed a play of about an inch. When the cars were in motion, there was a space of about eight inches between the hood, or projecting top, of the rear end of the motor, and the same part of the front end of the trailer car.

At some point between Colorado Springs and Colorado City, C. E. Bennett, a plasterer by trade, in no way connected with defendant, who was on his way home from work, got on the train and took the end seat upon the front bench of the trailer. He had with him some plasterer's tools in a sack, and a shovel and a hoe which he carried in his hands. The handle of the hoe was a long one, and when he held it, as he did, in an upright position, the top of the handle of the hoe extended above the roof of the trailer. The hoe itself rested on the floor, and the top of the handle was held against the front end or hood of the trailer, projecting several inches above the same. Neither plaintiff, who saw Bennett, nor any of the passengers had or expressed any expectation ³³⁴ or fear of any danger resulting to any passenger from the manner in which Bennett held the hoe. The conductor saw Bennett get on the car, and collected his fare, and, until the conductor went forward into the motor car to collect a fare, he had Bennett under his constant observation, and, during all this time, for several minutes, and while the train was running ten or twelve blocks, Bennett continued to hold the hoe handle against the hood of the trailer car, in which position no such accident would be likely to occur. The motor-man was on the front platform of the motor car, and did not

see or have his attention called to Bennett. While the conductor was engaged in collecting the fare, with his back toward the trailer, and Bennett, for the moment, was out of his sight, Bennett, it seems, becoming tired, let go of the handle of the hoe, so that its top rested upon the rear end of the hood of the motor car, the other end still being on the floor of the trailer. The evidence of plaintiff tended to show that the track along this portion of the road was rough. The trucks under these cars were in the middle, instead of at each end. When the train was traveling at a fair rate of speed, as it was on this day, because of the condition of the track and position of the trucks of the cars, there resulted a perpendicular rocking motion, and sometimes, while the rear end of the motor car was going up, the front end of the trailer car was going down. After the plaintiff relaxed his hold on the handle, the hoe itself still resting upon the floor of the trailer car, the end of the handle lay upon the rear end of the roof of the motor car. In the rocking motion of the cars the handle was caught under the rim of the rear hood of the motor car, and broken, and a piece thereof was hurled backward through the trailer ³³⁵ car, and struck the plaintiff, inflicting the injuries to recover damages for which this action was brought.

Neither the conductor nor any of the passengers made any objection to the act of Bennett in taking his tools aboard, or the manner in which he held the hoe, and no suggestion was made by the conductor to Bennett to lay down the tools in a horizontal position on the floor, or to put them in any other position than the one in which they were first held.

The particular acts of negligence charged in the complaint are, that the approximate cause of the injury was in allowing Bennett to get upon the car with his tools, shovel and hoe, and in negligently permitting him to carry the hoe in a partially upright position, so that the handle thereof projected upwards and between the ends of the two cars.

Both plaintiff and defendant introduced evidence, and when they rested, the court, upon motion of its counsel, directed the jury to return a verdict for defendant, which was done, and judgment entered accordingly.

The motion for a directed verdict was based upon seven specifications; and there is nothing in the record to show upon which ground or grounds the court rested its decision. It would seem, however, from the briefs of counsel, since to those points the argument is mainly directed, that the trial court was of opinion that the evidence failed to show that the

defendant was guilty of the acts of negligence charged in the complaint; and that the approximate cause of the injury was the wholly independent, intervening negligent act of Bennett in dropping the hoe, for which defendant was in no way responsible.

The general rule is, that the negligence of a ³³⁶ defendant, or contributory negligence of plaintiff, is a question of fact for the jury. It may, however, become a question of law for the court. The circumstances in which a court may direct a nonsuit or a verdict for defendant in this class of cases have been stated by this and other courts in different language.

In *Denver etc. R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121, we said: "When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established."

In *Griffith v. Denver Consolidated Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, it was said: "Where the facts are not in dispute, and there can be but one opinion as to their effect, the question is one of law, and it is proper for the court to decide it."

In *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390, 21 Pac. 148, it was said: "If the evidence, in the most favorable light in which it may be reasonably considered in behalf of the plaintiff, does not show, nor tend to show, the defendant guilty of the negligence causing the injury as alleged in the complaint, then the court may properly grant a nonsuit, or direct a verdict in favor of the defendant." And the court further said, in substance, what has already been quoted from the *Spencer* case (27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121).

Other cases hold that if, under the most favorable light that can be taken of the evidence in plaintiff's favor, the court would feel bound to set aside a verdict in case the jury should find for him, the case should be withdrawn from the jury and a nonsuit or verdict for the defendant entered.

The difficulty is not so much in the ascertainment ³³⁷ of the correct rule applicable, as in applying it to the ever-varying facts of such cases as they arise. It is very rare indeed that a case presenting the same facts as the case in hand is obtainable, and, as might be expected, we have not found among those cited by counsel, or others which we have examined, one such as this.

Plaintiff maintains that the Spencer case and Colorado Mortgage & Investment Co. v. Rees, 21 Colo. 435, 42 Pac. 42, are on all-fours with this, and conclusive that the trial court erred in directing a verdict. While some of the questions therein and some of the principles involved are the same as here, the facts of each case are, in material respects, different. In the Spencer case the approximate cause of the injury was the negligence of a servant of the railroad company in leaving in an exposed condition near to the track of an approaching train a truck, which, colliding with the train, hurt one lawfully on the depot platform. In the Rees case it was a defect in the construction of the lock of a door of an elevator, a failure of the owner to provide reasonably safe means of transit, by which a passenger was injured. Here, the negligence claimed is the failure of defendant's conductor to exercise the proper care and control over a fellow-passenger, whose act was such as to cause a reasonably prudent man to anticipate this, or a similar, accident, as the natural or probable result of the manner of holding the handle of the hoe by that passenger, which care, if exercised, would probably have prevented the injury.

It would serve no useful purpose to discuss at length the various cases pro and con cited by counsel, as none of them are of much aid, except as stating the general rule which measures the duty of a common carrier for hire to protect one passenger from another. It may be true, as defendant's counsel ³³⁸ say, that if Bennett, the fellow-passenger, had continued to hold the handle of the hoe in the position it was when he was under the eye of the conductor, it would not be possible for such an accident to occur; and it may also be true that had the roadway been smooth and the trucks of these cars been at the ends instead of the middle, there would have been no reason to anticipate or foresee that the handle would likely be caught in the hood of the motor car and broken, and a piece thrown backward into the trailer. But, considering the condition of the track and the position of the trucks, and the consequent rocking up and down of these cars, of which there was evidence, and of which the conductor and the passengers were aware, we cannot say, as matter of law, that the consent which the conductor gave to Bennett to carry this hoe as he did was a proper exercise of control over a fellow-passenger, or that his failure to cause Bennett to place his hoe on the floor of the car or to carry it in some other position was not negligence. It has been declared by our court of appeals, and we think it a correct

statement, that a common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of a fellow-passenger that it is to carry him safely; hence, the authorities cited by defendant to the point that defendant was in no respect responsible for the acts of Bennett are not applicable, for he was a fellow-passenger of plaintiff, against whose negligence defendant was bound to shield her by the exercise of the utmost vigilance.

In *Wright v. Chicago B. & Q. R. R. Co.*, 4 Colo. App. 102, 35 Pac. 196, the court, by Thomson, J., said: "It is now firmly established that a carrier of passengers must exercise the same degree of care to protect them from violence from their fellow-passengers or from intruders that is required for the prevention ³³⁹ of casualties in the management and operation of its trains." And, as to this duty, there is no difference between mere negligence and willful misconduct: *Memphis & A. Ferry Cos. v. White*, 99 Tenn. 256, 41 S. W. 583.

The rule to be extracted from the cases cited by the defendant itself is thus succinctly stated in *Flint v. Norwich & N. Y. T. Co.*, 6 Blatchf. 158, Fed. Cas. No. 4873: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur, in view of all the circumstances."

The same rule is announced in *Putnam v. Broadway & S. A. R. R. Cos.*, 55 N. Y. 108, 14 Am. Rep. 190, cited to the point that no negligence of defendant was here shown. The court there said, substantially, that a defendant is bound to exercise all the means he can command, whenever occasion requires, to protect one passenger from another, and that if "a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible": See, also, *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306; *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Morris v. New York Cent. etc. R. R. Co.*, 106 N. Y. 678, 13 N. E. 455.

In *Cole v. German Savings etc. Soc.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, Sanborn, C. J., discusses with marked ability the liability of a defendant in a case which, in some aspects, is like this, and, in the course of the opinion, refers to *Colorado M. Investment Co. v. Rees*, 21 Colo. 435, 42 Pac. 42, in such a way as to indicate that, in all respects, the opinion therein does not meet with his approval. In case

of conflict, our duty would be plain; but we think the Cole case (124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416) can be distinguished ³⁴⁰ from the Rees case, and certainly from the one in hand.

In the Cole case, the court said that the sole and approximate cause of the injury was the wanton act of a trespasser over whom defendant had no control, of whose presence it was unaware, and for whose acts it was not liable, and then laid down what, under the facts of that case, we consider to be the true doctrine; that if an injury could not have been foreseen or reasonably anticipated as the natural or probable result of an act of negligence, it is not actionable, because such act is neither the remote nor any cause whatever of the injury.

The test which the authorities furnish for this case is: In view of the condition of the roadbed, the position of the trucks, the rocking motion of the cars, and all the surrounding conditions, ought the conductor, as a reasonable man, to have anticipated or foreseen, as a natural and probable result of the way in which Bennett held his hoe, that this or a similar accident would likely happen? If so, there was negligence of defendant; if not, there was none.

We must not, however, be understood as holding, as matter of law, that the act of the conductor in permitting Bennett to get on the cars with his tools and suffering him to carry the hoe handle in the position he did, was a negligent act, or that it was the approximate cause of the injury. We merely say that, in the light of all the evidence, the case should have been submitted to the jury under appropriate instructions, to determine these questions of fact. The case, we admit, is on the border line; but we think it comes within the rule often announced by this court, which requires submission to a jury.

Judgment reversed.

Mr. Justice Gabbert and Mr. Justice Maxwell concur.

A Common Carrier is Under a Duty to Protect Each Passenger from insult, indignities and personal violence, whether the disturbance to the passenger's peace, comfort or personal security comes from another passenger, a trespasser or an employé of the carrier: Nashville etc. Ry. Co. v. Flake, 114 Tenn. 671, 108 Am. St. Rep. 525; Brunswick etc. R. R. Co. v. Ponder, 117 Ga. 63, 97 Am. St. Rep. 152; Birmingham Ry. etc. Co. v. Baird, 130 Ala. 334, 89 Am. St. Rep. 43. The duty of a carrier of passengers for hire to use all proper means and precautions to protect its passengers against injury caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is not less stringent than the obligation to prevent misconduct or negligence on the part of its own servants: Kühlen v. Boston & Northern St. Ry. Co., 193 Mass. 341, 118 Am. St. Rep. 516.

WESTERN GLASS MANUFACTURING COMPANY v.
SCHOENINGER.

[42 Colo. 357, 94 Pac. 342.]

DISCOVERY—Physical Examination of Plaintiff.—Trial courts have the power to order a medical examination by experts of the person of a plaintiff seeking to recover for personal injuries. The defendant, however, has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the court, and the exercise of such discretion is reviewable by the appellate court, and to be corrected in cases of abuse. (p. 169.)

DISCOVERY—Physical Examination of Plaintiff.—When a physical examination is desired of the plaintiff in an action for personal injuries, it should be applied for before entering upon the trial, and should then be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice demand the disclosure or more certain ascertainment of important facts which can be disclosed or ascertained only by such an examination, if the plaintiff's life or health will not thereby be endangered. (p. 170.)

DISCOVERY—Physical Examination of Plaintiff.—An order in an action for personal injuries that the plaintiff submit himself to a physical examination may be enforced, not by punishment as for a contempt, but by staying or dismissing the action. (p. 170.)

DISCOVERY—Physical Examination of Plaintiff.—The refusal of the trial court in an action for personal injuries to order the plaintiff to submit to a physical examination by experts, where he alleges permanent injury but the accident produced no visible wound, and an examination would disclose the nature and extent of the injuries, is such an abuse of discretion as will result in a reversal by the supreme court of a judgment in his favor. (p. 171.)

Vaile, Dunham & McAllister, for the appellant.

Duncan McPhail, for the appellee.

³⁵⁸ MAXWELL, J. Plaintiff below (appellee here), a minor about sixteen years of age, by his next friend and natural ³⁵⁹ guardian, his mother, sued to recover damages alleged to have been sustained through the negligence of appellant in failing to provide suitable and safe machinery and appliances with which to perform the work appellee was required to do.

The complaint alleged that the injuries received resulted in total and permanent disability. Eight days preceding the date when the cause was set for trial, a demand in writing was made by the attorneys for defendants upon the attorney for plaintiff for an opportunity to have a physical examination of plaintiff made, before the day of trial, by a competent physician to be selected by the attorneys for defendant, or by the judge of the court before whom the case was to be

tried. This demand was refused upon the grounds, as stated, that the accident to plaintiff had happened so long ago that it would not be fair to plaintiff to have a physical examination of plaintiff made at that time. About thirteen months had elapsed between the accident and the date of the demand. On the day of the trial, before the taking of testimony began, defendant moved the court for an order requiring plaintiff to submit to a physical examination by some reputable and competent physician, to be appointed by the court. The motion set forth the necessity for such examination, the written demand for same, and was supported by an affidavit. This motion was denied, an exception saved, and the assignment of error based thereon will be the only one considered in the determination of this appeal.

The question thus presented is a very important one, and is submitted to this court for the first time, although the practice of granting such motion prevails in many of the nisi prius courts of this state. Courts are instituted by the state to administer, so far as possible, impartial justice to contending parties. The plaintiff, of his own motion, enters ³⁶⁰ the court, seeking justice for an alleged wrong inflicted, or to prevent a wrong threatened. In such contests it is the duty of the court to bestow upon the litigants full and exact justice. This cannot be done until the court obtains the full and exact truth touching all matters in issue, so far as the same can be obtained by exhausting all methods available to the full attainment of that end. Plaintiff is a voluntary actor, appealing to the sovereign power of the state for justice, impliedly assenting to do justice to the other party, and impliedly agreeing, in advance, to make any disclosure which is necessary to be made in order that justice may be done. Approximate justice, as the best the courts can do in the administration of the law, must often be accepted, but while the law is satisfied with approximate justice where exact justice cannot be obtained, the court should recognize no rules which stop at the first, when the second is within reach. In actions of this character a plaintiff has under his control evidence which will reveal the truth more clearly than any other which could be introduced.

In the dissenting opinion of Mr. Justice Brewer, in *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, 35 L. ed. 734, it is said: "The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the

courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physician into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose ³⁶¹ the actual facts to the jury if his interests require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve and thus make manifest the truth; nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

If the court is powerless, in actions for personal injuries, to require a plaintiff to submit himself to a physical examination, to the end that the truth as to their nature, effect and possible duration may be ascertained, when he, by his suit, has made them the subject of judicial investigation, then the law will permit him to disclose just so much and such parts of the facts as, in his judgment, would benefit his case, at the expense of his adversary, and to invoke the court's aid to compensate him for the injury through a partial and one-sided investigation. Under such circumstances, the court would be an instrument for the accomplishment of the grossest injustice, and, therefore, the object for which courts are instituted would be defeated.

On the other hand, if the plaintiff's claim is meritorious; if he has suffered the injuries he complains ³⁶² of, and on account of which he prosecutes his action, he has nothing to fear from the most rigid examination. His case will only be strengthened thereby.

Beginning with the case of *Lloyd v. Hannibal etc. Ry. Co.*, 53 Mo. 509, decided in 1873, there have been many adjudications upon the power of trial courts to order a physical exam-

ination of the plaintiff, in suits for personal injuries, upon the request of defendant. In this first case the power was denied, but it has since been affirmed by the supreme court of Missouri in *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Sidekum v. Wabash etc. R. R. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; *Owens v. Kansas City etc. Ry. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350.

In 1877, in the well-considered case of *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375, the power was affirmed, and the rule there announced has been followed in the following cases: *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90, 9 L. R. A. 442; *King v. State*, 100 Ala. 85, 14 South. 878; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *St. Louis etc. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189, 9 S. E. 602, 3 L. R. A. 808; *South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 60 N. E. 271, 54 L. R. A. 396; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Hall v. Manson*, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; *Atchison etc. Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *City of Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252; *Atchison etc. Ry. Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90; *Belt Electric L. Co. v. Allen*, 102 Ky. 551; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561, 54 N. W. 757, 19 L. R. A. 641; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; *Wanek v. Winona*, 78 Minn. 98, 79 Am. St. Rep. 354, 80 N. W. 851, 46 L. R. A. 448; *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Sidekum v. Wabash etc. R. R. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; *Owens v. Kansas City etc. R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; *Brown v. Chicago etc. R. Co.*, 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153; *Miami & M. T. Co. v. Bailey*, 37 Ohio St. 104; *Hess v. Lake Shore etc. R. Co.*, 7 Pa. Co. Ct. 565; *Lane v. Spokane Falls etc. Ry.* ³⁶³ *Co.*, 21 Wash. 119, 75 Am. St. Rep. 821, 57 Pac. 367, 46 L. R. A. 153; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *O'Brien v. La Crosse*, 99 Wis. 421, 75 N. W. 81, 40 L. R. A. 831.

Opposed to the doctrine announced in the above cases, the only cases which have come to our knowledge are *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, 35

L. ed. 734, *Parker v. Anslow*, 102 Ill. 272, 40 Am. Rep. 588, and several early New York cases, which have since been met by statutory enactments in that state granting the power.

The majority opinion of the supreme court of the United States is greatly weakened by the dissenting opinion of Mr. Justice Brewer, concurred in by Mr. Justice Brown, and while we have very great respect for the opinions of that court, the opinion in this case cannot be considered an authority here.

Bearing in mind the fact that the federal courts, other than the supreme court, possess no jurisdiction except what is given them by Congress, and that no federal statute gives to those courts power to order a discovery, the argument of the majority opinion, to the effect that the statute of the United States prescribes the mode of proof in the trial of actions at law, and that it shall be oral testimony and examination of witnesses in open court, except as in the statute provided—the only exception being the one for taking depositions and for compulsory production of books or writings in the possession of a party, and, therefore, that the statute inhibits any form of examination or discovery, and removes from the courts the power to require it—we find that the supreme court was passing upon limitations by statute that have no binding force upon the state courts.

There is no limitation either in the constitution or statutes of this state upon the power of the district court to order such an examination as was demanded by the motion filed in this case. And for these reasons we say that the opinion in this case ³⁶⁴ cannot be considered as a controlling authority here.

This case is the only authority cited and relied on by counsel for appellee in support of his position that the court has no power to make the order requested, counsel planting himself squarely upon the proposition that such power is not vested in the court.

In *Parker v. Anslow*, 102 Ill. 272, 40 Am. Rep. 588, the question here presented is disposed of, without discussion or the citation of a single authority, in a single line, as follows: "The court had no power to make or enforce such an order."

The authorities above cited in support of the power concur in the establishment of the following propositions:

1. That trial courts have the power to order a medical examination by experts, of the person of a plaintiff seeking a recovery for personal injuries.

2. That a defendant has no absolute right to demand the enforcement of such an order, but that the motion therefor is addressed to the sound discretion of the trial court.

3. That the exercise of such discretion is reviewable by the appellate court, and corrected in case of abuse.

4. That the examination should be applied for and made before entering upon the trial, and should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of important facts, which can only be disclosed, ascertained and fully elucidated by such an examination, and when the examination may be made without injury to plaintiff's life or health or the infliction of serious pain.

365 5. That the refusal of the motion where the circumstances appearing in the record present a reasonably clear case for the examination, under the rule stated, is such an abuse of the discretion lodged in the trial court as will result in a reversal of the judgment in plaintiff's favor.

6. That such order may be enforced, not by punishment as for a contempt, but by staying or dismissing the action.

In the case before us plaintiff sued to recover for injuries alleged to be permanent, caused by an accident which was so slight that it caused no visible wound or abrasion of the skin, and no outcry at the time from the plaintiff, nor did it in the slightest manner inconvenience him at the time—plaintiff, on the contrary, continuing his work without interruption, and for two days succeeding the date of the accident; that two or more weeks after the accident he consulted a physician, who, relying largely upon statements made him by plaintiff and his mother, diagnosed the case as acute chorea, or St. Vitus' dance, with partial paralysis, and treated him for that trouble; that the case yielded readily to the treatment, and within a month or two the patient was sufficiently recovered to dispense with further treatment and resumed his occupation as a common laborer; that for a year preceding the trial the physician had not seen the patient until within a week of the trial, when he made an examination of the patient for the purpose of preparing himself to testify at the trial. Plaintiff and his mother testified that plaintiff was suffering from the results of the accident at the time of the trial, to such an extent that he was practically incapacitated from performing any labor; that he had lost several positions on account of his inability to perform his work.

The plaintiff introduced other testimony which ³⁶⁶ tended to substantiate the testimony of himself and his mother as to his physical condition. The physician who attended plaintiff testified, in his behalf, as to his condition a few days before the trial, and expressed the opinion that the plaintiff was cured, subject, however, to recurrent attacks of paralysis which usually attends St. Vitus' dance. A physician called by defendant testified that from his observation of plaintiff in the courtroom during the trial, he would pronounce him entirely cured. In replying to a question relating to plaintiff's physical condition, this physician said: "I can only answer that question partially. To make good that answer I would have to have the privilege of examining the case."

This witness also testified that a physical examination would determine whether a complete recovery had been made from acute chorea and partial paralysis. The court instructed the jury that in determining the amount of their verdict they should take into consideration the likelihood of plaintiff's suffering pain and sickness in the future, and also of any permanent injuries.

The amount of the verdict, two thousand five hundred dollars, clearly indicates that the jury must have been impressed with the idea that plaintiff's injuries must have been of a severe and permanent character.

It is clear that an examination by medical experts under the direction of the court, as contemplated by the motion, would have either put plaintiff's claim in this regard beyond question, or have destroyed it altogether.

"In either case, there would have been an unquestioned assurance that justice had been done, an assurance which finds no secure anchorage in the present record": *Atlantic etc. Ry. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764, 8 South. 90, 9 L. R. A. 442.

³⁶⁷ Upon reason and principle, sustained by the overwhelming weight of authority, we conclude that in actions of this character, trial courts have the power to order a physical examination of the plaintiff, under the rules above stated, and that the court erred in overruling the motion for such examination, for which reason the judgment will be reversed.

Chief Justice Steele and Mr. Justice Helm concurring.

The Physical Examination of Parties to an action by order of court is discussed in the notes to *Cleveland etc. Ry. Co. v. Huddleston*, 68 Am. St. Rep. 242; *State v. Height*, 94 Am. St. Rep. 336.

HILL v. FRUITA MERCANTILE COMPANY.

[42 Colo. 491, 94 Pac. 354.]

ATTACHMENT, Alteration of Affidavit for—When Immaterial. When a complaint alleges that the amount claimed does not exceed \$2,000, and an affidavit in the action for an attachment states that the claim was for a sum "not exceeding 200 dollars," though the affidavit shows on its face that the claim is for \$414.18, an alteration so that the affidavit reads "20 hundred" instead of "200 dollars" is not sufficient ground for striking the affidavit and bond from the files, there being no proof that the alteration occurred after the affidavit was sworn to, and the alteration being of an unnecessary, immaterial statement. (p. 174.)

SALES—When for Cash on Delivery.—In the absence of a specific agreement, goods sold are to be paid for in cash on delivery. (p. 175.)

SALES—Payment Due on Delivery to Carrier.—When there is no time fixed for the payment of goods, the purchase price is due when the vendor delivers them pursuant to the contract of sale to a carrier to be transported to the vendee. (p. 175.)

SALES—Delivery to Carrier—Attachment.—Where an offer to purchase goods at a certain price if shipped on a specified day is accepted by the vendor, and he delivers them to a carrier pursuant to the requirements of the offer, the sale is consummated so that an attachment may be sustained in an action for the purchase price. (p. 175.)

SALES—Vesting of Title on Delivery to Carrier.—Where an offer to purchase goods at a certain price if shipped on a specified day is accepted, and the seller pursuant to the requirements of the offer delivers them to a carrier on that day, and the buyer is at once notified that shipment is made to him, the delivery to the carrier vests title in the buyer, and for any default on the part of the carrier a right of action arises in his favor rather than in favor of the seller. (p. 176.)

James J. McFeeley, for the appellant.

Carnahan & Van Hoorebeke, for the appellee.

493 **GODDARD, J.** This action was brought by the appellee November 4, 1903, in the county court of Mesa county, Colorado, to recover the purchase price of a carload of potatoes alleged to have been sold and delivered to appellant on August 20, 1903. At the time of the sale and the commencement of the action, appellant was living at Cripple Creek, Teller county, Colorado. Prior to the date of purchase the appellee telegraphed the appellant that it had choice potatoes for sale at a certain price per hundred pounds. On August 20, 1903, appellant telegraphed appellee as follows:

"Dated Cripple Creek, Colo.
"To Fruita Merc. Co.,
"Fruita, Colo.

"Will pay one twenty-five if shipped to-day. Ans. quick.

"W. J. HILL."

Upon receipt of this telegram appellee wired appellant as follows:

“8-20-1903.

“W. J. Hill,

“Cripple Creek.

“F. G. E. two two one to-day. Your bid.

“THE F. M. CO.”

The letters “F. G. E.” stand for the initials, and “two two one” is the number of the car in which the potatoes were shipped.

In pursuance of these telegrams the potatoes were loaded into a car of the Denver and Rio Grande Railroad Company at Fruita on the afternoon, between 1 and 6 o'clock, of the 20th of August, 1903, and the car delivered to the railroad company. The ⁴⁹⁴ following bill of lading was delivered by the company to the appellee:

“SHIPPING RECEIPT.

“The Denver & Rio Grande Railroad Company.

Consignor Marks and Destination.	Articles.	Weight (subject to correction).
W. J. Hill, Cripple Creek, Colorado.	Std. Potatoes O. R. S. L. & C. T. E. E. 18220	20,000
Via D. & R. G. Cr. & C. S. D.		A. A. BETTS, Agent.”

The Denver and Rio Grande Railroad was the only railroad over which the potatoes could be shipped from Fruita. A charge for the potatoes was made on the books of the appellee on August 20th, and a bill for the same mailed to him at Cripple Creek. On August 24, 1903, the potatoes not having arrived at Cripple Creek, the appellant wired the appellee that he would not receive them, and on September 20, 1903, he wrote the appellee the following letter:

“Cripple Creek, Colo., 9-20-1903.

“Fruita Mer. Co., Fruita, Colo.

“Gentlemen—Your letter to hand. My reason for not accepting the car of potatoes was the delay by the R. R. Co. of getting them in here. I place no blame upon you people. The R. R. Co. is to blame entirely. I did not ask them the cause of the delay. They are responsible for my not taking

the car of potatoes. I wired your house the day before they reached this district that I could not accept them on account of the delay.

Yours truly,

“(Signed) W. J. HILL.”

495 The appellee received notice from the railroad company that it had delivered the carload of potatoes to Mr. A. K. Barwise, of Cripple Creek, and that it had received from him about one-half of the price charged for the potatoes. There is no evidence as to the disposition of this money by the company. On December 26, 1904, an affidavit in attachment was filed, and a writ of attachment issued. Appellant traversed the affidavit and, after hearing, the court sustained the writ. Thereafter appellant filed a motion to strike the affidavit and bond in attachment from the files, which motion was denied. The cause was tried to the court, and judgment rendered in favor of appellee against the appellant for four hundred and forty-six dollars and ninety-five cents and costs.

From this judgment and the judgment sustaining the attachment, this appeal is prosecuted.

1. Counsel for appellant contends that the court erred in denying his motion to strike the affidavit and bond in attachment from the files, for the reason that after the affidavit was sworn to and before the hearing on the motion it had been altered. The alteration consisted in this: The affidavit, as originally drawn, contained the statement that the appellant was indebted to the appellee in a sum of money “not exceeding 200 dollars,” and that it now reads, “20 hundred”; in other words, that one of the ciphers has been erased.

This contention is without merit, for several reasons: 1. There was no competent proof to show that the alteration occurred after the affidavit was sworn to; 2. The alteration was of an unnecessary, immaterial statement in the affidavit, to wit, that of a jurisdictional fact.

496 The complaint averred that the amount claimed did not exceed two thousand dollars. This was sufficient. The statement need not be repeated in the affidavit. Furthermore, the affidavit, even on its face, shows that the claim was for four hundred and fourteen dollars and eighteen cents, which would satisfy the statute if it was necessary for the affidavit to contain such an allegation: *Barndollar v. Patton*, 5 Colo. 46; *Hughes v. Brewer*, 7 Colo. 583, 4 Pac. 1115.

The further claim that the evidence introduced upon the hearing of the traverse was insufficient to sustain the ground of attachment, to wit, that the action was for the purchase

price of goods that were to be paid upon delivery, is clearly untenable.

As appears from the above statement, the appellant bought these potatoes at one dollar and twenty-five cents per hundred, if shipped on the 20th of August. The offer was accepted, the potatoes were loaded and delivered to the common carrier according to this requirement. No time being fixed for payment, on its face it was a cash transaction, and the potatoes were to be paid for on delivery.

It is well settled that, in the absence of a specific agreement concerning the terms of sale, goods sold are to be paid for in cash on delivery. To change this presumption, the defendant must establish an agreement for credit: *Dolan v. Paradise*, 4 Colo. App. 314, 35 Pac. 987; *Metz v. Albrecht*, 52 Ill. 491; *Elder v. Hood*, 38 Ill. 533; *Dwyer v. Duquid*, 70 Ill. 307.

It follows, therefore, that there being no time fixed for payment, the purchase price was due when the potatoes were delivered. The attachment, therefore, was properly sustained, if the delivery to the common carrier on the day fixed by the contract was a delivery to appellant. The controlling question on this issue, as well as on the merits of the case, is, Was the delivery of the potatoes to the common carrier a delivery to appellant?

⁴⁹⁷ The rule is well settled that, in the absence of any agreement to the contrary, delivery to the carrier is delivery to the consignee: 4 *Elliott on Railroads*, sec. 414, and cases cited in note 60.

And the converse of this rule is that, where the seller undertakes to deliver the goods himself at the buyer's place of business and selects his own carrier, the carrier is usually regarded as the agent of the seller, who thus assumes the risk of carriage: 4 *Elliott on Railroads*, sec. 414, and cases cited in note 60.

In *Angell on Carriers*, at section 497, it is said: "But by the delivery of the goods to a carrier on behalf of the consignee, and if they have been placed at his absolute disposal, and no other fact appears, the legal presumption is, that he is the true owner, and the property in the goods then becomes immediately vested in him; and, therefore, in the event of a loss, he, and not the consignor, must bring the action, for the consignor has his remedy against the purchaser."

As appears from the statement of facts, the potatoes were sold to appellant on a telegram August 20, 1903, to be shipped that day. Appellee loaded them, and obtained bill of lading

from the common carrier on that day, and notified appellant at once that the potatoes had been shipped, giving him the description of the car.

From these undisputed facts, we think the case clearly comes within the general rule above stated, and that the delivery of the potatoes to the railroad company vested the title thereto in the appellant, and for any default on the part of the company in delivering the goods to him, a right of action arose in his favor, and not in favor of the appellee.

2. The complaint avers that the appellee is and was a corporation. The answer of appellant was insufficient to put this allegation in issue.

⁴⁹⁸ 3. The error assigned upon the refusal of the court to permit the witness Silcox to testify that it was the custom in cases similar to this that the buyer had the privilege at all times to inspect the carload of potatoes before receiving them, and to reject them if they were not according to contract, is without merit, for the reason that the appellant did not base his objection to receive the potatoes upon this ground, but based it wholly on the ground of the failure of the railroad company to deliver them at as early a date as he expected, as evidenced by his letter of September 20th, wherein he assigns this reason for not accepting the car of potatoes, and exonerates the appellee from all blame in the matter.

Without noting in detail the other objections, suffice it to say that, upon a careful inspection of the record, we are satisfied that the court, in the trial of the cause, committed no error prejudicial to the rights of the appellant, and that, upon the undisputed facts, its conclusion as to the law was correct.

Its judgment is, therefore, affirmed.

Chief Justice Steele and Mr. Justice Bailey concur.

Where a Vendor of Goods Delivers Them to a Carrier for Transportation to the vendee, the title then usually passes to the latter, the delivery to the carrier being deemed a delivery to the vendee: Main v. Jarrett, 83 Ark. 426, 119 Am. St. Rep. 144; Templeton v. Equitable Mfg. Co., 79 Ark. 456, 116 Am. St. Rep. 88.

STEELE v. GOLD FISSURE GOLD MINING COMPANY.

[42 Colo. 529, 95 Pac. 349.]

CORPORATION—Officer Voting Himself Salary.—A director of a corporation who has been elected president is disqualified from voting upon a resolution fixing his salary. (p. 178.)

CORPORATION—Quorum of Disinterested Directors.—It is essential that a majority of the quorum of a board of directors be disinterested with respect to the matter voted upon in order to render the vote valid and binding upon the corporation. (p. 179.)

CORPORATION—Officers Voting Themselves Salaries.—Directors who have been elected president and secretary of a corporation cannot be counted in making a quorum to pass a single resolution which fixes their salaries. (p. 179.)

CORPORATION—Right of Director to Compensation.—The directors of a corporation are not entitled to compensation for discharging their ordinary duties unless it is legally provided for. (p. 179.)

CORPORATION—Right of President to Compensation.—The president of a corporation is not entitled to compensation for discharging the ordinary duties of his office, in the absence of an antecedent valid agreement by the corporation to pay him. (pp. 179, 180.)

CORPORATION.—The Husband of a Stockholder is not presumed to have authority to represent his wife in her absence. (p. 180.)

Chas. J. Hughes, Jr., and Gerald Hughes, for the appellant.

Branch H. Giles, for the appellee.

530 GABBERT, J. Appellant, as plaintiff, brought suit against the appellee, as defendant, to recover the balance claimed to be due for services rendered the latter as its president. There was judgment for the defendant, from which the plaintiff appeals.

The defendant is a corporation organized under the laws of this state. Its articles of incorporation fix the number of directors at three. By these articles George A. and Willis Bristol and plaintiff were designated as directors to manage its affairs for the first year of its existence. The board as thus constituted met and passed the following resolution:

“On motion, duly seconded, the following resolution was adopted:

“Resolved, That the salary of the superintendent be fixed at \$150.00 per month for the coming year, and that of the president and secretary and treasurer at \$200.00 per month each for the year.”

Previous to adopting this resolution the board had convened and elected plaintiff president, and George A. Bristol secretary and treasurer. This action, as well as the adoption of

the resolution, was had on the first day of February, 1900. From that date until the first day of April, 1901, plaintiff acted as president of the corporation, and during that period went east, remaining there between two and three months for the purpose of selling the treasury stock of the company, and did sell stock for which the company received something over fifteen thousand dollars. It is under the resolution above mentioned, and by virtue of the services rendered, ⁵³¹ that he claims the defendant is indebted to him for the balance of salary which is the subject matter of the action brought by him in the court below. At the time the resolution was adopted the shareholders of the corporation were the directors, their wives and Bertha T. Blakeley. The latter was present at the meeting.

The relation of a director to the corporation which he represents in that capacity is fiduciary, and for this reason the law forbids him from making a contract in which his private interests may conflict with the interests of his principal. He cannot unite his personal and representative character in the same transaction: *Paxton v. Herron*, 41 Colo. 147, 124 Am. St. Rep. 123, 92 Pac. 15; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Fishel v. Goddard*, 30 Colo. 147, 69 Pac. 607; *Mosher v. Sinott*, 20 Colo. App. 454; *Butts v. Wood*, 37 N. Y. 317; *Coleman v. Second Ave. R. R. Co.*, 38 N. Y. 201, 13 Am. Rep. 595; *Hoyle v. Plattsburgh & Mo. R. R. Co.*, 54 N. Y. 314; *Martin v. Santa Cruz W. S. Co.*, 4 Ariz. 174, 36 Pac. 36; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846.

Plaintiff was, therefore, disqualified from voting upon the resolution which purported to fix his salary. He could not make a bargain with himself for a salary binding upon the company. Counsel for plaintiff contend that the vote of the other two directors was sufficient to render the resolution valid. By the resolution in question Bristol, as secretary and treasurer, was voted a salary. He, as well as plaintiff, was interested in its adoption and the object to be attained by its passage, i. e., securing a salary for each. Bristol was as much interested in its adoption as plaintiff, and being personally interested therein, was disqualified from voting thereon. The two directors, Bristol and plaintiff, were acting ⁵³² together to secure a contract from the company in favor of themselves. The resolution by which it was sought to make this contract could not have been passed except both voted thereon, because, with respect to plaintiff's salary, he was disqualified from voting, and on the subject of the salary voted for Bristol, he was also disqualified, but as each was

personally interested in its passage, he was disqualified from voting upon it at all. It is essential that the majority of the quorum of a board of directors be disinterested with respect to the matter voted upon in order to render it valid and binding upon the corporation: *Smith v. Los Angeles I. & L. Co-op. Assn.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131, 23 Atl. 708; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Miner v. Belle Isle I. Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Graves v. Mona Lake Hy. M. Co.*, 81 Cal. 303, 22 Pac. 665.

Counsel for plaintiff cite *Funsten v. Funsten Commission Co.*, 67 Mo. App. 559, wherein it seems to be held that a resolution of the character under consideration is divisible, and that the vote of Bristol could be counted in favor of that part of the resolution fixing plaintiff's salary. We think this case is clearly opposed to the weight of authority, and clearly contrary to the universal doctrine that a director who is disqualified by reason of personal interest in the matter before a directors' meeting loses his character as a director, and cannot be counted for the purpose of making it a quorum, nor can his vote be counted for the purpose of determining whether a resolution has been passed by a majority vote. Under this rule, it seems clear that when a director has a direct personal interest in the passage of a resolution, he is disqualified from voting upon it for all purposes, even though part of it may not relate to matters in which he has such an interest as, standing alone, would disqualify him.

533 It is next urged by counsel for plaintiff that the contract entered into by virtue of the resolution in question having been executed, the defendant is precluded from questioning its validity. There are cases to which this rule of law applies, but it is not applicable to the case at bar. Directors of a corporation are not entitled to compensation for their services in that capacity in discharging their ordinary duties, unless it is legally provided for: *Brown v. Republican Mt. Silver Mines*, 17 Colo. 421, 30 Pac. 66, 16 L. R. A. 426; *Thompson on Corporations*, sec. 4380; *Arapahoe Inv. Co. v. Platt*, 5 Colo. App. 515, 39 Pac. 584; *McConnell v. Combination Mining etc. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

The rule is the same with respect to the president of a corporation: 4 *Thompson on Corporations*, sec. 4682.

It does not appear from the resolution in question, or from the pleadings or evidence, that the compensation which the directors undertook to provide for the president was to be

paid for anything more than such duties as he would ordinarily discharge in that capacity; so that it does not appear that by virtue of this resolution he performed any services other than those which he would have been required, in the absence of a legal agreement, to perform gratuitously. Therefore, he is not in a position to invoke the rule contended for by his counsel, because he does not appear to have performed any services other than he should have performed, and in order to recover for those, he must establish an antecedent, valid agreement by the corporation to pay for them. This he has failed to do.

The final question upon which counsel for plaintiff rely is, that all the stockholders were present at the time when the resolution fixing his compensation was passed, and therefore it will be presumed that, although the resolution was not regularly passed by ⁵³⁴ the board, that the corporation assented thereto. The record does not sustain the contention as to the presence of all the stockholders. It was not a stockholders', but a directors', meeting, in which the stockholders took no part as such; but waiving this question, inasmuch as the wives of the directors were not present, it will not be presumed that their husbands had any authority to represent them; neither is there any evidence to the effect that they claimed to have such authority. The members of the board only assumed to act in the capacity of directors.

The judgment of the district court is affirmed.

Mr. Justice Campbell and Mr. Justice Maxwell concur.

A Director of a Corporation Occupies a Fiduciary Relation Toward the stockholder, and cannot act for the corporation in a matter in which he has a personal or adverse interest: Hooker v. Midland Steel Co., 215 Ill. 444, 106 Am. St. Rep. 170; Pacific Vinegar etc. Works v. Smith, 145 Cal. 352, 104 Am. St. Rep. 42; Matthews v. Thompson, 186 Mass. 14, 104 Am. St. Rep. 550; Scott v. Farmers' etc. Nat. Bank, 97 Tex. 31, 104 Am. St. Rep. 835; Luther v. Luther Co., 118 Wis. 112, 99 Am. St. Rep. 977. Directors in a corporation cannot act on, nor form part of a quorum to act on, a proposition to vote part of their number salary, increase their compensation, or vote themselves back pay. Their acts in this respect are void: McConnell v. Combination Mining etc. Co., 30 Mont. 239, 104 Am. St. Rep. 703; Crichton v. Webb Press Co., 113 La. 167, 104 Am. St. Rep. 500.

HOWE v. TOWN OF GUNNISON.

[42 Colo. 540, 95 Pac. 283.]

LIMITATION OF ACTIONS—Town Warrants.—Where the authorities of a town repudiate its warrants, and, because of their alleged invalidity, refuse to provide the special fund out of which they are payable, the statute of limitations commences to run against the holders. (p. 183.)

Richardson & Hawkins, for the plaintiff in error.

No appearance for the defendants in error.

541 HELM, J. The judgment of dismissal before us followed an order sustaining a demurrer to the amended complaint. The action related to certain warrants issued by the town of Gunnison during the years 1885, 1887, 1888, aggregating the principal sum of thirteen hundred and fifty dollars and three cents. The demurrer challenged the complaint upon two grounds: First, that a cause of action was not stated therein; and, second, that relief was barred by our six years statute of limitations.

No oral argument was made in the case, and no printed argument or brief was filed for defendants in error. Nor does the record contain any opinion or statement showing the specific ground upon which the demurrer was sustained by the court below.

542 A strong and persuasive printed argument is, however, filed on behalf of plaintiff in error, and from the same we infer that the ruling below rested upon the statute of limitations. It is insisted that the complaint was carefully drawn, and that its averments sufficiently state a cause of action and require an answer; also, that where, as in this instance, municipal warrants are issued by a town or city, which warrants are payable out of a special fund created by taxes to be levied, the statute of limitations does not begin to run until the money for the payment of such warrants has been collected and credited to the special fund, nor until by call of the warrants, or otherwise as provided by law, the holder has been legally notified to present the same for payment.

Upon both of these questions, as at present advised, we are strongly inclined to accept the view presented by counsel for plaintiff in error. But examination of the complaint reveals an infirmity not mentioned which is also reached by the latter branch of the demurrer, and might have been the basis of the ruling below.

The latest of the warrants in suit were issued and registered in 1888; this action was not begun until 1902; thus a period of fourteen years elapsed between the two dates. The complaint alleges that the town officers have at all times during this period claimed that there were no funds applicable to the payment of these warrants; also, that such officials have refused to levy a tax or otherwise provide for such payment. But in referring to those officials, and stating the reason for their refusal to make such levy, the pleading declares that: "They do now claim, and have at all times claimed—and their predecessors before them—that the said warrants and orders ⁵⁴³ are invalid and void, and that they have not provided, and will not provide, for the payment of the same or any part thereof."

The paragraph in which this language occurs deals with the entire period mentioned; it describes the action of the town authorities and the efforts of the owner of the warrants from "the dates of the said several registrations as aforesaid" down to the time of the filing of the complaint. And we think it sufficiently appears on the face of the pleading that the first assertion by the town authorities of the invalidity of the warrants sued on and refusal to take care of the same, occurred more than six years prior to the commencement of the action.

The warrants were regular in form and appear to be binding contracts of the municipality; they were, according to the complaint, taken by plaintiff for valuable consideration and in good faith; their repudiation by the town authorities as illegal and invalid, coupled with a positive refusal to provide for their payment, certainly gave the holder a right to invoke judicial inquiry. Such holder at once became entitled to an adjudication in some form of the question of invalidity thus raised. And if successful upon such inquiry, he could properly require a tax levy, or in some appropriate way coerce payment, if the municipal authorities still declined to act.

Under these circumstances it became the duty of the holder of the warrants to proceed with reasonable promptness in the assertion of his rights. It cannot be that after such repudiation by the town officials he could remain passive indefinitely; he could not quietly wait for a change of heart by those officials, or for the election of others who would hold his warrants legal; nor could he fold his hands and bide his time until the evidence showing his warrants to be illegal had disappeared, either through the ⁵⁴⁴ death or removal of witnesses or by the loss or destruction of papers and documents:

The Justices v. Orr, 1 Ga. 137; 1 Dillon's Municipal Corporations, 4th ed., sec. 505, note.

It follows from the foregoing that a plea of the statute of limitations was in order. And as the matters essential to such plea sufficiently appear in the complaint, the demurrer was correctly sustained.

The judgment will be affirmed.

Chief Justice Steele and Mr. Justice Bailey concur.

The Statute of Limitations does not Ordinarily Commence to Run against a city warrant until there is money in the city treasury which may be applied to its payment and until its holder has had such notice as will enable him to present it for payment to the city treasurer: Potter v. New Whatcom, 20 Wash. 589, 72 Am. St. Rep. 135; Arapahoe Village v. Albee, 8 Am. St. Rep. 206.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

OFF & CO. v. MOREHEAD.

[235 Ill. 40, 85 N. E. 264.]

CONSTITUTIONAL LAW—Class Legislation.—The legislature has power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation. (p. 186.)

CONSTITUTIONAL LAW—Bulk Sales Act.—A statute declaring that a sale of a stock of merchandise in bulk, or a sale of any portion thereof otherwise than in the ordinary course of trade, shall be presumed fraudulent as against creditors of the seller, unless certain prescribed inquiries, inventories and notices are made or given by the parties, is unconstitutional because it arbitrarily imposes a burden upon certain persons from which others are exempt. (pp. 188, 189.)

Action in assumpsit and attachment wherein the constitutionality of the following statute was involved: "That a sale of any portion of a stock of merchandise, otherwise than in the ordinary course of trade or in the regular and usual prosecution of the seller's business or a sale of an entire stock of merchandise in gross, will be presumed to be fraudulent and void as against the creditors of the seller unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory showing the quantity, and so far as possible, with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale, in good faith, make full and explicit inquiries of the seller as to the names and places of residences or places of business of each and all of the creditors of the seller and the amount owing each creditor and unless the purchaser shall

at least five days before the sale, in good faith, notify or cause to be notified, personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge or can, with the exercise of reasonable diligence, acquire knowledge, of said proposed sale and of the said cost price of the merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall at least five days before such sale fully and truthfully answer in writing each and all said inquiries.

"Except as especially provided in this act, nothing therein contained nor any act thereunder, shall change or affect the present rules of evidence or the present presumptions of law."

Winslow Evans and George J. Jochem, for the appellant.

A. D. Cadwallader, for the appellee.

⁴³ VICKERS, J. The constitutionality of this statute is challenged on the ground that it is in conflict with sections 1 and 2 of the Bill of Rights. These sections are as follows:

"Sec. 1. All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

"Sec. 2. No person shall be deprived of life, liberty or property, without due process of law."

⁴⁴ The statute in question singles out a particular class of persons and imposes burdens upon them from which all other classes are exempt. The persons thus affected are deprived of both liberty and property, in that they are not permitted to contract in respect to a particular kind of property subject to the same laws that are applicable to all other classes of property. The privilege of contracting is both a liberty and a property right, and a law which deprives a man or a class of the right to acquire and enjoy property upon the same terms and in the same manner permitted to the community at large is in violation of the constitutional rights of the persons affected by such law: *Cooley's Constitutional Limitations*, 1st ed., 393; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492.

"Due process of law" is synonymous with "law of the land," and it means a general public law, binding upon all members of the community under all circumstances, and

not partial or private laws affecting the rights of private individuals or classes of individuals: *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *Frorer v. People*, 147 Ill. 171, 31 N. E. 395, 16 L. R. A. 492.

The legislature undoubtedly has the constitutional power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation: *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007, 52 L. R. A. 283; *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, 32 L. R. A. 445; *Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, 49 L. R. A. 181; *Starne v. People*, 222 Ill. 189, 113 Am. St. Rep. 389, 78 N. E. 61.

The general principle running through all the cases is, that a statute which arbitrarily selects a class of individuals and subjects them to peculiar rules or imposes upon them special obligations or burdens from which other persons are exempt, is unconstitutional. In the language of Judge Cooley, in his work on Constitutional Limitations, sixth edition, 481-483: "Everyone has a right to demand that he be⁴⁵ governed by general rules, and a special statute which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

Meadowcroft v. People, 163 Ill. 56, 54 Am. St. Rep. 447, 45 N. E. 303, 35 L. R. A. 176, was a prosecution under the act for the protection of bank depositors, which provided, among other things, that the "failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank within thirty days from and after the time of receiving such deposit shall be prima facie evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank." In that case the constitutionality of the statute was assailed on the ground that it was special legislation, in that it established a rule of evidence applicable only to a particular class of persons. That contention was answered by this court, speaking by Mr. Justice Baker, by pointing out that the business of banking is not *juris privati*, but is, like that of an

innkeeper or common carrier, affected with the public interest, and therefore subject to public regulation, and the law was sustained on the ground that there was manifest reason and necessity for protecting the community in their dealings with persons engaged in the banking business that do not exist with respect to their transactions with those employed in "the ordinary agricultural, manufacturing, merchandising and mining pursuits."

The only persons affected by this statute are persons who own "stocks of merchandise," and persons who may purchase a portion of such stock of merchandise in some manner other than in the ordinary course of business, or the entire stock of merchandise in gross. The words "stock of merchandise," in this statute, are used in the common and ordinary acceptance of those terms, and mean the goods or chattels which a merchant holds for sale, and are equivalent ⁴⁶ to "stock in trade" as ordinarily used and understood among merchants and tradesmen. The title of this act indicates its purpose to be the prevention of sales of merchandise in fraud of creditors. It cannot be seriously contended that a creditor of a merchant occupies a position of such peculiar public concern, that the passage of this act can be justified because of the inability of creditors of merchants to take care of themselves upon an equal footing with creditors of persons engaged in other lines of business. There is, furthermore, no reason pointed out, and none suggests itself to us, why sales of stocks of merchandise should be placed under the protection of a special statute imposing onerous restrictions and conditions upon both seller and buyer from which persons dealing in all other classes of property are exempt. This law has no application to a sale by a manufacturer of all his machinery, tools, finished articles and raw material; or by a farmer of all his livestock, farm implements, crops grown or growing, and household goods; or by a hotel-keeper of his entire business and all the property therein; or by a livery or transfer company of all its rolling stock, harness and horses owned and used in the business; or by a publisher of all his presses and printing machinery and appliances; or by a mine owner of all the property owned and used in the mining business; or to a sale by a miller who may sell his business, mill machinery and the grain and its products on hand. On behalf of these and all others the law indulges the presumption of honesty and fair intentions in making sales, either in or out of the ordinary course of business, with or without an inventory, and in bulk

or by parts and parcels. If sales made of the various classes of property above referred to are presumed to be fair and honest, it is difficult to see why a sale of a stock of merchandise under similar conditions should be presumed to be fraudulent and void. There is no such actual, substantial difference between the members of the class of individuals upon whom its statute is intended ⁴⁷ to operate and the owners of other kinds of property as to warrant the legislature in passing an act applicable only to persons dealing in stocks of merchandise. The act in question is, therefore, special class legislation, which is prohibited by the constitution of 1870.

Statutes bearing more or less similarity to the one now under consideration have been enacted in a number of other states. The validity of these statutes appears to have been questioned in the courts of last resort in eight states and one territory. These courts have reached widely different results. Thus, in *Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312, *Walp v. Moar*, 76 Conn. 515, 57 Atl. 277, *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50, *McDaniel v. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947, and *Williams v. Fourth Nat. Bank*, 15 Okl. 477, 82 Pac. 496, 2 L. R. A., N. S., 334, 6 Am. & Eng. Ann. Cas. 970, statutes of the same general character as the one here involved have been held constitutional; while in *Block v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971, 76 Pac. 22, 65 L. R. A. 308, *McKinster v. Sager*, 163 Ind. 671, 106 Am. St. Rep. 268, 72 N. E. 854, 68 L. R. A. 273, *Miller v. Crawford*, 70 Ohio, 207, 71 N. E. 631, and *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A., N. S., 338, the opposite conclusion was reached and the statutes declared unconstitutional. We do not regard the question involved here as one to be determined upon the weight of authority outside of this state. We have so often expressed our views in regard to the clause of our constitution now under consideration, that its interpretation is settled by the previous decisions of this court too firmly to be departed from out of regard for opposing views in other states, however highly we may esteem them. Without regard to the question of the weight to be given to the conflicting decisions of other courts upon the question now in hand, we think the reasoning of those courts which have held such statutes unconstitutional on the ground upon which we rest our judgment in this case are more in harmony with the views of this court as expressed in the numerous cases than

⁴⁸ are the reasons which are given by those other courts in which a different result has been reached.

Our conclusion is that the act in question is void in its entirety. It follows, therefore, that the court below committed no error in refusing the evidence offered to prove that the sale in question was not made in accordance with its provisions.

The judgment of the county court of Logan county will be affirmed.

The Constitutionality of Statutes Regulating Sales in bulk is the subject of a note to *Block & Griff v. Schwartz*, 101 Am. St. Rep. 986. Such statutes are, according to the better rule, free from objection on constitutional grounds: *Spurr v. Travis*, 145 Mich. 721, 116 Am. St. Rep. 330; *Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322; *Neas v. Borches*, 109 Tenn. 298, 97 Am. St. Rep. 851. Some courts, however, have thought otherwise: *Block & Griff v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971.

NORTH v. GRAHAM.

[235 Ill. 178, 85 N. E. 267.]

ESTATE—Determinable Fee Created by Deed to Church.—A deed to the trustees of a church providing that the land shall "revert to the party of the first part whenever it ceases to be used or occupied for a meeting-house or church" creates a "determinable or qualified fee." (p. 191.)

ESTATE—Possibility of Reverter cannot be Conveyed.—The possibility of reverter when land has been conveyed on the condition that it shall revert to the grantor if it ceases to be used for church purposes is not such an estate as he can convey or assign, and hence does not pass by his quitclaim deed executed before the reverter takes place. (p. 193.)

ESTATE—Descent of Possibility of Reverter.—A possibility of reverter, while it cannot be alienated or devised by the grantor, may descend to his heirs. (p. 193.)

ESTATE—Possibility of Reverter Distinguished from Reversion. The right or interest under a possibility of reverter is very like, though not strictly identical with, a reversion. (p. 193.)

DESCENT—Necessity of Actual Seisin.—The word "estate" in the Illinois statute of descent applies to all property, without reference to the actual seisin of the ancestor. (pp. 194, 195.)

DESCENT—Possibility of Reverter.—If the Grantor of a Determinable fee dies before the happening of the event which is to effect a reversion, the possibility of reverter is cast by descent upon his heirs at the time of his death. (pp. 195, 196.)

EJECTMENT.—The Defendant in Ejectment can Defeat Recovery by showing title out of the plaintiff or right of possession in third persons. (p. 196.)

EJECTMENT—Title Acquired After Commencement of Suit.—A defendant in ejectment can defeat a recovery of the entire property by showing a half interest in himself acquired after the commencement of the suit. (p. 196.)

H. S. Tanner and F. C. Van Sellar, for the appellants.

Frank T. O'Hair, for the appellee.

179 CARTER, J. This is an action in ejectment brought by appellee in the circuit court of Edgar county against appellants to settle the ownership of a small tract, containing about a quarter of an acre of land, situated in that county. At the February term, 1906, judgment was entered in favor of appellee, and appellants thereafter took a new trial as provided by statute. The case was heard a second time, jury being waived, at the June term, 1907, of said court. At this trial the court entered judgment, holding that appellee was the owner of, and entitled to, the possession of the property in question. An appeal was thereupon prayed to this court.

From the agreed statement of facts it appears that Adam Stewart died in 1888, intestate, leaving no widow and leaving as his only heirs at law his three daughters, Martha Stewart, Demeris Snyder and the appellee, Mary North. Martha Stewart died in 1889, unmarried and without children. Demeris Snyder died in 1892, leaving W. W. Snyder, her husband, and Myrtle Snyder, her daughter and only heir at law. Myrtle Snyder died in 1898, unmarried, leaving the said W. W. Snyder, her father, her only heir at law. It appears that Adam Stewart and his wife, February 1, **180** 1877, made a deed of the land in question to the trustees of a Methodist church called "Pilot Class," of Edgar county, containing this provision: "Said tract of land above described to revert to the party of the first part whenever it ceases to be used or occupied for a meeting house or church." On July 10, 1886, Adam Stewart and wife quitclaimed the eighty-acre tract of which this meeting-house piece formed a part, with other property, to his brother, James Stewart, and the property thereafter, by a chain of conveyances, was conveyed from James Stewart to the appellants in this case.

Appellants' first contention is that there is nothing in the record to show that there was such an organization as the Pilot Class church in existence at the time of the deed from Adam Stewart, in 1877, and that it was incumbent upon appellee to prove this fact. We cannot agree with this contention, as appellants have recognized, by their stipulation of facts, the existence of the Pilot Class church in

these words: "It is agreed that the tract of land in question ceased to be used and occupied for a meeting house or church, as provided in the deed from Adam Stewart to the trustees of Pilot Class, of the county of Edgar and state of Illinois, dated February 1, 1877, in the month of August, 1904, and that the building theretofore used as a meeting-house or place of worship was removed from said premises in October, 1905."

Appellants make the further contention that whatever title passed to the church under said provision of the deed created a reversion in Adam Stewart and his heirs, and as a reversion may be conveyed (2 Washburn on Real Property, 4th ed., *389), the deed from Adam to his brother, James, included and conveyed all the reversionary interest of Adam and his heirs. The estate taken by the church was a fee, because it was to continue in said organization as long as the land was devoted to the specified uses, which might be forever, but as it might end on the happening of an event it is what is usually called a "determinable or qualified fee": ¹⁸¹ First Universalist Society v. Boland, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231. "Where one grants a base or determinable fee, since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him—that is, he has no future vested estate in fee, but only what is called a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs": Tiedeman on Real Property, 3d ed., sec. 291. In Challis on Law of Real Property, page 63, it is stated: "Possibility of reverter denotes no estate, but, as the name implies, only the possibility to have an estate at a future time. Of such possibilities there are several kinds, of which two are usually denoted by the term now under consideration—(1) the possibility that a common-law fee may return to the grantor by breach of a condition subject to which it was granted; and (2) the possibility that a common-law fee, other than a fee simple, may revert to the grantor by the natural determination of the fee." The possibility of reversion expectant on such an estate as the one we are now considering is left in the person who limits it, but "in the meantime the whole estate is in the grantee or owner, subject only to a possibility of reverter in the grantor. The grantee has an estate which may continue forever, though there is a contingency which, when it happens, will determine the estate. This contingency cannot with propriety be called a condition. It is a part of the lim-

itation, and the estate may be termed a fee. Plowden uses the phrase, 'fee simple determinable'": 1 Preston on Estates, 441, 484. "Some estates were terminable by special or collateral limitations. . . . On the happening of the contingency the feoffor was in of his old estate without entry. . . . After such a fee it has commonly been supposed that there could be no remainder, but there was a so-called possibility of reverter to the feoffor and his heirs which was not alienable": Gray on Rule Against Perpetuities, 2d ed., sec. 13. This author (section 32) questions whether there is now ¹⁸² any such estate as a qualified or terminable fee, stating that it has not been sustained in England since the statute *Quia Emptores*, and argues that it ought not now to be sustained in this country. An estate of this nature has so frequently been upheld by this court (*Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105; *Becker v. Becker*, 206 Ill. 53, 69 N. E. 49, and cases cited); that it must be held to be recognized as the settled law in this state. This is in accord with the great weight of authority in this country: 1 Jones on Law of Real Property, secs. 630, 631; 2 Washburn on Real Property, 4th ed., *390; Kales on Future Interests, secs. 124, 126; 4 Kent's Commentaries, 12th ed., *390; 1 Tiffany on Law of Real Property, secs. 81, 115, 116; 24 Am. & Eng. Ency. of Law, 2d ed., 425; *First Universalist Society v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650, and cases cited. Moreover, Gray concludes (section 41a) that a sound distinction in this regard may be made when property is given for charitable purposes, and that "possibilities of reverter might be allowed where the first estate was for a charitable purpose; and it would seem immaterial whether the estate had been acquired by sale or gift." This court in *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927, and *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159, 42 N. E. 836, has held that a possibility of reverter was recognized by the law of this state.

Appellants contend that the decisions just referred to must be distinguished from this proceeding because in those cases "the fee was absolute, subject only to the rule governing the disposition of undisposed of real estate of that kind upon dissolution" of a corporation. Manifestly, from the authorities cited, this distinction does not exist. Indeed, in *Mott v. Danville Seminary*, 129 Ill. 403, 21 N. E. 927, a provision or condition such as the one found in this deed was passed upon, and this court said (page 415): "The deed from Mrs. Lamon to the board of trustees of the original seminary was

made upon condition that the trustees should maintain upon the land an institution of learning in accordance with the provisions of ¹⁸³ the act of 1849. The condition so contained in the deed is known to the law as a condition subsequent. This being so, the effect of the deed was to vest a fee simple estate in the board, subject to be defeated by their noncompliance with the condition." The recent decision of *Miller v. Riddle*, 227 Ill. 53, tends strongly to uphold the same conclusion. The right which remained to the grantor and his heirs under this deed represents whatever was not conveyed by the deed—that is, "the possibility that the land may revert to the grantor or his heirs when the granted estate determines": *Universalist Society v. Boland*, 155 Mass. 271, 29 N. E. 524, 15 L. R. A. 231. It is clear from these authorities that the right remaining in the grantor, Adam Stewart, after he had given the deed to the church organization (so long as it was a mere possibility of reverter), was not one that he could convey or assign, and hence his quitclaim deed given thereafter to his brother conveyed no interest of any kind or nature in the land in question: *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159, 42 N. E. 836.

Appellants make the further contention that even though the deed in question reserved in the grantor and his heirs only the possibility of a reverter, still the court should not have entered judgment in favor of appellee for all the premises; that the three daughters of Adam Stewart succeeded him, at his death, in the ownership of this possibility of reverter; that one daughter, Martha Stewart, died unmarried, without children, leaving her sisters, Demeris Snyder and appellee, who succeeded her as owners of her interest in this possibility of reverter, and that Demeris Snyder's interest descended to her daughter, Myrtle, and through her to her father, William W. Snyder, who has since conveyed whatever interest he had to appellants. The authorities lay down the rule that the possibility of reverter, while it cannot be alienated or devised by the grantor, may "descend to his heirs": *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159, 42 N. E. 836. Did the land in question revert or descend to the grantor's heirs who were in existence at the time of his death, or to his ¹⁸⁴ heirs who were in existence at the time the fee in question terminated? The authorities do not appear to discuss this precise question. The right or interest under the possibility of reverter is very like, though, as we have seen, not strictly identical with, a reversion: *Kales on Future Interests*, sec. 1. In *Preston on Estates*, volume 1,

445, it is stated "that succession by heirship to these determinable fees is in the same order and under the same rules as the succession to estates in fee simple." Under the common law the reversion descended to the heirs of the person who was last seised in fee: Tiedeman on Real Property, 3d ed., sec. 293; 4 Kent's Commentaries, *388. Though the law passed an inheritance to the heir immediately upon the ancestor's death, he thereby only acquired a seisin in law, and this, alone, would not enable him to transmit the inheritance to his heirs. He must have obtained an actual seisin or possession or seisin in deed, according to the maxim "*Seisina facit stipitem*," as contradistinguished from a seisin in law, in order to make the estate transmissible to his heirs: 27 Am. & Eng. Ency. of Law, 2d ed., 297. This common-law doctrine was followed by the courts in early decisions of some of our states, but was repudiated by many, and has now been abrogated in most, if not all, so that "reversions and remainders vested by descent pass to the heirs in like manner as other estates, and no distinction is made between estates in possession and in reversion": 4 Kent's Commentaries, *389; Tiedeman on Real Property, 3d ed., sec. 293.

The laws of this state governing devises and descent of property are wholly statutory, as none of the common-law provisions relating thereto are now in force in Illinois: *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; *In re Mulford*, 217 Ill. 242, 108 Am. St. Rep. 249, 75 N. E. 345, 1 L. R. A., N. S., 341; *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37, 122 Am. St. Rep. 54, 83 N. E. 542, 14 L. R. A., N. S., 356. The right or interest remaining under the said deed in the grantor, Adam Stewart, as we have seen, was such a right or interest as descended to his heirs. Our statute on descent states that "estates, both real and personal, of resident ¹⁸⁵ and nonresident proprietors in this state dying intestate . . . shall descend," etc. The word "estate" is used with a variety of meanings: 16 Cyc. 599. In its primary and technical sense it referred only to an interest in land, and doubtless that was its meaning under the common-law definition of possibility of reverter. In our statutes controlling descent and devise of property it undoubtedly refers to all interests in property to which the deceased shall be entitled. In *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101, we held (page 398): "The word 'estate' has a broad signification, and would, of course, be sufficient to pass personalty." Real and personal property, under our statutes, are treated together for the purpose of tracing descent.

This common-law doctrine to which we have just referred never had any relation to the distribution of personal property. We think it must be held in this state that on the death of the ancestor the descent, whether as to real or personal property, was cast upon the heirs, without reference to the actual seisin of the ancestor: *Isham v. Gilbert*, 3 Conn. 166. Indeed, it was held by Justice Story in *Cook v. Hammond*, 4 Mason, 467, Fed. Cas. No. 3159, that the word "seisin," under acts of descent in this country, was equivalent to "ownership." In *Miller v. Miller*, 51 Mass. 393, that court, in discussing a similar question, speaking through Chief Justice Shaw, said (page 400): "But even if the vesting of the estate were suspended until the happening of any event, when the event does happen the right by descent must depend upon the law as it stood when the descent was cast. Suppose an estate was granted sixty years ago, in 1785, upon a condition subsequent, and the grantee died the year following, and now the event happens upon which the estate, by force of the condition, is defeated and the heirs of the grantor become entitled to enter, and the question is, Who are his heirs? Would it not be those who were the heirs of the donor at the time of his decease, in 1786? The benefit of the condition—the *scintilla juris*—then vested in them, viz., the ¹⁸⁶ right to enter for the condition broken; and whether the condition were broken before or after the change of the law, 1st of January, 1790, the same persons would be heirs, constituted so by law, taking in the proportion fixed by that law when they became heirs." We find no cases in this state exactly in point, but some very similar in principle. In *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237, we said (page 444): "Where a testator creates a life estate and then disposes of the fee by contingent remainder which is void or for any reason fails, then the fee goes as intestate property to the testator's heirs at law, not to those who are the heirs at law at the time of the death of the life tenant, but to those who are the heirs at law at the time of testator's death." This same doctrine was reaffirmed by this court in *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643, and *Chapin v. Nott*, 203 Ill. 341, 67 N. E. 833.

The right or interest reserved by the deed in question to the grantor and his heirs must have been in some one between the death of the original grantor, Adam Stewart, and the determination of the estate when the property ceased to be used and occupied as a church. It is an interest that is inherited, and therefore must have been cast by descent upon

Adam Stewart's heirs at the time of his death, and did not originate at the time the property ceased to be used for church purposes. This conclusion is supported by the great weight of authority, and is in harmony with the customs and practice, not only in this state but of the country at large. Under this rule the three daughters of Adam Stewart inherited this interest in equal parts. Through the deaths of various heirs, one-half interest descended to William W. Snyder, the husband of one of these daughters, and was owned by him at the time said property ceased to be used as a church. He thereafter, May 5, 1906, after the commencement of this suit, quitclaimed his interest to Samuel Graham, one of the appellants herein.

The burden of proof in ejectment is upon the plaintiff. We have held that the defendant can defeat recovery by ¹⁸⁷ showing title out of the plaintiff or right of possession in third parties: *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91; *Woods v. Soucy*, 184 Ill. 568, 56 N. E. 1015; *Chicago etc. R. R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223. From this it necessarily follows that appellants could defeat appellee's right to the entire property by showing title in themselves, even though the same was acquired subsequent to the commencement of the suit: See on this point, 15 Cyc. 63, and *Duggan v. McCullough*, 27 Colo. 43, 59 Pac. 743. We assume that appellants claimed the exclusive right of possession adverse to appellee, and hence the action of ejectment was authorized: *Hurd's Stats.* 1905, p. 847, c. 45, sec. 26; *Lundy v. Lundy*, 131 Ill. 138, 23 N. E. 337. The trial court should have entered judgment in favor of appellee, not for the entire premises, but for one-half the premises.

For the reasons indicated, the judgment of the circuit court will be reversed and the cause remanded.

That Contingent Estates Will Pass by descent, see *Garrison v. Hill*, 79 Md. 75, 47 Am. St. Rep. 362.

As to Whether a Reversion may be the subject of a conveyance, see *Cribbins v. Markwood*, 13 Gratt. 495, 67 Am. Dec. 775; *Akers v. Clark*, 184 Ill. 136, 75 Am. St. Rep. 152. In *Presbyterian Church v. Venable*, 159 Ill. 215, 50 Am. St. Rep. 159, it is held that a naked possibility of reverter is incapable of alienation or devise, but descends to the heirs; and therefore when land is conveyed to a corporation whose charter subsequently expires or is forfeited, although the property reverts to the grantor and his heirs, such reverter cannot operate to the advantage of his assignees or devisees.

PEOPLE v. SPOOR.

[235 Ill. 230, 85 N. E. 207.]

BIGAMY—Belief that Prior Marriage has been Dissolved.—Proof that the second marriage was entered into in good faith, under an honest but mistaken belief that the first marriage has been dissolved by divorce, constitutes no defense to a charge of bigamy. (p. 198.)

BIGAMY—Proof of Dissolution of Prior Marriage.—One accused of bigamy who relies upon the dissolution of his former marriage by divorce must not only prove the divorce, but also that it was granted by lawful authority. (p. 200.)

INDICTMENT—Immaterial Variance—Idem Sonans.—Where an indictment for bigamy charges the name of the defendant's wife to be "Sarah Staunton," but the proof shows her name to be "Sarah Stanton," there is no material variance. (p. 200.)

NAMES—Doctrine of Idem Sonans.—The names "Sarah Staunton" and "Sarah Stanton" are idem sonans. (pp. 200, 201.)

Shutt & Fain, for the plaintiff in error.

W. H. Stead, attorney general, F. L. Hatch, state's attorney, and William St. J. Wines, for the people.

230 CARTER, J. Plaintiff in error was found guilty of bigamy in the circuit court of Sangamon county and sentenced to the penitentiary. He was married November 16, 1903, at the age of eighteen, with the consent of his parents, to Sarah Stanton, aged nineteen. They lived together in Springfield, Illinois, for several months, when they separated, the wife going to Peoria and the husband to Missouri. After working as a teamster and farm hand at various places he returned ²³¹ to Springfield about three months later and worked in a coal mine. August 26, 1906, he was married to Grace Watts. Both marriages were performed by the same justice of the peace and both licenses were obtained from the same county clerk. Plaintiff in error lived with his second wife in Springfield until May 30, 1907, when he was arrested for bigamy on the complaint of the first wife. The second wife, after an interview with the first, left plaintiff in error and did not again live with him. Plaintiff in error introduced both wives to neighbors and friends during the respective times he lived with them, and introduced the second wife to a number of persons who had met the first one. His reputation appears to have been good. The facts, so far, appear to be practically undisputed. Plaintiff in error, however, attempted to prove that he had received from his first wife a number of letters—one or more asking for money with which to procure a divorce, and one stating that she had

obtained a divorce, and another telling him she was married again and hoped he was happy. It does not appear from the record that before attempting to prove the contents of these letters he offered to show that the letters themselves could not be produced. Questions were asked of his mother and sisters as to whether they had seen these letters, and as to whether the first wife had not admitted, in the office of the state's attorney, that she had written such letters. These questions were objected to and the objections were sustained. The court also sustained an objection to the introduction of testimony of plaintiff in error that the testimony of two of his friends would show that they had visited Peoria and saw his wife living there with a man as his wife, and that she told them she was married again. It appears that these witnesses were not present, but a motion was made to continue the case to obtain their testimony. This motion was denied.

Plaintiff in error contends that when he married the second wife he believed his former wife had obtained a decree ²³² of divorce and remarried, but no evidence along this line was permitted to be presented to the jury. The refusal to admit this evidence is the chief error urged. This question has never been presented to this court for decision. While it is true that there is authority to the effect that belief in information as to the divorce or death of the former wife, when acted on cautiously and circumspectly and without fault, has been held to relieve one from the criminal intent of a second marriage (Bishop on Statutory Crimes, 3d ed., secs. 596a, 596b, 608; Queen v. Tolson, 8 Am. Cr. Rep. 59), yet we think that the decided weight of authority in this country holds that proof of the fact that the second marriage was entered into in good faith, under an honest but mistaken belief that the first wife was dead or had obtained a divorce, constitutes no defense to the charge of bigamy: 4 Elliott on Evidence, secs. 2871, 2872. Where a legal divorce, granted before the second marriage, is offered as a defense, the burden is on the defendant to prove the validity of the decree: 4 Elliott on Evidence, sec. 2873.

It is contended in this connection that the evidence offered as to the divorce obtained by the first wife tended to show lack of criminal intent on the part of the plaintiff in error, and therefore should have been admitted. The intent may be inferred from the criminality of the act itself. The rule on this question is thus stated by Lord Mansfield: "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found;

but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent": *State v. Goodenow*, 65 Me. 30. See, also, *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Davis v. Commonwealth*, 76 Ky. 318; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802, 34 L. R. A. 784.

The criminal statute on this question in this state reads as follows: "Whoever, having a former husband or wife ²³³ living, marries another person, or continues to cohabit with such second husband or wife in this state, shall be deemed guilty of bigamy, and be imprisoned in the penitentiary not less than one nor more than five years, and fined not exceeding \$1,000: Provided, nothing herein contained shall extend to any person whose husband or wife shall have been continually absent from such person for the space of five years together, prior to said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that is, or shall be at the time of such second marriage, divorced by lawful authority from the bands of such former marriage, or to any person where the former marriage hath been, by lawful authority, declared void": *Hurd's Stats.* 1905, p. 671, c. 38, sec. 28.

From the wording of this statute the conclusion seems natural that in order to make the divorce a defense to prosecution for the second marriage, it must be shown to have been legally granted. The naming of certain exceptions in the proviso may well be held to exclude other exceptions not named: *Gaddis v. Richland County*, 92 Ill. 119; *People v. Town of Thornton*, 186 Ill. 162, 57 N. E. 841. If it should be held that under this statute proof could properly be offered to show that a person charged with bigamy believed in good faith that his former spouse had obtained a divorce, then we cannot see that the provision in said section 28 that "nothing herein contained shall extend to any person that is, or shall be at the time of such second marriage, divorced by lawful authority from the bands of such former marriage," has any practical force or effect, for if such evidence as was offered in this case to prove the lack of intent be proper, then it would conclusively follow that the actual proof of divorce by legal authority could be proved without this express provision in the statute just quoted. Chief Justice Shaw, in the case of *Commonwealth v. Mash*, 48 Mass. 472, speaking on

this subject, on page 473, said: ²³⁴ "It appears to us that in a matter of this importance, so essential to the peace of families and the good order of society, it was not the intention of the law to make the legality of a second marriage whilst the former husband or wife is, in fact, living, depend upon ignorance of such absent party being alive, or even upon an honest belief of such person's death. Such belief might arise after a very short absence. But it appears to us that the legislature intended to prescribe a more exact rule, and to declare as law that no one should have a right, upon such ignorance that the other party is alive, or even upon such honest belief of his death, to take the risk of marrying again unless such belief is confirmed by an absence of seven years, with ignorance of the absent party being alive within that time." This reasoning applies with great force not only to the first exception in our statute as to absence for five years of the former husband or wife, but also with equal force as indicating the exact rule which the legislature intended to be applied when a divorce is urged as a defense. Manifestly, the legislature intended by this statute that there must not only be proof of divorce, but that this divorce must have been granted by lawful authority before it would be held a defense to the charge of bigamy. We think the trial court ruled correctly in excluding the evidence in question.

The indictment against the plaintiff in error spelled the name of his first wife as "Staunton" instead of "Stanton," as the testimony showed it to be. It is contended on behalf of plaintiff in error that the court erred in giving an instruction to the jury to the effect that if they believed from the evidence, beyond a reasonable doubt, that plaintiff in error was married to Sarah Stanton, it was not material that the indictment spelled the name "Staunton" instead of "Stanton." It was held by this court in *Rivard v. Gardner*, 39 Ill. 125, that "St. Clair" and "Sinclair" were *idem sonans*. In *Barnes v. People*, 18 Ill. 52, 65 Am. Dec. 699, it was held that "Dougal" and "Dugald" by ordinary enunciation were not ²³⁵ distinguishable: See, also, *Gross v. Village of Grossdale*, 177 Ill. 248, 52 N. E. 372, in which "Bettie" and "Beattie" were held *idem sonans*; *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737, where "Zerelday" and "Serelda" were decided to come within the rule; and *Lyon v. Kain*, 36 Ill. 362, in which case "Emonds" and "Emmons" were held to be the same in sound. We think the trial court instructed properly that the names here in

question were idem sonans, and that the party might be as well known by one name as the other.

We find no error in the record. The judgment of the circuit court will therefore be affirmed.

Mr. Justice Vickers dissenting.

THE CRIME OF BIGAMY.

- I. Nature of the Offense, 201.
- II. Elements of the Offense—In General, 202.
 - a. Statutory Provisions, 204.
 - b. Intent as an Element of the Offense—In General, 205.
 - 1. Belief that Former Marriage has been Dissolved by Decree of Divorce or by Death of Other Party, 206.
 - c. Absence of Former Husband or Wife as Defense, 208.
 - d. Divorce as a Defense, 209.
 - e. Cohabitation as Element of Offense, 214.
 - f. Former Marriage Under Age of Consent, 215.
 - g. Where Marriage was Solemnized by Unauthorized Person.
 - 1. Former Marriage, 216.
 - 2. Second Marriage, 216.
 - h. Marriage Without License, 217.
 - i. Separation by Mutual Consent of Parties to First Marriage—Effect of, 218.
 - j. Principal in Second Degree, 218.
 - k. The Edmunds' Anti-Polygamy Law, 219.

I. Nature of the Offense.

Bigamy was not a crime at common law, but an offense of exclusively ecclesiastical cognizance, and not until the reign of James I was it held to be a civil offense. By statute 1 James I, chapter 11, it was enacted that if any person, being married, shall afterward marry again, the former husband or wife being alive, "such offense shall be felony, and the person and persons so offending shall suffer death as in cases of felony." There were certain exceptions, by way of provisos, to this general enactment: 1. Where either party had been continually abroad for seven years, whether the party in England had notice of the other's being living or no; 2. Where either of the parties had been absent from the other seven years within the kingdom, and the remaining party had no knowledge of the other's being alive within that time; 3. Where there was a divorce or separation a mensa et thoro by sentence in the ecclesiastical court; 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed a vinculo; 5. Where either of the parties was under the age of consent at the time of the first marriage: 4 Blackstone's Commentaries, 164. Later English statutes have somewhat modified the statute of 1 James I, chapter 11, but, at the present time, both in England and all of the states there are statutes which, though differing in minor points, in substance provide that it shall be a felony for any person having a husband or wife living to enter into a second marriage; provided the first marriage has not been dissolved or declared void by a court of competent jurisdiction; or unless one of the parties to the first marriage has continually

remained away from the other for a fixed period of years without the deserted party having knowledge of such absent spouse being alive within that time. The nature of the offense has not been changed by the statutes, though the punishment has: *Barter v. State*, 50 Md. 161.

II. Elements of the Offense—In General.

As the offense of bigamy consists in the act of marrying while the wife or husband by a former marriage is still alive (*Johnson v. Commonwealth*, 86 Ky. 122, 9 Am. St. Rep. 269, 5 S. W. 365), it is clearly necessary in a prosecution for bigamy that the fact of a prior marriage must be found by the triers of the facts, and it is not enough for them to find marital association and repute: *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241, and note; *State v. St. John*, 94 Mo. App. 229, 68 S. W. 374; hence, where a man lives with a woman not his wife, he may be guilty of open, gross lewdness and lascivious behavior, but in the event of his subsequent marriage, he cannot be convicted of bigamy: *State v. Cooper*, 103 Mo. 266, 15 S. W. 327. And not only is it necessary that the person charged with the offense must have a husband or wife living at the time of the second marriage, but this former husband or wife must be one in law; for the gist of the offense consists in entering into a second marriage while a prior valid marriage exists: *Beggs v. State*, 55 Ala. 108; *People v. Brown*, 34 Mich. 339, 22 Am. Rep. 531. Consequently, bigamy cannot be predicated of a second marriage where the first marriage is void: *Beggs v. State*, 55 Ala. 108; *State v. Barefoot*, 2 Rich. (S. C.) 209; *McCombs v. State*, 50 Tex. Cr. App. 490, 123 Am. St. Rep. 855, 99 S. W. 1017, 9 L. R. A., N. S., 936. Thus, where A marries B, and afterward during B's life marries C, and at a still later time, when B is divorced, but during C's life, marries D, the last marriage is not bigamous because the second was void: *Halbroor v. State*, 34 Ark. 511, 36 Am. Rep. 17; and to same effect is *Lane v. State*, 82 Miss. 555, 34 South. 353; *People v. Corbett*, 63 N. Y. Supp. 460, 49 App. Div. 514; *Keneval v. State*, 107 Tenn. 581, 64 S. W. 897. And this rule applies, even though the first marriage had been dissolved, if the decree of divorce was void: *People v. Chase*, 27 Hun, 256. But while bigamy cannot be predicated of a second marriage when the first marriage is absolutely void, if it is merely voidable, contracted under disabilities or impediments, which render it capable of confirmation or avoidance as the party may elect, it is a marriage in fact, until avoided, and a second marriage, while it remains a marriage in fact, is criminal: *Beggs v. State*, 55 Ala. 108. Thus in *Barber v. People*, 203 Ill. 543, 68 N. E. 93, it appeared that the former marriage had been entered into while the defendant was in such a state of intoxication that he did not have sufficient mental capacity to understand what he was doing, but the court said: "The marriage was not void, and, if voidable, it was binding upon the parties thereto till it was set aside in a court of competent jurisdiction"; and a similar rule was applied where the former marriage of a nephew

to his aunt was the basis of a prosecution for bigamy upon his entering into a subsequent marriage during the life of the former: *State v. Barefoot*, 2 Rich. (S. C.) 209.

Whether a former marriage has such validity as to sustain a prosecution for bigamy in the event of either party thereto contracting a subsequent marriage during the life of the other depends upon the different statutes of the various states regarding what constitutes a valid marriage. Thus in Arizona a marriage may be established by contract between the parties without ceremony, and proof of such a marriage will sustain the charge of bigamy: *United States v. Tenney*, 2 Ariz. 127, 11 Pac. 472. So, also, a marriage by consent, followed by "a mutual assumption of marital rights, duties or obligations," as prescribed by the California code, is as sufficient a basis for a prosecution for bigamy as one by consent "followed by a solemnization": *People v. Beevers*, 99 Cal. 286, 33 Pac. 844; and in Texas a former common-law marriage will sustain an indictment for bigamy: *Burks v. State*, 50 Tex. Cr. App. 47, 94 S. W. 1040; *Hearne v. State*, 50 Tex. Cr. App. 431, 97 S. W. 1050. In the latter case the following charge with reference to the sufficiency of the former marriage to sustain an indictment for bigamy was held not erroneous: "Whatever be the form of the ceremony, or, if there be no ceremony, if the parties agree to take each other for husband and wife, and from that time on live confessedly in that relation, proof beyond a reasonable doubt of these facts would be sufficient proof of a marriage, binding on the parties." The question whether the bigamous marriage would or would not have been void had the first marriage not existed seems to be a matter of no importance in determining whether the crime of bigamy has been committed. Thus, in *People v. Brown*, 34 Mich. 339, 22 Am. Rep. 531, it was held that it is no defense to an indictment for bigamy that the second marriage was between persons forbidden by statute to intermarry. Said the court: "The argument is, that if the ceremony of marriage had taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married a second time at all. The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second marriage; for every bigamous marriage is void, and it is entering into the void marriage while a valid marriage exists that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also." Likewise in *People v. Mendenhall*, 119 Mich. 404, 75 Am. St. Rep. 408, 78 N. W. 325, a conviction for bigamy was upheld against a husband, who, during the life of his wife, contracted a common-law marriage lacking the formalities which the statute prescribed for the solemnization of marriages.

The words "former wife," used in the Texas Penal Code providing that any person having a "former wife" living who shall marry another, etc., are used in contradistinction to the person then being taken to wife, and a man having a wife living who marries another woman violates the statute: *Burton v. State*, 51 Tex. Cr. App. 196, 101 S. W. 226.

a. **Statutory Provisions.**—In *United States v. Crawford*, 6 Mackey (D. C.), 319, it was held that the act of Congress of 1862 (U. S. Rev. Stats., sec. 5352) in relation to bigamy, and its amendments of 1882 (22 Stat. 30) and 1887 (24 Stat. 635), in relation to polygamy and unlawful cohabitation, is not in force in the District of Columbia. This ruling, however, was made in a prosecution for fornication, not bigamy, and the facts in the case hardly required the court to go that far, and its decision thereon was later overruled by the same court where the question came up directly in *Knight v. The United States*, 6 App. Cas. 1. The appellant in this case had been convicted of bigamy, and based his appeal upon the assumption that the statute of 1 James I, chapter 11, was still in force in the District of Columbia; and that he was entitled to be protected from the prosecution of bigamy upon the theory that under the first proviso of the statute of James, his first wife, being in the city of Baltimore, was and had remained beyond the seas for more than seven years, though he had deserted her and left her remaining where he married her. His contention was founded on the supposed analogy to the construction of the term "beyond the seas" in statutes of limitations, where it has been held that the term "beyond seas" in a proviso to a statute of limitations is equivalent to "without the limits of the state" where the statute was in force. Without deciding whether such a defense could be available in such a case, it was held that the statute of James was superseded by Revised Statutes, section 5352, as amended by the act of Congress of March 22, 1882. The statute of bigamy (1 James I, chapter 11), was early adopted by the state of Maryland, and was in force in that state in February 27, 1801: *United States v. Jennegen*, Fed. Cas. No. 15,474, 4 Cranch C. C. 118; and it is still in force in that state, modified by subsequent legislation as to the punishment for the offense, but not as to the grade of the crime: *Barber v. State*, 50 Md. 161. In *State v. Stewart*, 194 Mo. 345, 112 Am. St. Rep. 529, 92 S. W. 878, the indictment for bigamy was founded upon a statute (Mo. Rev. Stats. 1899, sec. 2169), which provided that "every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriages would be punishable if contracted or solemnized within this state, and shall afterward cohabit with such person within this state, shall be adjudged guilty of bigamy, and punished in the same manner as if such marriage had taken place within this state."

Section 2167 of the act of 1899 provided that every person having a husband or wife living, who shall marry another person, whether married or single, etc., shall on conviction be adjudged guilty of bigamy. On a motion to quash the indictment, the constitutionality

of section 2169 was attacked upon the ground that it sought to make cohabitation bigamy, and that it was beyond the power of the legislature to name the acts denounced by the statute bigamy; that as the bigamous marriage was contracted in a foreign state, the crime was complete, and that one state cannot punish as crimes acts committed in another state. It was held that section 2169 was valid and constitutional, although the offense therein denounced could not have constituted bigamy as that term is used in section 2167. Said Gantt, J.: "While a state cannot punish as crimes acts committed beyond the state boundary, if the consequences of an unlawful act committed outside the state have reached their ultimate and injurious result within it, the perpetrator may be punished as an offender against such state": Cooley's Constitutional Limitations, 177.

And the supreme court of North Carolina in *State v. Long*, 143 N. C. 670, 57 S. E. 349, sustained a conviction for bigamy upon an indictment founded on a statute (Revisal 1905, sec. 3361) almost identical with the Missouri statute quoted in the *Stewart* case (194 Mo. 345, 112 Am. St. Rep. 529, 92 S. W. 878). "There is nothing in the state or federal constitution," said the court, "which disables the legislature from enforcing this statute, when, though the second marriage took place elsewhere, the bigamous marriage is exploited by avowedly and openly living in ratification of it in this state." In *Re Murphy*, 5 Wyo. 297, 40 Pac. 398, it was held that the fact that bigamy was punishable under the laws of the United States does not make the law of a territory punishing it unconstitutional, in that the person committing it would be subject to two punishments. Nor is Revised Statutes, section 5352, defining and providing for the punishment of bigamy, in conflict with the constitutional provision against the making of laws respecting religion: *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244, affirmed 1 Utah, 226.

b. Intent as an Element of the Offense—In General.—There is some conflict of authority as to whether criminal intent is an essential ingredient in the offense of bigamy. It is undoubtedly true, as a general proposition in criminal law, that, where there is no criminal intent there can be no guilt; but it is equally true that every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. In applying these fundamental principles to the offense of bigamy it is said that where the statute makes it criminal to do any act under particular circumstances, the party doing that act is criminally responsible for doing it regardless of any criminal intent: *Rice v. Commonwealth*, 31 Ky. Law Rep. 1354, 105 S. W. 123; *State v. Cain*, 106 La. 708, 31 South. 300; *State v. Arming-ton*, 25 Minn. 29. Thus, in a prosecution for bigamy the fact that the defendant thought and believed that the want of a license invalidated his first marriage is immaterial: *State v. Robbins*, 28 N. C. (6 Ired.) 23, 44 Am. Dec. 64; or that he had been informed and believed that his first marriage was void, and acted on such belief: *Medrano v. State*, 32 Tex. Cr. App. 214, 40 Am. St. Rep. 775, 22 S. W.

684; *State v. Sherwood*, 68 Vt. 414, 35 Atl. 352. Nor is criminal intent necessary in a prosecution for bigamy where the defendant, knowing that he was married, deliberately contracted a second marriage, although impelled thereto by his religious belief: *United States v. Reynolds*, 1 Utah, 226, affirmed 98 U. S. 145, 25 L. ed. 244. The question of criminal intent as applied to the offense now under consideration most frequently arises in those cases where the bigamous marriage was contracted under the honest but mistaken belief of the party charged, that the former marriage had been dissolved by a decree of divorce or that the other party thereto was dead. We will now note the cases which fall within these classes.

1. **Belief that Former Marriage has been Dissolved by Decree of Divorce or by Death of Other Party.**—According to the weight of authority, the fact that a party charged with bigamy believed in good faith that he had been lawfully divorced from his first wife constitutes no defense: *Russell v. State*, 66 Ark. 185, 74 Am. St. Rep. 78, 49 S. W. 821; *People v. Hartman*, 130 Cal. 487, 62 Pac. 823; *People v. Spoor*, 235 Ill. 230, ante, p. 197, 85 N. E. 207; *Davis v. Commonwealth*, 76 Ky. (13 Bush) 318; *Rogers v. Commonwealth*, 24 Ky. Law Rep. 119, 68 S. W. 14; *Rice v. Commonwealth*, 31 Ky. Law Rep. 1354, 105 S. W. 123; *State v. Cain*, 106 La. 708, 31 South. 300; *State v. Armington*, 25 Minn. 29. The reason upon which the ruling in these cases is based is well stated by the court in *Rice v. Commonwealth*, 31 Ky. Law Rep. 1354, 105 S. W. 123. "The statute does not say that whoever marries a woman knowing that he has a previous wife alive from whom he has not been divorced is guilty of the offense; but the statute is, whoever marries and at the time has a previous wife living shall be guilty of the offense. We presume that the statute was so drafted to cause persons about to enter into a marriage to not take any chance on the question as to whether or not the divorce has been granted. The statute requires them to know the fact before entering into a subsequent marriage." It would seem from the language, which is fairly illustrative of that used in all the decisions of this class, that care and diligence on the part of a defendant to ascertain whether the former marriage had in fact been dissolved by divorce, and the reasonableness of his mistaken belief, could not aid a defense based on such belief. But this rule was relaxed in *Squire v. State*, 46 Ind. 459. The defendant in this case having been convicted of bigamy, on appeal assigned as error refusal of the trial judge to charge "that if the jury believe, from all the evidence in the case, that the defendant married the second time in the honest belief that his former wife had been divorced from him, they should find him not guilty." Touching this refusal the supreme court quoted Bishop on Criminal Law, section 303, volume 1: "The wrongful intent being the essence of every crime, the doctrine necessarily follows that whenever a man is misled without his own fault or carelessness, concerning facts, and, while so misled, acts as he would be justified in doing were the facts what

he believes them to be, he is legally innocent, the same as he is innocent morally"; and said: "We think the court should have charged the jury, if it had been so asked, that if they believed from the evidence that the defendant had been informed that his wife had been divorced, and that he had used due care and made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of his second marriage, that his former wife had been divorced from him, they should find him not guilty. There was probably no error in refusing the instruction as asked, as it was based solely upon the belief of the defendant, and did not require that such belief should be the result of due care and careful inquiry, and that he should have reasonable grounds to entertain such belief." And the rule as thus stated by the supreme court of Indiana with reference to belief in the dissolution of the former marriage by a decree of divorce has been enunciated in several jurisdictions as the correct rule to be applied when the defense is based on belief that the prior marriage has been dissolved by death. But all of these cases recognize that bigamous marriages disturb the peace of families, are offensive to society, and involve the legitimacy of offspring and the descent and succession of estates, and require that one who defends himself against the charge of bigamy upon the ground of belief in the death of his former wife should show such a degree of care and diligence in ascertaining the truth as is commensurate with the importance of the offense with which he is charged. In *Dobson v. State*, 62 Ala. 141, 34 Am. Rep. 2, it is said: "The belief must be honest and real, not feigned, and whether it is honest or feigned, the jury must determine in view of all the evidence. Whether there was fault or carelessness in acquiring knowledge of the facts is also a matter for their determination. No man can be acquitted of responsibility for a wrongful act, unless he employs 'the means at command to inform himself.'" Not employing such means, though he may be mistaken, he must bear the consequences of his negligence. If he relies on information obtained from others, he should have some just reason to believe that from them he could obtain information on which he may safely rely." Hence, a belief based on an absence of more than a year, coupled with a rumor that the absent party was dead, is not sufficient to constitute a defense to the charge of polygamy: *Jones v. State*, 67 Ala. 84.

In *Welch v. State*, 46 Tex. Cr. App. 528, 81 S. W. 50, an instruction in a prosecution for bigamy was held to be correct which charged that the statute provides that if a person, under a mistake as to a particular fact, does an act otherwise criminal, he is guilty of no offense; that the mistake must be such that had the supposed fact existed, the person would have been excusable. "Therefore if you believe from the evidence that defendant had been informed and believed at the time he married Mattie Jennings that his first wife was dead, and if you believe he exercised proper care to ascertain whether she was in fact dead, then, in that event, you will acquit him. If you believe the defendant was laboring under a mistake of fact

as to his first wife's death, but you believe such mistake arose from a want of proper care on his part, such mistake could not avail him." But the majority of cases apply the same rule to belief of death as to a belief of divorce, and hold that even an honest and reasonable belief in the death of a former husband or wife before the expiration of the period when the law presumes death is not a defense to a prosecution for bigamy: *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472; *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 40 N. E. 846, 28 L. R. A. 318; *Reynolds v. State*, 58 Neb. 49, 78 N. W. 483; *State v. Ackerly*, 79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450. It was said in the last case: "It is clearly the intent of the statute that one who marries within the seven years shall do so at his peril. There is nothing in the harshness of the provision that justifies a doubt of this intention. The consequences of an invalid marriage to society and to innocent parties are so serious that the law may well take measures calculated to insure the procurement of the most positive evidences of death before the contracting of another marriage in less than the time fixed." And all of the other cases thus holding base their opinions on the doctrine that when a statute forbids the doing of an act under particular circumstances, that the party doing it knowingly is criminally responsible, and his intent is not an essential ingredient of the offense.

c. **Absence of Former Husband or Wife as a Defense.**—The provisos to the statutes relating to bigamy which except from the operation of the statute any person whose husband or wife shall have continuously remained away from the other for a fixed period of years, without knowledge of the other party of his or her being alive within such period, are all based on the legal inference that such absent party is dead. But it has been held that this presumption cannot be invoked by the party who created the absence of the other by his own misconduct. Thus in *Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43, a conviction for bigamy was sustained where it appeared that the defendant had abandoned his first wife and gone into another state, and remarried after the statutory absence of five years, it also appearing that the first wife was alive shortly before such second marriage. Said the court: "A husband cannot create absence by abandoning his family, and then invoke the presumption of innocence to destroy the presumptive proof of continuing life." Likewise in *State v. Goulden*, 134 N. C. 743, 47 S. E. 450, the defendant had not entered into the second marriage until after the seven years required by the statute had expired; but it appeared that he had driven his first wife away, and it was held that her involuntary departure procured by the defendant himself was not such "absence" as excused him from inquiry even after the lapse of seven years. Moreover, although one of the spouses has been continuously away for the statutory period and the other spouse contracts a second marriage after such time, but while the absent one is in fact alive, and believed by the one so marrying to be alive, though not having

actual knowledge of the fact, such second marriage constitutes bigamy. Thus in a prosecution for bigamy, when the wife of defendant had been absent for the five years required by the statute, if defendant contracted a second marriage while his wife was in fact alive, and he believed her to be so, although he did not have actual knowledge of the fact, he is guilty of bigamy, as he must have believed that his wife was not living to constitute a defense: *People v. Meyer*, 8 N. Y. St. Rep. 256, affirmed 44 Hun, 624. In *Poss v. State*, 47 Tex. Cr. App. 486, 83 S. W. 1109, appellant had been convicted of bigamy. A requested charge embracing the defense as provided in article 345, Penal Code of 1895, was refused. It appeared that defendant married his first wife in the state of Georgia, and that she had left him and gone to another state some eight years previous to his marriage in Texas; that he lived in Georgia a number of years and came to Texas a year and some months before his intermarriage with his Texas wife; that he had not been in Texas five years. It was held that the first portion of said article 345, Penal Code of 1895, which provided that the article in reference to bigamy (Penal Code 1895, art. 344) shall not extend to any person whose husband or wife shall have continuously remained out of the state for five years, etc., does not apply; but that the subsequent portion providing that if one of the spouses should have voluntarily withdrawn from the other, and remained absent for five years, etc., does apply. It was further held in this case that under article 345, Penal Code of 1895, proof by the defendant that his first wife voluntarily withdrew from him and remained absent more than five years before his second marriage was a complete defense, irrespective of the presumption of life or death after the absence of five years.

d. **Divorce as a Defense.**—We have seen that the second marriage which is the inhibited act under the statutes of bigamy is not necessarily criminal; that its criminality depends upon the collateral or extrinsic facts that a former valid marriage had taken place, and that such former marriage had not been dissolved by death or divorce. But as the offense of bigamy cannot be predicated on a prior invalid marriage, so, when the prior marriage has been established to be valid, the bigamous marriage cannot be excused upon the ground that the former marriage had been dissolved by divorce, unless the decree of divorce is valid. Thus in *Tucker v. People*, 122 Ill. 593, 13 N. E. 809, the defendant in a prosecution for bigamy relied upon a divorce obtained in Utah. The record showed a defect in the time allowed for answering the summons in the divorce suit, and defects in the jurisdictional prerequisites to obtaining such a divorce. Defendant further attempted to show that the defect in the record had been cured by an amendment made nearly three years after the divorce was granted, without notice to the defendant. A judgment of conviction was sustained upon the ground that the divorce relied on by defendant was invalid. And in *Davis v. Commonwealth*, 76 Ky. (13 Bush) 318, it was held that a decree of divorce

granted in another state which is incomplete on its face is no defense in a prosecution for bigamy. But it not infrequently happens that one or both of the parties to a marriage goes to a foreign state and there obtains a decree of divorce without having established any legal domicile in such state. Where a decree of divorce has been obtained under such circumstances and no jurisdictional defect appears on the face of the record in the divorce suit, it has been strenuously contended in behalf of the validity of such decrees, when relied on by one of the parties thereto as a defense to the charge of bigamy in the state of his residence, that the question of the jurisdiction of the court granting the decree is precluded under article 4, section 1, United States constitution, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. The verity that should be accorded to a decree of divorce of a sister state, between parties who are residents of another state, seems to have given the courts considerable trouble when such decree is set up as a defense to a prosecution for bigamy, and especially when the record in the divorce proceedings are not only regular, but show that both parties appeared in the action. The weight of authority, however, establishes the rule that as it is the status of the parties which is to be passed upon and determined in a divorce suit, that though the parties submit to jurisdiction of their persons, the foreign court acquires no jurisdiction over the subject matter of the action where the parties had no domicile in the state where jurisdiction was assumed, and that the decree is void, and constitutes no defense. Thus, in *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260, a conviction for bigamy was sustained. The records of the court of common pleas of Noble county, Indiana, showed that defendant's first wife had obtained a divorce from him, that defendant had appeared in that action by attorney, and the decree recited that both parties to the divorce action resided in Indiana. It was shown, however, by the prosecution that both parties to the divorce suit were residents of the state of Michigan when the decree was rendered, and had been residents thereof for nearly two years previous thereto. Speaking of the contention that the appearance of the parties in the divorce suit precluded the question of jurisdiction the court said: "That might be so if the matter of divorce was one of private concern exclusively. But such is not the case under our laws, nor will it ever be until it comes to be understood that parties have the right to marry and unmarry at pleasure, and that if they choose to trade spouses, it is the concern of nobody but themselves. Such an understanding would require a considerable change in the existing laws of this state. As those laws now are, there are three parties to every divorce proceeding—the husband, the wife and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion.

.... Such being the case, suppose we admit that the parties to the marriage may be bound by their voluntary appearance in the foreign jurisdiction; how does that affect the present case? How and in what manner did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding—that is to say, of the state of Michigan? Those who insist upon the validity and binding force of this decree should be able to point out how and in what manner, by what written or oral consent, or through what neglect or default this third party has lost its right to have its own concerns passed upon by its own courts, or has handed them over to a foreign authority.” With reference to the application of the constitutional provision regarding the faith and credit to be given by one state to the judicial proceedings of another, the court continued: “Its whole purpose and aim was in the direction of justice, comity, and good neighborhood between the states; and it would be most remarkable if it could now be employed to bolster up a proceeding where a court of one state has interfered in a matter which wholly pertains to the concerns of another state; which is within the exclusive jurisdiction of such other state, and relates to its citizens exclusively; which it is impertinent for such court, in any manner, to meddle with, and which justice, as well as every principle of comity, requires such court to let alone. If the constitutional provision can be so employed, then I do not hesitate to say that it is capable of accomplishing more evils than it has the power to prevent, and that, too, in the very direction in which its good influences were anticipated. For the effect is, to destroy the interstate comity and good neighborhood by enabling one state to extend its laws and legal procedure into the domain of its neighbor; to subject the citizens of such neighbor to its own control in their most important relation of life and to introduce among them practices which their own laws regard as in a very high degree vicious and demoralizing.” Likewise in *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21, it was held that a divorce obtained in a state of which neither the husband nor the wife is a resident is void and cannot be set up by the husband as a defense against an indictment for having married and openly cohabited with another woman during the lifetime of the wife; and to the same effect is *Van Fassen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507. But a doctrine directly opposed to that established by the three foregoing cases was upheld in *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132. It was here held that where a husband and wife were married in Massachusetts and the husband went to Illinois and filed a bill for divorce, and the wife entered an appearance, and afterward by collusion a decree of divorce was obtained, the divorce was valid in New York and the wife entitled to marry again. “The court had jurisdiction of the subject matter of the action,” said chief justice Church; “that is, it had jurisdiction to decree divorces according to the laws of that state; and every state has the right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction. The court also had jurisdiction of

the parties by the voluntary appearance of the defendant. . . . The question whether he [the husband] was a resident there, so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. . . . I think such a judgment is protected by the constitution of the United States which declares that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' In a later New York case (*People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274) the defendant in a prosecution for bigamy pleaded a divorce obtained by his former wife in Ohio. Defendant had been a resident of New York pending the divorce proceedings in Ohio, service of the proceeds upon him had been made by publication, and he had no actual notice of the proceedings, and had not voluntarily appeared. It was held that the decree of divorce constituted no defense, that a court of another state cannot grant an absolute divorce against one domiciled and actually abiding in a different state throughout the pendency of the proceedings, upon a substituted service of process, such party having no actual notice of the proceedings. Reference is made to the *Kinnier* case last cited (45 N. Y. 535, 6 Am. Rep. 132), as not being opposed to the ruling here made, because in the *Kinnier* case the court had "the parties within its jurisdiction." An opposite ruling, however, is found in *Thompson v. State*, 28 Ala. 12. In this case the defendant left his wife in Mississippi and took up his residence in Arkansas. After living in Arkansas the necessary time to acquire domicile under the statute he obtained a divorce from his wife on publication of summons, and thereafter removed to Alabama and married again, his first wife still living. It was held the Arkansas divorce was a defense to a prosecution for bigamy. Said Judge Walker: "The general doctrine is not intended to be denied in this opinion, that decrees and judgments, when attempted to be set up in a different state from that in which they were rendered, may be avoided when the court had no jurisdiction of the defendant's person, and there was no appearance; but, in our judgment, that rule does not apply to decrees for divorce. The jurisdiction over questions of divorce must be maintained, where the party seeking the divorce is domiciled in the country, and the proceedings are consistent with the laws of the state in which the party has his domicile. The right of a court, when authorized by the statute of the state, to proceed against the nonresident defendant by publication, results necessarily from the existence of the jurisdiction. If it cannot proceed on notice of that kind it cannot proceed at all; for no other notice can be given, and a denial of the power thus to proceed would be fatal to the jurisdiction."

In those states where the statute prohibits the guilty party to a divorce decree from marrying again within a certain time, or during the life of the other spouse, a second marriage contracted within the prohibited time within such state would be bigamous. This rule was disputed in *People v. Hovey*, 5 Barb. (N. Y.) 117, where it was

held that after a divorce for adultery the marriage is at an end, and that a violation of the prohibition does not constitute bigamy, because neither party would have a husband or wife living. But this decision was overruled in *People v. Faber*, 92 N. Y. 146, 44 Am. Rep. 357, where it was held that one who marries in New York in violation of the statute of divorce prohibiting the remarriage of the guilty party during the lifetime of the complainant, falls within the language of the statute of bigamy declaring "every person having a husband or wife living, etc.," shall be guilty of bigamy. In Massachusetts the statute of 1841, chapter 83, expressly declares that the guilty party to a divorce who marries again during the life of the other shall be guilty of polygamy, but in the absence of such statute it is said that, whether a husband who so marries again after his first marriage has been judicially dissolved is guilty of polygamy is a *quaere*: *Commonwealth v. Richardson*, 126 Mass. 34, 30 Am. Rep. 647. And when a husband divorced by his own fault contracts a second marriage in another state, when the marriage would be lawful, after which the parties to the second marriage are found cohabiting in Massachusetts, he is not liable to indictment for polygamy; at least without proof that the parties to the second marriage went from Massachusetts with the intent to evade its laws: *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509. But in *People v. Chase*, 28 Hun, 310, the defendant's first wife procured a divorce from him in New York, the decree prohibiting him from marrying again during her life. He went to another state and married, and afterward returned to New York and married again. It was held that the second marriage in another state was valid, and that bigamy could be predicated thereon. And the principle that the laws of one state relating to the remarriage of divorced persons has no extraterritorial effect was also applied in *Turpin v. Turpin* (Tenn. Ch. App.), 58 S. W. 763, where it was held that a statute of the state of Washington prohibiting a person who has been granted a divorce from remarrying within a certain time, and providing that the violation thereof shall be punished as a contempt of court, does not render the person so divorced guilty of bigamy by contracting a marriage in Tennessee within the prohibited time.

In Massachusetts, Statutes of 1895, chapter 427, provides that where a marriage contract has been duly solemnized, and the parties thereafter cohabit, and at the time of the ceremony a former marriage was in force, and one of the parties to the subsequent marriage has acted in good faith, and the impediment to the subsequent marriage is removed by death or divorce, the parties shall be deemed legally married from the removal of the impediment; consequently, where a second marriage contract was duly entered into, the parties lived together as husband and wife, and the wife in good faith believed a former marriage had been dissolved by divorce, such marriage became valid after the removal of the impediment to the marriage by the expiration of two years from the time the decree of divorce became absolute, and a subsequent marriage by the husband sub-

jected him to indictment for polygamy: *Commonwealth v. Josselyn*, 186 Mass. 186, 71 N. E. 313. But in New York, under a statute which provides that the statute of bigamy shall not extend "to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court for some cause other than the adultery of such person," it was held no defense to an indictment for bigamy that subsequently to the second marriage the first has been dissolved by the decree of a competent court, for some cause other than the adultery of the defendant: *Baker v. People*, 2 Hill (N. Y.), 325.

e. **Cohabitation as Element of Offense.**—We have already seen that the gist of the offense of bigamy consists in contracting a second marriage knowing that a former valid marriage is subsisting. Cohabitation, therefore, consequent on the second marriage is not a necessary ingredient of the offense; it is complete when the unlawful marriage is consummated, the maxim being, "*Concensus non concubitus facit nuptias*": *Beggs v. State*, 55 Ala. 108; *Scroggins v. State*, 32 Ark. 205; *Nelms v. State*, 84 Ga. 466, 20 Am. St. Rep. 377, and note, 10 S. E. 1087; *State v. Patterson*, 24 N. C. (2 Ired.) 346, 38 Am. Dec. 699; *Gise v. Commonwealth*, 81 Pa. (31 P. F. Smith) 428. This rule was applied in *Nelms v. State*, 84 Ga. 466, 20 Am. St. Rep. 377, 10 S. E. 1087, where the defendant was arrested immediately after the performance of the ceremony of the second marriage. "It is the outrageous and villainous conduct of the defendant in marrying the second time which constitutes the crime," said Chief Justice Bleckley. In *Gise v. Commonwealth*, 81 Pa. 428, the parties separated immediately after the ceremony and there had been no cohabitation. In *State v. Patterson*, 24 N. C. (2 Ired.) 346, 38 Am. Dec. 699, the doctrine was thus stated: "Marriage, or the relation of husband and wife, is in law complete when parties, able to contract and willing to contract, actually have contracted to be man and wife in the forms and with the solemnities required by law. It is marriage—it is this contract, which gives to each right or power over the body of the other, and renders a consequent cohabitation lawful. And it is the abuse of this formal and solemn contract, by entering into it a second time, when a former husband or wife is yet living, which the law forbids because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right. A man takes a wife lawfully when the contract is lawfully made. He takes a wife unlawfully when the contract is unlawfully made—and this unlawful contract the law punishes." But while cohabitation consequent upon a bigamous marriage is not an ingredient in the offense, a conviction of bigamy cannot be sustained when it appears that the first marriage was not performed in accordance with statutory requirements, and there is no evidence of subsequent cohabitation of the parties: *People v. McQuaid*, 85 Mich. 123, 48 N. W. 161. In some of the states continued cohabitation under a bigamous marriage as well as the marriage constitutes the offense: *State v. Nadal*,

69 Iowa, 478, 29 N. W. 451; *Commonwealth v. Bradley*, 2 Cush. (Mass.) 553; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241, and note. In *Commonwealth v. Lucas*, 158 Mass. 81, 32 N. E. 1033, it was held that under a statute which provides that whoever, having a former wife living, marries another, or continues "to cohabit" with such second wife, is guilty of polygamy. The word "cohabit" means to live together as husband and wife ordinarily do, but does not necessarily imply sexual intercourse; and it was held in Alabama, under a similar statute, that it is unnecessary to constitute the crime of bigamy that sexual intercourse should continue during the whole time the parties live together, but the crime is committed when they live under the same roof, and acknowledge each other as husband and wife, although they are prevented, by incapacity, from committing the carnal act: *Cox v. State*, 117 Ala. 103, 67 Am. St. Rep. 166, 23 South. 806, 41 L. R. A. 760.

f. **Former Marriage Under Age of Consent.**—We have already seen that bigamy cannot be predicated on a void marriage, but that a former marriage which is merely voidable will sustain an indictment for that offense. Hence, as a marriage of a person under the age of consent is a marriage until disaffirmed, a subsequent marriage by such person before the former has been set aside is bigamy: *Beggs v. State*, 55 Ala. 108; *Cooley v. State*, 55 Ala. 162; and to same effect is *Walls v. State*, 32 Ark. 565; *State v. Cone*, 86 Wis. 498, 57 N. W. 50. But in *People v. Slack*, 15 Mich. 193, defendant had married a girl who was under the age of consent. They separated before she arrived at the age of consent and had not cohabited since the separation. Defendant subsequently married another woman. A conviction of bigamy was set aside upon the ground that mutual separation before the girl reached the age of consent rendered the former marriage void. But it was further held that if defendant deserted the former wife without her consent he would be guilty of bigamy. A case similar in some respects to the last is that of *Shafhen v. State*, 20 Ohio, 1. Here defendant was married while under the age of consent. He left his wife and contracted a second marriage, not having arrived at the age of consent until shortly after his second marriage. It was insisted by the state that the first marriage was merely voidable, and not having been disaffirmed by the defendant, his second marriage was bigamous. It was held that the first marriage not having been confirmed by cohabitation since the defendant arrived at the age of consent, that a conviction of bigamy could not be sustained. And under a statute declaring that the marriage of one below the age of consent can only be annulled by that party, and that if he or she freely cohabit with the other after attaining the age of consent, the marriage is valid, one who has married a girl below the age of consent cannot, after remarrying, plead that fact to the charge of bigamy: *People v. Beevers*, 99 Cal. 286, 33 Pac. 844.

g. Where Marriage was Solemnized by Unauthorized Person.

1. **Former Marriage.**—While, as we have already seen, the existence of a former marriage in fact is indispensable as a condition precedent to sustain the offense of bigamy, still it is held that where the former marriage has been entered into in good faith and consummated, the fact that such marriage was solemnized by one who had no authority to perform the ceremony would not make the marriage invalid, but that it would sustain an indictment for bigamy in the event of a subsequent marriage: *Robinson v. Commonwealth*, 69 Ky. (6 Bush) 309; and in *State v. Davis*, 109 N. C. 780, 14 S. E. 55, it was held in a trial for bigamy that, an instruction that defendant could not be convicted unless the jury were satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a duly appointed, qualified and acting justice of the peace," was properly refused, it being sufficient if such justice was a *de facto* officer. But in *State v. Hodgekins*, 19 Me. 155, 36 Am. Dec. 742, it was held that performance of the marriage ceremony by one duly authorized for that purpose is necessary to be proved in a prosecution for adultery; the court saying that its decision was reached from the ruling in the English case in 4 Burr. 2059, that in actions for criminal conversation, and an indictment for bigamy, a marriage in fact must be proved, and that bigamy was an offense of the same grade as adultery.

2. **Second Marriage.**—The rule supported by the weight of authority with reference to a former marriage solemnized by an unauthorized person has also been applied with reference to the second marriage. Thus in *Hayes v. People*, 25 N. Y. 390, 82 Am. Dec. 364, in a prosecution for bigamy, it appeared that defendant, whose wife was still living, agreed to marry another woman, and procured a person dressed as a clergyman to perform the marriage ceremony, at which she agreed to take him for her husband and he agreed to take her for his wife, and the person officiating pronounced them man and wife, and this ceremony was followed by cohabitation as man and wife. It was held that the defendant was guilty of bigamy, whether the person officiating was a clergyman in fact or was merely procured to impersonate one. "If parties, competent to contract, in the presence of witnesses, agree together to be husband and wife, and afterward cohabit and recognize each other as such, it is a sufficient marriage to sustain an indictment for bigamy, in the event of one of the parties having before that time married another who is still living." It was contended in this case that in order to constitute a valid marriage by contract in *praesenti*, the parties must be capable of contracting, and that as defendant had a wife living at the time of the alleged second marriage, he was incapable of contracting a second marriage. In reply to this the court said: "The bigamist, although he is not capable of contracting the second marriage, may, nevertheless, 'marry another person,' so as to incur the penalty denounced against bigamy." Likewise, in *Carmichael v. State*, 12

Ohio St. 553, it appears that the person who solemnized a second marriage upon which an indictment for bigamy had been found, had no license or authority to perform the ceremony; but that thereafter the parties had cohabited as husband and wife. It was held that it was to be inferred that the parties openly and mutually consented to a contract of present marriage, and thereafter cohabited as such, and that this constituted a legal marriage upon which a conviction for bigamy could properly be had.

h. Marriage Without License.—Whether a charge of bigamy can be predicated on a former marriage performed without a license, or under a license which gives no authority, is a question upon which there is some conflict of judicial opinion. In *Kopke v. People*, 43 Mich. 41, 4 N. W. 551, it was held that a civil marriage performed under a license irregularly issued, and under such circumstances that all must be presumed to know that it gave no authority, cannot furnish ground for a prosecution for bigamy if not based on the voluntary consent of both parties, or followed by cohabitation, or some recognition of a marriage entered into in good faith. But in *State v. Robbins*, 28 N. C. (6 Ired.) 23, 44 Am. Dec. 64, the former marriage upon which a charge of bigamy was predicated had been celebrated by a justice of the peace without the procurement of a license, and it was held that though a minister or a magistrate may subject himself to a penalty for celebrating a marriage without a license, that the marriage is notwithstanding good in every intent and purpose; and a conviction for bigamy was accordingly upheld.

In *Bashaw v. State*, 9 Tenn. (1 Yerg.) 177, the former marriage upon which an indictment for bigamy was predicated was solemnized by a justice of the peace of one county in another county and without a license. The parties, however, to the marriage had mutually agreed to take, and did take, each other for husband and wife, and they were pronounced by the justice to be husband and wife. Moreover, they lived together and cohabited as man and wife for a number of years, during which time they had children, and then separated. After the separation, the wife lived and cohabited with another man and went by his name. The husband remarried during her life and a judgment of conviction for bigamy was set aside upon the grounds that the prior marriage was solemnized without a license, and also by one who was not authorized to perform the ceremony. Said Judge Wythe: "In the prosecution for the offense of bigamy, to constitute a lawful or valid marriage, two requisites are indispensable and must be proved to have existed: 1. A proper authority, empowering the solemnization of the marriage, which is a regular and lawful license, or a regular and lawful certificate of the publication of bans; 2. The solemnization of the marriage performed by a person duly qualified—that is, by a regular minister of the gospel having the care of souls, or a justice of the peace duly qualified." The decision in this case was rendered pursuant to an act of the state of North Carolina before the separation of the state of Tennessee from her

territory; but in the Robbins case cited above (28 N. C. (6 Ired.) 23, 44 Am. Dec. 64), the supreme court of North Carolina held that failure to procure a license for the first marriage did not prevent a charge of bigamy being predicated thereon.

i. **Separation by Mutual Consent of Parties to First Marriage—Effect of.**—As the statutes of bigamy recognize the dissolution of marriage only by death, divorce or annulment by competent authority, it follows that dissolution of a former valid marriage by mutual consent is no defense to a prosecution for bigamy against one of the parties thereto who after the dissolution of the former marriage by mutual consent marries another: *McConico v. State*, 49 Ala. 6; and the fact that defendants, after entering into articles of separation from his wife, was advised by a lawyer that he was free to marry again, constitutes no defense to a prosecution against him for bigamy: *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706; or that he was advised by a justice of the peace that the agreement for separation was, in legal effect, a divorce: *People v. Weed*, 29 Hun, 628, affirmed in 96 N. Y. 625. So, too, under a statute which provides that bigamy consists of having two wives or two husbands at the same time, knowing that the former husband or wife is still alive, and that nothing contained in the section shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for five years prior to the second marriage, or to any divorced person, or to any person when the former marriage has been declared void, it is no defense in a prosecution for bigamy that defendant believed that his first marriage had been annulled by agreement with his wife: *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800, 46 Pac. 802, 34 L. R. A. 784.

j. **Principal in Second Degree.**—The books show only one case, so far as we have been able to discover, where the doctrine of principal in the second degree has been applied to the crime of bigamy. In *Boggus v. State*, 34 Ga. 275, one Davis was indicted for bigamy and Boggus was indicted jointly with him as an accessory before the fact. It appeared that both Davis (a married man) and Boggus (who was single) were married at the same time and place, both couples standing up together and the marriage solemnized by one and the same ceremony; that on the evening of the marriage, shortly before it took place and after the license was procured, Davis told Boggus that he knew Davis' situation and if he would not expose him he would go ahead; that Boggus promised not to expose him and told him to go ahead. It further appeared that previous to the marriage Boggus, for Davis and in his name, wrote several letters to the woman with whom Davis was to contract the second marriage, to quiet certain suspicions on her part which had been aroused. It was contended by counsel for Boggus that as he was a single man at the time he aided and abetted Davis in the offense, and could not have been guilty of the offense of bigamy, he could not be a principal in the second degree, and requested the court to charge that no

one could be a principal in the second degree in the crime of bigamy. The court refused to so charge and Boggus was convicted. In sustaining the judgment the court, by Judge Lumpkin, said: "Because Boggus was a single man and, therefore, could not have been convicted of bigamy, as principal, himself, if he had married Miss Windham, yet, why could he not be guilty in the second degree, as present, aiding and abetting Davis? It may seem strange and startling, but yet unquestionably true, that a female may be guilty and punishable for rape in the second degree, being present, aiding and abetting. Lord Audley was convicted of rape upon his own wife, being present, aiding and abetting one of his minions to perpetrate this monstrous crime, and for which this devil-crazed nobleman was hung. It by no means, therefore, follows, that because the accused could not be convicted as principal in the first degree, he may not be in the second."

k. The Edmunds Anti-Polygamy Law.—While it is clear that all bigamous marriages are void for the reason that when a valid marriage exists, another valid marriage cannot be contracted, still a polygamous marriage may be, as knowledge by the second wife of former existing marriage, though vitiating the second marriage, does not make it any less a polygamous marriage and such are the marriages the Edmunds law aims to suppress: *United States v. Tenny*, 2 *Ariz.* 127, 11 *Pac.* 472.

The courts of Utah and the supreme court of the United States are principally the ones which have been called upon to construe what acts constitute a violation of the act of Congress of March 22, 1882, commonly known as Edmunds' Anti-Polygamy Law. The main questions which have been presented to the courts with reference to this act have been, whether (1) the word "cohabit" as used in the act requires proof of sexual intercourse; (2) whether the offense is a continuous one having duration, or one offense consisting of an isolated act; (3) whether one is guilty of the offense who does not live ostensibly with more than one woman. The decisions are uniform that the word "cohabit" as used in the act does not necessarily imply sexual intercourse. Thus a man who lives in the same house with two women, eats at their respective tables one-third of his time, and holds them out to the world, by his language or conduct, as his wives, is guilty of the offense of polygamy under the Edmunds act, although he may not occupy the same bed or sleep in the same room with either of them, or actually have sexual intercourse with either of them: *Cannon v. United States*, 116 *U. S.* 55, 6 *Sup. Ct. Rep.* 278, 29 *L. ed.* 561, affirming 4 *Utah*, 153, 7 *Pac.* 389. Likewise where a man, while recognizing, supporting and holding out to the world his lawful wife as a wife, provided houses for and supported other women who lived therein, and acknowledged them as his wives, he was "cohabiting with more than one woman," within the inhibition of the Edmunds act: *United States v. Snow*, 4 *Utah*, 280, 9 *Pac.* 501; and a charge to the effect that the law aims at the unlawful example or the appearance, as well as the actual continuance, of the polyg-

amous relation, without reference to what actually occurs with the plural wives, is not error. The law punishes the semblance of polygamous living: *United States v. Smith*, 5 Utah, 232, 14 Pac. 291. So, also, a polygamist whose wives, both the lawful and plural, are living within the jurisdiction of the court, both bearing his name and known as his wives, is guilty of violating the Edmunds-Tucker law, against cohabiting with more than one woman, though he lives exclusively with the plural wife, and deserts the lawful one: *United States v. Clark*, 5 Utah, 120, 21 Pac. 463.

That the offense is a continuous one, and not one consisting of an isolated act, is also established. Thus in *Ex parte Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556, 30 L. ed. 658, petitioner was convicted on three several indictments, each founded on the Edmunds act, and they were alike in all respects, except that each covered a different period of time. One judgment in force was rendered covering all the cases. Defendant sought his release in the district court by application for a writ of habeas corpus, and, the writ being refused, appealed. The supreme court of the United States were unanimously of opinion that the order and judgment of the district court must be reversed and the case remanded with direction to grant the writ of habeas corpus. Said Mr. Justice Blatchford, speaking for the court: "The offense of cohabitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife. It is inherently a continuous offense, having duration, and not an offense consisting of an isolated act. . . . There was but a single offense committed prior to the time the indictments were found. . . . For so much of the offense as covered each of these periods the defendant is, according to the judgment, to be imprisoned for six months and pay a fine of three hundred dollars. . . . On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to ten thousand five hundred dollars, or even an indictment covering each week, with imprisonment for seventy-five years and fines amounting to forty-four thousand four hundred dollars, and so on ad infinitum for smaller periods of time. It is to prevent such an application of penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution, prior to the time the prosecution is instituted." But though it is a continuous offense, and separate indictments will not lie for successive periods of time covered by such cohabitation prior to the finding of the indictments, yet if, after one indictment, the cohabitation is continued, another indictment will lie for such subsequent cohabitation: *United States v. Eldridge*, 5 Utah, 161, 13 Pac. 673, 5 Utah, 189, 14 Pac. 42. Nor is it essential under the Edmunds law against polygamy that a person should live ostensibly with more than one wife, for the gist of the offense is cohabitation with more than one wife, whether ostensibly or in secret; *United States v. Peay*, 5 Utah, 263, 14 Pac. 342.

As the federal statute is silent as to what shall constitute a marriage, as well as the method of proving marriage, it is difficult to determine just what rule should be adopted in proving the cohabitation inhibited by the Edmunds act. In *United States v. Tenney*, 2 Ariz. 29, 8 Pac. 295, it is held that the statute of the territory may be properly resorted to and applied in a prosecution under the act of Congress. But in a prosecution under the Edmunds act it is not proper for the court to charge the jury that if the defendant has by his acts induced others to believe, or the public to believe, that defendant has cohabited with more than one woman, then his acts are unlawful: *United States v. Langford*, 2 Idaho, 561, 21 Pac. 409. On the subject of proof of cohabitation in prosecution for polygamy under the Edmunds law, the following charge was held not error: "When you come to the proof of cohabitation with the illegal wife it requires actual proof of the fact. The presumption would be against it, to commence with. The presumptions of the law are in favor of innocence, and until some evidence has been given tending to show these acts of cohabitation on his part, the presumption would be he didn't do that; but where it is shown these acts of cohabitation have taken place with the plural wives, if shown beyond a reasonable doubt, then it is cohabitation within the meaning of the law": *United States v. Peay*, 5 Utah, 263, 14 Pac. 342.

KINSER v. COWIE.

[235 Ill. 383, 85 N. E. 623.]

CORPORATE STOCK—Rescission of Contract to Buy.—A purchaser of corporate stock may rescind his contract and recover the purchase money paid if the seller refuses to deliver the certificate, irrespective of whether title passed without such delivery. (p. 223.)

Zeisler, Farson & Friedman, for the appellants.

John A. Bloomington, for the appellee.

383 DUNN, J. Appellee, William J. Kinser, purchased of appellants, Robert E. M. Cowie, Charles H. Bohanon and Oscar J. Friedman, forty-one shares of the stock of the Porter Coinometer Company for twelve hundred and fifty dollars. He gave Cowie a check for six hundred dollars and received the following receipt:

"CHICAGO, ILLINOIS, *November 10, 1902.*

"Received of Mr. William J. Kinser, of the city of Chicago, Illinois, the sum of \$600, being part payment of a total of \$1250, the balance of which is to be paid on or before January 10, 1903, in consideration of which we are to turn over to said

William J. Kinser forty-one shares of the capital stock of the Porter Coinometer Company, which is capitalized for \$25,000.

“ROBERT E. M. COWIE,

“FOR ROBERT E. M. COWIE,

“CHARLES H. BOHANON,

“O. J. FRIEDMAN,

“Owners of 167 shares of the Porter Coinometer Company.”

On January 10, 1903, Kinser paid six hundred dollars of the balance and on February 14th the remainder. On January 16, 1903, ³⁸⁴ Cowie acknowledged receipt of the six hundred dollars, and stated that the stock would be transferred to Kinser as soon as Bohanon returned from Mexico. The stock was never transferred to Kinser on the books of the company, and no certificate was ever delivered to him, though he frequently demanded it. On December 23, 1904, Kinser began this action of assumpsit to recover the money paid, and recovered a judgment for thirteen hundred and forty-eight dollars and ninety cents, which has been affirmed by the appellate court. To reverse this judgment of affirmance a further appeal is now prosecuted to this court.

The appellants' contention in the court below was that the title to the stock passed to the appellee whether the certificates were ever delivered to him or not, and they asked the court to give to the jury the following instructions, the refusal of which is the only error alleged and argued by them:

“4. The court instructs you that certificates of stock are merely evidence of title. The title to the forty-one shares of capital stock of the Porter Coinometer Company, which is the subject at controversy in this case, may have passed, notwithstanding the fact that certificates of the said stock were never issued to the plaintiff. You are to determine whether title to said stock passed, and in determining this question you are to consider whether the plaintiff regarded himself as the owner of said stock, whether the defendants regarded him as the owner of said stock, and whether the plaintiff, Kinser's, acts in regard to the Porter Coinometer Company were consistent or not with the ownership of shares of stock of the Porter Coinometer Company. If his conduct was that of the possessor of stock, then you may find that the title passed, and if you find that title did not pass to the forty-one shares of stock, then you should find the issues for the defendants.

“5. The court instructs you that your decision in this case should depend upon the fact whether the defendants gave title to the plaintiff to forty-one shares of the capital ³⁸⁵ stock

of the Porter Coinometer Company. If you find, from the evidence, that title did not pass, then your verdict should be for the plaintiff, but if you find, from the evidence, that the title did pass to the forty-one shares of stock, then you should bring in a verdict in favor of the defendants. Certificates of stock are merely evidence of title, and do not themselves constitute title. It is not necessary, in order for the defendants to have given title to the plaintiff of the forty-one shares of capital stock of the Porter Coinometer Company, to have delivered the certificate or certificates for forty-one shares of the capital stock of the Porter Coinometer Company. Title may have passed irrespective of whether stock certificate or certificates were delivered to the plaintiff, and whether title passed is to be determined from all the evidence introduced in this case. In determining this question the acts of both plaintiff and defendants in regard to their dealings with the Porter Coinometer Company should be considered, and especially all those acts of the plaintiff whereby he regarded himself as the owner of the said forty-one shares of stock, and wherein he participated in the conduct of the affairs and negotiations and transactions in which the Porter Coinometer Company was interested."

These instructions were properly refused. The question whether title to the stock passed without delivery of the certificates was immaterial. The claim of the plaintiff was that he had bought the stock of the defendants and had a right to the evidence of his title, which the defendants wrongfully refused to deliver to him, and that having demanded the certificates which they had agreed to turn over to him, upon their refusal he had a right to rescind the contract and recover the purchase price which he had paid. It is no defense to such a claim that he had the title to the stock. The title to the stock was of no value if he had no evidence of it. The only evidence the corporation would recognize or was bound to recognize was the certificates. ³⁸⁶ The plaintiff could have no standing with the corporation as a stockholder, and could not compel a transfer of the stock on the books of the corporation to himself as a purchaser without the certificates. As a purchaser of the stock he was entitled to the certificates, and if their delivery was refused, to have the money paid refunded to him. Appellants claim that it was agreed at the time of the sale that no stock should be issued until a reorganization of the company was had, with an increased capital.

The instructions are not, however, based upon any such hypothesis.

The judgment of the appellate court will be affirmed.

A Certificate of Stock is authentic evidence of the title to stock, but it is not the stock itself, nor is it necessary to the existence of the stock or an assignment thereto: *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 938.

The Right of the Buyer of Personal Property to Recover installments paid in the event of a rescission of the contract of sale is discussed in *Pierce v. Staub*, 78 Conn. 459, 112 Am. St. Rep. 163, and cases cited in the cross-reference note thereto.

GOLLADAY v. KNOCK.

[235 Ill. 412, 85 N. E. 649.]

REMAINDERS.—A Vested Remainder is a Present Interest which passes to one to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after a particular estate terminates. (p. 226.)

REMAINDERS.—A Remainder is Vested When a Definite Interest is created in a certain person and no further condition is imposed than the determination of the precedent estate. It is not sufficient that there is a person in being who has the present capacity to take the remainder if the particular estate be presently determined; but it must also appear that there are no other contingencies which may intervene to defeat the estate before the falling in of the particular estate. (p. 226.)

REMAINDERS.—A Contingent Remainder is One Limited to take effect either to a dubious or uncertain person, or upon a dubious or uncertain event. (p. 227.)

REMAINDERS—When Vested and When Contingent.—When a remainder is subject to contingencies or conditions precedent, it is contingent; but when subject to contingencies or conditions subsequent, it is vested, subject to be divested by the happening of the subsequent event. (p. 227.)

REMAINDERS—When Contingent.—A Devise to One with Remainder in Fee to his children who survive him, with a devise over to another in case the life tenant dies leaving no children, does not create a vested interest in the last devisee, but such remainder is contingent upon the death of the life tenant without leaving children. (p. 229.)

REMAINDERS—When Contingent.—A Devise to the Testator's Wife for Life "and to her children after her death," and if she does not have children "that will live to inherit" the land, then it shall, on the death of her and her children, go to a named person and his heirs, creates a contingent remainder with a double aspect, and the children have no vested interest unless they survive the mother. (p. 230.)

REMAINDERS—How Far Transferable by Deed.—Where a grantor in a warranty deed of a contingent remainder dies before the contingency happens upon which the estate is to vest, nothing passes by the deed, and its covenants do not estop his children from asserting title when they do not claim by descent from him. (p. 231.)

C. C. Lee and H. A. Neal, for the appellants.

A. C. Anderson, for the appellees.

413 VICKERS, J. This is an appeal from the circuit court of Coles county in a partition proceeding in which the complainants claim an interest in the real estate in question as grandchildren and heirs of Moses Golladay.

The real estate involved was owned in fee simple by George Golladay at the time of his death, which occurred on the 13th of January, 1854. The interests of the parties **414** in the real estate depends upon the construction to be given to the second clause of the will of George Golladay. That clause is as follows: "After the payment of such debts I give, devise and bequeath unto my wife, Nancy Golladay, all my personal property and real estate, being in sections 9 and 10, in town 13 north, range 10 east, third P. M., in said county, and to her children after her death; and if the said Nancy Golladay does not have children that will live to inherit said real estate, that the said real estate, at the death of Nancy Golladay and her children, fall to Moses Golladay and his heirs, of said county."

At the time of the death of the testator, his widow, Nancy Golladay, had no children, but after the death of the testator his widow married one Johnson and had a daughter by him, who lived to be twenty-three years of age. This daughter died before her mother. Moses Golladay died in 1855, leaving two children, William Golladay and Mary Knock. On May 15, 1900, William Golladay executed a general warranty deed to Henry H. Fuller and Ross R. Fuller, purporting to convey the real estate described in the bill. William Golladay died January 1, 1904, intestate. Complainants are his children. Mary Knock, the only daughter of Moses Golladay, died intestate in the year 1890, leaving six children as her only heirs. John Knock, Jr., one of the children of Mary Knock, on the twenty-seventh day of February, 1904, made a warranty deed conveying his interest in the real estate involved to Henry H. Fuller. Nancy Golladay died in 1907.

The court below found that Nancy Golladay took a life estate in the real estate in question under the will of George

Golladay, and that Moses Golladay and his heirs took a contingent remainder, which, upon the death of Nancy Golladay without leaving children surviving her, became a fee in the persons who at that time answered the description of "heirs of Moses Golladay"; that Henry H. Fuller and Ross R. Fuller took nothing under their deed from William ⁴¹⁵ Golladay, and said deed was, by the decree of the court, canceled as a cloud upon the title. The court by its decree found that the complainants are each entitled to a one-sixteenth interest in the premises in fee, and that H. H. Fuller, Jack Knock, Catherine Knock, Minnie Knock, Anna Knock and Emma Knock are each seised of an undivided one-twelfth interest in said estate, and that no other parties have any interest therein. All of the defendants other than H. H. and R. R. Fuller claimed as heirs of Cassie Johnson, the daughter of Nancy Johnson, formerly Nancy Golladay. The court found that these parties had no interest in the premises. Henry H. and Ross R. Fuller excepted to the decree and have perfected an appeal to this court. The error relied on for a reversal are, that the court erred in finding that the second clause of the will of George Golladay gave Moses Golladay a contingent remainder instead of a vested remainder, and that the court erred in rendering a decree in favor of complainants, against the defendants.

⁴¹⁷ The principal question in this case is whether the interest devised to Moses Golladay and his heirs was a vested or a contingent remainder. A vested remainder is a present interest which passes to a party to be enjoyed in future, so that the estate is invariably fixed in a determinate person after a particular estate terminates: 2 Blackstone's Commentaries, 168; Howard v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503. Fearne, in his work on Remainders, on page 2, says: "An estate is vested when there is an immediate fixed right of present or future enjoyment; an estate is vested in possession when there exists a right of present enjoyment; an estate is vested in interest when there is a present fixed right of future enjoyment." A remainder is vested when a definite interest is created in a certain person and no further condition is imposed than the determination of the precedent estate. It is not sufficient that there is a person in being who has the present capacity to take the remainder if the particular estate be presently determined. It must also appear that there are no other contingencies which may intervene to defeat the estate before the falling in of the particular estate: Smith v. West, 103 Ill. 332. In the case last

above cited this court quoted with approval the language of Chancellor Walworth in *Hawley v. James*, 5 Paige, 466, as follows: "A remainder is vested in interest where the person is in being and ascertained, who will, if he lives, have an absolute and immediate right to the possession of the land upon the ceasing or failure of all the ⁴¹⁸ precedent estates, provided the estate limited to him by the remainder shall so long last—in other words, where the remainderman's right to an estate in possession cannot be defeated by third persons or contingent events or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest."

A contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. This general definition has often been approved by this court. While the difference between a vested and a contingent remainder is clear enough under the definitions as given by the authorities, still it is not always an easy matter to determine whether a particular instrument creates a vested or a contingent remainder. Thus, it does not necessarily follow, in all cases, that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The contingency or condition may be either precedent or subsequent. If the former, the estate is contingent; if the latter, the remainder is vested, subject to be divested by the happening of the condition subsequent: *Haward v. Peavey*, 128 Ill. 430, 15 Am. St. Rep. 120, 21 N. E. 503, and authorities there cited. To distinguish between a contingent remainder and one that is vested, subject to be divested by a condition subsequent, is often a matter of much difficulty. So far as our investigation has gone we have found no attempt to formulate a rule on the subject, except the general rule that it is to be determined in each case as a question of construction of the instrument creating the interest.

In the case at bar both parties agree that under the second clause of the will of George Golladay, Nancy Golladay took a life estate. The devise over to Moses Golladay and his heirs cannot be construed as vesting a present interest in fee, subject to be divested upon the death of the life tenant leaving children surviving her. The language of the testator will not bear such construction. The clearly expressed ⁴¹⁹ intention of the testator was to give his wife a life estate in the premises, with remainder in fee to such of her children as might be living at the time of her death; then, to meet the possibility

that his wife might die leaving no children surviving her, he made the devise over to Moses Golladay and his heirs. Here the devise over depended on a dubious and uncertain contingency—that is, the death of the life tenant without leaving children surviving her. The language of the testator that the real estate is to fall to Moses Golladay and his heirs “at the death” of the life tenant, clearly indicates that the testator did not intend or contemplate a vesting of the devise over before the happening of that contingency. In other words, the testator has fixed the time and the condition under which the estate may vest, and it is not the province of courts to defeat the intention of the testator by a resort to artificial rules of construction.

Appellants place much reliance upon the case of *Boatman v. Boatman*, 198 Ill. 414, 65 N. E. 81. That case arose under the following facts: The testator devised a certain portion of his real estate to his son, Emory Boatman, subject to the following condition: “The share of the real estate that my son Emory gets under this will is only a life estate. He is to have the use, rents and proceeds of said land, after paying taxes and necessary repairs, so long as he may live. At his death, if he leaves any child or children surviving him, then said land is to go to such child or children, but if he dies leaving no child or children surviving him, then said lands to go to his brothers and sisters.” After the death of the testator, and during the life of Emory Boatman, Clara V. Worsham, a sister of Emory Boatman, conveyed, by quitclaim deed, all of her interest in the real estate of her father, including that upon which Emory Boatman held a life estate, to four of her brothers, one of whom was Clarence E. Boatman. Clarence E. Boatman died intestate February 14, 1899, leaving no children, but leaving Ida ⁴²⁰ M. Boatman, his widow. Emory Boatman died June 19, 1901, leaving no widow, child or children or descendants of a child or children. Ida M. Boatman filed her bill for a partition, claiming that her deceased husband was seised of a vested interest in the lands in which Emory Boatman held a life estate, and that by the death of her husband without children, she, as his widow, became seised, under the statute of descent, of one undivided half interest in the lands upon which Emory Boatman held the life estate. This court affirmed a decree sustaining the contention of the widow of Clarence E. Boatman. In that case, on page 420, a definition of a vested remainder was given, as follows: “A vested remainder is an estate to take effect after another estate for years, life or in tail, which

is so limited that if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency."

This definition is not erroneous when all of the language embraced within it is properly considered. The definition, however, is very erroneous and misleading, unless the modifying clause introduced by the last eight words employed is constantly kept in mind. The subsequent treatment of the question involved in that case shows that the court applied the definition given, without considering that the death of the life tenant leaving children surviving him was the "concurrence of a collateral contingency," which, under the definition given, prevented the interest of the brothers and sisters of Emory Boatman from being a vested remainder. There was in that case, as there is in the case at bar, a collateral contingency to be taken into account—that is, the death of the life tenant without leaving surviving children before the remainder could become vested. This contingency is a dubious and uncertain event. It could not ⁴²¹ be known until the death of the life tenant whether this contingency would happen; hence the remainder was contingent in the Boatman case (198 Ill. 414, 65 N. E. 81) as it is in this. In this respect the Boatman case is out of harmony with our previous decisions as well as the great weight of authority outside of this state: See 24 Am. & Eng. Ency. of Law, 2d ed., p. 418. In so far as the Boatman case seems to lay down the rule that a devise to one with remainder in fee to his children who may survive him, with a devise over to another in case the life tenant died leaving no children, creates a vested interest in remainder in the last devisee, that case is overruled. The case of Chapin *v.* Nott, 203 Ill. 341, 67 N. E. 833, in so far as it is based on the Boatman case on this point, must be regarded as unsound. The remainder created by the devise over in such case is contingent upon the death of the life tenant without leaving children. That this is the proper construction of a clause in a will or deed is recognized by many decisions of this court, among which the following may be cited: City of Peoria *v.* Darst, 101 Ill. 609; Smith *v.* West, 103 Ill. 332; McCampbell *v.* Mason, 151 Ill. 500, 38 N. E. 672; Furnish *v.* Rogers, 154 Ill. 569, 39 N. E. 989.

In the case last above cited the clause in the will involved was as follows: "I give and bequeath to my grand-niece, Jessie

Starkweather, my house and two lots in Sycamore, also thirty-two acres in Mayfield, De Kalb county, Ill., and \$500, all of which is to go to her children should she marry. If she should die childless, then it is to be divided between her mother and the rest of my grand-nieces and nephews who will appear and give evidence of such." It was held that under the foregoing clause Jessie Starkweather took a life estate, and that the remainder created by the devise over was contingent on her marriage and the birth of children who survive the life tenant. In disposing of that case this court, speaking by Mr. Justice Phillips, on page 571, said: "The language employed designates the children as those who take the remainder,"⁴²² and the estate does not vest in them, as an absolute fee simple title to them and their heirs forever, until the death of Jessie, as it is further provided that if she die childless the estate is to be divided among her mother and the rest of the testator's grandnieces and nephews, etc., whose estate is contingent upon the death of Jessie without a surviving child or children or the descendants of such child or children, in which case the takers of the remainder are substituted for surviving children. By the first clause of the will Jessie Starkweather takes an estate for life in the house, lots and land and in the five hundred dollars therein bequeathed. The remainder is a concurrent, contingent remainder with a double aspect, to be determined immediately upon the death of Jessie, as at that moment it will vest in her child or children, or the descendants of such child or children, that survive her, and in default of such survival the remainder would vest in the mother of Jessie and the other grandnieces and nephews of the testator"; citing *Dunwoodie v. Reed*, 3 Serg. & R. 435, and *City of Peoria v. Darst*, 101 Ill. 609.

The law as laid down in the *Rogers* case (154 Ill. 569, 39 N. E. 989) and the others above cited in line with it furnishes the correct rule of decision in the case at bar. The second clause of the will of George Golladay gave his wife a life estate with a contingent remainder with a double aspect, to be determined upon the death of the life tenant. At the time of her death she left no children surviving her. The devise over to the heirs of Moses Golladay therefore took effect as a fee simple interest upon the falling in of the life estate. The daughter of Nancy Golladay who died before her mother, and such of the heirs of Moses Golladay as predeceased the life tenant, had no interest in the premises.

William Golladay was a son of Moses Golladay. As already shown, he made a warranty deed purporting to convey his interest in the premises to Henry H. Fuller and Ross R. Fuller several years before the death of the life tenant. Appellants contend that this deed operated as a ⁴²³ conveyance of the interest of William Golladay, and that if said deed was otherwise inoperative it should be given effect, by way of estoppel, against the assertion of title by the complainants, who are the children of William Golladay. This contention cannot be sustained. William Golladay died before the life tenant. No title ever vested in him. His children are not estopped by the covenants in this deed, for the reason that they are not asserting a title by descent from their father, but are claiming under the will of George Golladay, as heirs of Moses Golladay. A contingent remainder may be transferred by warranty deed, under our statute, so as to vest the title in the grantee: Hurd's Stats. 1905, c. 30, sec. 7; Wadhams v. Gay, 73 Ill. 415; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332. But where the grantor of such an interest dies before the contingency happens upon which the estate is to vest, nothing passes by such deed: Thomas v. Miller, 161 Ill. 60, 43 N. E. 848. Had William Golladay survived the life tenant appellants would have succeeded to his share in this estate. In that event his deed would have been binding upon him and his heirs after his death. The conveyance by John Knock, Jr., to Henry H. Fuller is valid under the authorities which nullify the deed of William Golladay. John Knock, Jr., survived the life tenant. The court below correctly held that H. H. Fuller was entitled to the share of John Knock, Jr. This is the only interest he has in this estate. The other appellant, Ross R. Fuller, who claims under the deed of William Golladay, has no interest whatever.

There is no error in the decree of the circuit court. The decree will be affirmed.

Mr. Justice Dunn took no part in the decision of this case.

Remainders are Contingent when they are limited to take effect either to a dubious or uncertain person, or upon a dubious and uncertain event; vested remainders exist when the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. The law favors vested rather than contingent remainders: Haward v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120; Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213; Patton v. Ludington, 103 Wis. 629, 74 Am. St. Rep. 910.

A Devise to the Wife of the Testator for and during her natural life, and at her death to the daughter of the testator and her two children, creates in the latter a vested remainder, subject only to a

life estate in the widow: *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291. Under a devise and bequest of property to M., to be invested by the testatrix's executors for M.'s benefit during his natural life and for the benefit of his wife and issue after his death, a trust is not created as to the wife and children, but the title vests in them absolutely on M.'s death: *Mee v. Gordon*, 187 N. Y. 400, 116 Am. St. Rep. 613. And under a will by which a testatrix devises to her husband all of her interest in a certain lot of land, "also all my right" in two certain other lots, "to have the said interests in the said described parcels of land" for life, with a gift over to others, the husband takes only a life interest in all of the land: *Platt v. Brannan*, 34 Colo. 125, 114 Am. St. Rep. 147.

COLLINS v. CAPPS.

[235 Ill. 560, 85 N. E. 934.]

WILLS.—**Parol Evidence, Though not Admissible to change the language of a will, may be received when necessary to identify the subjects and objects of the testator's bounty.** (p. 233.)

WILLS.—**However Many Errors There may be in a Description, either of the devisees or of the subject of a devise, the gift will not be avoided, if enough remains after rejecting the errors to show with certainty what was intended, when considered from the position of the testator.** (p. 233.)

WILLS.—**Rejection of False Description.**—Where a testator devised the "west half" of a certain quarter section "containing about seventy-six acres," when the only land owned by him in that county was seventy-six acres in the north half of that quarter section, the word "west" may be stricken out and the will be given effect as a gift of the seventy-six acres in the section which he owned, though there is a residuary clause. (p. 234.)

WILLS.—**It is Presumed that a Testator Intended to dispose of his own land.** (p. 235.)

Wight & Alexander, for the appellants.

'Jack, Irwin, Jack & Miles and Bracken, Young & Peirce, for the appellees.

561 DUNN, J. William Collins died on April 30, 1901, having on the day before made his will, whereby he gave to his wife all his personal property absolutely, and the use, income and rentals of all his real estate during her life. The third paragraph of the will contains the following language:

"Third—At the decease of my said wife, I give, devise and bequeath unto my son William J. Collins, of McLean county, Illinois, that certain tract of land in said county described as follows: The west half of the north-east quarter of section ten (10), in township twenty-one (21), range one (1), west, containing about seventy-six (76) acres. Provided, however,

my daughter Mary E. Collins shall have an interest in said premises and a lien thereon to the extent of \$1000, which shall be paid to her upon the sale of said property, and until it shall be sold and conveyed my said son William shall pay to her on March 1 each year the sum of seventy-five dollars (\$75). It is my desire that said farm should not be sold for five years after the decease of my said wife, and if my said son William or my said daughter Mary Elizabeth shall die without issue before said land shall be conveyed, the fee simple title thereto shall vest absolutely and in fee in the surviving brother or sister."

The fifth paragraph is as follows:

"Fifth—All the balance and residue of my property, real and personal, I give, devise and bequeath to my wife, Eliza Collins."

The testator owned the north half of the northeast quarter of section 10 mentioned in the will, except four ⁵⁶² acres which were occupied by a railroad right of way, but not the southwest quarter of the northeast quarter of said section, nor any other land in said section or in McLean county. He also owned one hundred and twenty acres of land in Logan county, which was specifically devised by another clause of his said will, and he owned no other real estate. Mrs. Collins died a few days after her husband, and after the expiration of five years William J. Collins, who has since his mother's death been in possession of the north half of the northeast quarter of said section 10, and his sister, Mary E. Collins, filed their bill for the construction of their father's will, praying that they may be decreed to be entitled under the said will to the north half of the northeast quarter of said section 10. All the other heirs of William Collins, who were also all the heirs of his wife, were made defendants, and a cross-bill was filed for the partition of the northeast quarter of the northeast quarter of section 10 among the heirs of the wife, under the claim that she took the title thereto under the fifth clause of the will. On a hearing the court dismissed the cross-bill and decreed the relief prayed in the original bill. The question presented by this appeal is whether the devise is of the west half of the quarter section or the north half.

The purpose of the construction of a will is to determine the intention of the testator. That intention must be found in the words of the will itself, as applied to the subjects and objects of the testator's bounty. Parol evidence, though not admissible to change the language of the will, may be received when necessary to identify such subjects and objects. A

court of equity cannot correct a mistake in a will by reforming the instrument, but all the circumstances surrounding the testator and the state and description of his property may be shown, for the purpose of applying the language used to the conditions existing. However many errors there may be in a description either of a devisee or the subject of a devise, the devise will not be avoided if ⁵⁶³ enough remains, after rejecting the errors, to show with certainty what was intended, when considered from the position of the testator.

In this case the testator, after devising to his wife the use of all his real estate for life, attempted to dispose of it all after her death by specific devises. The Logan county farm was thus disposed of and no question arises as to it. But when we come to the McLean county farm of seventy-six acres, the error in describing it as the west half of the quarter section instead of the north half defeats the intention of the testator unless it can be corrected from the language of the will itself, in view of circumstances surrounding the testator. No doubt whatever can exist as to the testator's intention. The only question is whether such intention is expressed in the will after the rejection of the false part of the description.

The case in this particular is not distinguishable from the cases of *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, *Douglas v. Bolinger*, 228 Ill. 23, 119 Am. St. Rep. 409, 81 N. E. 787, and *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170. If the word "west" is stricken out of the clause of the will under consideration, there remains a devise of "the half of the northeast quarter" of the section. The testator owned a tract of land, and only one, to which this description applies, and it must be regarded as the tract intended to be devised. In each of the cases cited it was held that where it appears that the description of land devised, though full, certain and explicit on the face of the will, is in part false, and the testator did not own the land, extrinsic evidence may be heard, not to add to or change the words of the will, but to show the situation of the testator's property, and to enable the court to apply the words to the subject matter in view of the circumstances surrounding the testator at the time of the execution of his will, and if enough remains, after striking out the false part of the description, to identify the property the testator intended to convey, his intention will be given effect. In *Page on Wills* (section 819, ⁵⁶⁴ page 376), it is said: "Where testator describes the property devised by township, range, section and quarter section, but does not locate it in the

correct section or range, or the like, the weight of authority is that extrinsic evidence is admissible to show exactly what real estate the testator owned. Under this view, if he owns any real estate which corresponds, in part, to the description in the will, the court will reject the incorrect part of the description and will pass the realty conveyed by the correct description." Other cases in which the principle has been applied are *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, 28 L. R. A. 149; *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493; *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287, 69 N. E. 281, 63 L. R. A. 593; *Eckford v. Eckford*, 91 Iowa, 54, 58 N. W. 1093, 26 L. R. A. 370; *Stewart v. Stewart*, 96 Ill. 620, 65 N. W. 976; *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Riggs v. Myers*, 20 Mo. 239; *Allen v. Lyons*, 2 Wash. C. C. 475; *Fed. Cas. No. 227*; *Winkley v. Kaime*, 32 N. H. 268; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617, 29 L. ed. 860.

It is sought to distinguish this case from the *Decker* case on the ground that the will there stated the testator's intention to devise "a part of my real estate," while here there are no words of ownership or possession. The distinction is immaterial. The presumption is that the testator intended to dispose of property which he owned: *Pate v. Bushong*, 161 Ind. 533, 100 Am. St. Rep. 287, 69 N. E. 281, 63 L. R. A. 593; *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. Rep. 617, 29 L. ed. 860; *Case v. Young*, 3 Minn. 209. In the latter case the will gave to the wife "one-third of all real estate," to a son David "the north half of the real estate," to a son Jacob "the south half of the real estate," and no other description was found in the will. The court held that it was the intention of the testator to devise his own lands to his sons, and extrinsic evidence was competent to identify them. In *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181, 40 N. E. 553, 28 L. R. A. 149, *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570, and *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345, there were no words of ownership or possession.

It is also sought to distinguish this case from those of *Douglas v. Bolinger*, 228 Ill. 23, 119 Am. St. Rep. 409, 81 N. E. 787, and *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170, ⁵⁶⁵ on the ground that there was no residuary devise in either of those cases. Appellants claim that there being a residuary clause here, no presumption arises that the testator intended to dispose of all of his property by the specific de-

vises. He did dispose of all except this McLean county land by other specific devises, and by the clause under consideration he undertook to dispose of the half quarter of section 10, containing seventy-six acres, thus manifesting sufficiently his intention to dispose of the remainder in all the land, after his wife's life estate, by the specific devises. The residuary clause is therefore not material in the consideration of the case. The specific bequest, after omitting the false descriptive word "west," is of the half of the quarter section. It is presumed to be the half the testator owned.

The appellants rely upon the cases of Kurtz v. Hibner, 55 Ill. 514, Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. 13, 16 L. R. A. 321, Williams v. Williams, 189 Ill. 500, 59 N. E. 966, and Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A., N. S., 942. In those cases the rule was expressly recognized that repugnant elements in the description employed in the devise may be rejected, and if, after this is done, a sufficient description remains, when interpreted in the light of surrounding circumstances, to identify the land, the devise will be given effect. But it was also held that the court had no power to reform a will or correct a mistake therein by inserting or changing words, and that in each of those cases the rejection of the repugnant words did not leave a description which, when read in the light of the circumstances surrounding the testator at the time of the execution of the will, was sufficient, without inserting words not found in the will, to identify the property which it was claimed the testator intended to devise.

The decree of the circuit court will be affirmed.

In Construing a Will Extrinsic Evidence is admissible, in cases of doubt or ambiguity, to identify the devisee or the property devised: Bryan v. Bigelow, 77 Conn. 604, 107 Am. St. Rep. 64; note to Chappell v. Missionary Society etc., 50 Am. St. Rep. 289.

If There is a Misdescription of the Subject of a Devise, and, after striking out that part of the description which is false, enough remains when read in the light of the circumstances surrounding the testator at the time the will was executed to identify the property he intended to convey, the remaining portion of the description may be so read and the testator's purpose given effect: Douglas v. Bolinger, 228 Ill. 23, 119 Am. St. Rep. 409; Pate v. Bushong, 161 Ind. 533, 100 Am. St. Rep. 287.

BARNES v. DANVILLE STREET RAILWAY AND LIGHT COMPANY.

[235 Ill. 566, 85 N. E. 921.]

STREET RAILWAYS—Act of Employé in Emergency.—The law does not exact the same measure of prudent judgment from the employés of a street railway company when they are compelled to act in a sudden emergency, as it does when there is time for deliberation. (p. 240.)

STREET RAILWAYS—Negligence of Motorman in Emergency.—When a street-car, owing to a sudden cessation of power, stops on a steam railroad crossing, and in the emergency the motorman throws his controller around intending to disconnect the current but in fact not doing so, and then jumps from the car and with the aid of others pushes it back to a place of safety, from which it suddenly starts when the power is resumed and dashes forward into an approaching locomotive, injuring a passenger who did not alight from the car, the question whether the motorman was negligent in not completely shutting off the power is a question of fact for the jury. (p. 240.)

STREET RAILWAYS—Contributory Negligence of Passenger. When a street-car, owing to a sudden cessation of power, stops on a steam railroad crossing, and the crew and most of the passengers jump to the ground and push the car back to a place of safety, from which it suddenly starts when the power is resumed and runs in front of an approaching locomotive, the question whether a passenger, who remains on the car in the face of the danger, fails to exercise due care for his safety is a question of fact for the jury. (p. 241.)

DAMAGES—Evidence of Earnings or Wages.—In an action for personal injuries evidence of what the plaintiff's services prior to the injury were reasonably worth is admissible when only general damages are claimed. (p. 241.)

DAMAGES—Testimony of an Osteopath.—In an action for personal injuries an osteopath, who is also a graduate of a medical college, who treated the plaintiff for his alleged injuries, may give in evidence subjective symptoms of the plaintiff, given at the time of the treatment. (p. 241.)

STREET RAILWAYS.—The Maxim "*Res Ipsa Loquitur*" does not apply upon mere proof of the happening of an accident to a street-car which results in injury to a passenger who was exercising due care for his safety. (p. 243.)

H. M. Steely and Louis Clements, for the appellant.

Curtis G. Redden and S. M. Clark, for the appellee.

568 **CARTWRIGHT, C. J.** On October 3, 1906, the appellee became a passenger on a street-car of appellant on Vermillion street, in Danville, at the public square, and rode north about half a mile to where a double track railroad crossed the street railway at right angles. The street-car stopped about thirty feet south of the south railroad track and all of the passengers got off except ten or twelve. The conductor went ahead upon the railroad crossing to see if the

way was clear, and finding it clear, he signaled the motorman to come on. The motorman started the street-car across the railroad tracks, but the power suddenly went off the trolley wire and the street-car stopped, standing over the tracks. The north track was used for west-bound trains and the south track for east-bound trains. There was a locomotive engine on the north track, a short distance east of the street-car, which was either standing or moving slowly toward it, waiting for the signal that would permit it to cross the street-car track. The signal consisted of a horizontal arm, which would be dropped down to give the engine the right of way; and there was another engine near by on the other track, either standing still or moving slowly. When the street-car stopped on the tracks the motorman threw his controller around to disconnect from the power but failed to entirely close it by three notches. This was done in great haste, and he jumped off the car on the west side, calling for help to assist him in shoving the street-car off the railroad tracks. The conductor, who was on the east side of the street-car, between the two tracks, called to the passengers to get off the car, and they all got off except the appellee, who was sitting in the front seat, facing north on the west side, reading a newspaper, and a lady who was in the rear seat on the east side. The car was an open summer car, and all that was done was plainly visible to everybody. The appellee was somewhat hard of hearing and did ⁵⁶⁹ not hear the motorman but did hear the conductor, and he saw the motorman jump off hurriedly and saw what was being done. The conductor, motorman and passengers who got off took hold of the street-car and shoved it back to the south, off the railroad track. The signal was then given for the locomotive to cross the track and it started up. The appellee sat in the car until this time, when he got up and was folding his newspaper, with the intention, as he says, of getting off the car, and stepped to the other side of the car, when the power suddenly came on again and the street-car started forward and ran in front of the approaching locomotive. When the car started the motorman jumped for the car to get on and get to his levers, and was climbing up on the west side of the car when it was struck by the locomotive and turned partly around, throwing the motorman against the curbstone on the west side of the street and throwing appellee out on the east side of the car. The appellee suffered a scalp wound, which soon healed, and a fracture of the left shoulder blade, which united in a short time. He was disabled for about ten weeks, when he re-

sumed his occupation. He brought this suit in the circuit court of Vermilion county to recover damages for his injuries.

The negligence charged in the declaration as a ground of liability was that the motorman negligently failed to disconnect the street-car from the power, and negligently permitted the car to stand on the street-car track, near the railroad track and crossing, without being disconnected from the power. The plea was the general issue, and upon a trial there was a verdict finding the appellant guilty and assessing the damages at three thousand dollars. The court overruled a motion for a new trial and entered judgment on the verdict, from which the appellant appealed to the appellate court for the third district. The appellate court affirmed the judgment, and this further appeal was prosecuted.

570 There was no material conflict in the evidence, by which the facts above recited were proved, and it is argued that the court erred in refusing to direct a verdict of not guilty, for the reason that the evidence did not fairly tend to prove that the plaintiff was in the exercise of due care to avoid the injury nor that the defendant was guilty of any breach of duty toward him. Counsel call attention to the testimony of the plaintiff that he saw the car stopped on the tracks and noticed the locomotive engine a short distance east, either standing or approaching slowly, and also some cars on the south track to the east and another engine on the west side; that he saw the motorman jump off in a hurry and heard the conductor call for the passengers to get off and saw them get off, and did not get off but remained on the car while the conductor, motorman and other passengers assisted in getting the car off the tracks. It is true that the plaintiff was not bound to assist in moving the car; but that fact has no bearing on the question whether he neglected that care which was reasonably to be expected from an ordinarily prudent person in the same condition by remaining upon the car in entire unconcern in the situation and under all the circumstances. As it turned out, if he had remained in the seat until the collision he would not have been injured. All the evidence was to be considered by the jury, but under the evidence the question whether the plaintiff was in the exercise of ordinary care for his own safety was a question of fact. On the question of alleged negligence of the defendant, the evidence tended to prove that an emergency existed and the motorman was under considerable excitement when the car stopped in a place of danger; that it happened to

be necessary for him to act with great promptness, and that he made an immediate effort to shut off the power and get the car off the tracks, and also that the conductor called to the passengers to get off the car. It is true that in determining whether the defendant was in the exercise of the highest degree of care ⁵⁷¹ for the safety of its passengers the law would not exact the same measure of prudent judgment from its employés when compelled to act in a sudden emergency as it would in a case where there was time for deliberation. Persons who have to act in a sudden emergency are not to be judged in the light of after-events, but are to be judged, under all the circumstances of the case, by the standard of what a prudent person would have been likely to do under the same circumstances. Whether the failure of the motorman to turn the controller so as to completely shut off the power before he jumped from the car was negligence was a question of fact, to be determined from all the circumstances and in view of the evidence tending to prove that he was confronted with a sudden emergency and an unexpected danger which required prompt and immediate action. The questions relating to care of the plaintiff and negligence of the defendant were questions of fact and not of law, and the court did not err in refusing to direct a verdict.

It is next contended that the court erred in rulings on the admission of evidence. The court overruled a motion of defendant to exclude an answer of the motorman that he knew the power that day was going on and off. It was not charged that there was any negligence in the power going off and coming on, but the purpose of the testimony was to show that the power had been intermittent during the day, and was likely to again come on suddenly, and it was competent for that purpose.

The plaintiff testified that he was a traveling salesman, and was asked what he had been earning prior to the injury. The defendant objected to the question on the ground that the averment of the declaration related to general damages and not special damages, and the court sustained the objection. The plaintiff was then asked what his services just prior to the injury were fairly and reasonably worth, and the court overruled an objection to that question. He answered that his services were worth to the firm he was representing ⁵⁷² one hundred and thirty dollars a month, and it was close on to ten weeks before he was able to go to work. The answer was improper, since the question was not what

plaintiff's services were worth to the firm, but what the damage was to him in being deprived of his power to earn money while he was unable to work. But there was no motion to exclude the answer. The first question was proper. There was nothing to show that the plaintiff was seeking to recover for loss of profits or earnings depending upon the performance of a special contract or engagement, and the proof of his ordinary wages or earnings was admissible: *Chicago etc. R. R. Co. v. Meech*, 163 Ill. 305, 45 N. E. 290. The defendant induced the court to make an erroneous ruling, and when the question was put in another form and the answer was not responsive, the defendant failed to ask the court to exclude it, for which reasons the alleged error will not be considered.

An osteopath, who was also a graduate of a regular medical college, with twenty-three years' experience, was called to treat the plaintiff about November 15, 1906, for the injuries which he had suffered, and treated him by the osteopathic method and also gave him some medicine. The osteopath was permitted to give in evidence subjective symptoms of the plaintiff given at the time of the treatment, and in this there was no error.

The first instruction given at the instance of the plaintiff was as follows: "The court instructs the jury that the happening of an accident to the car and proof that an injury to a passenger resulted therefrom during the course of his transportation, and proof that at the time of the accident, and just prior thereto, the passenger was himself in the exercise of due care and caution for his own safety, raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests upon the carrier."

The maxim *res ipsa loquitur* has a proper and legitimate application in actions for negligence, including an ⁵⁷³ action against a carrier of passengers for an injury to a passenger, but the maxim does not apply upon mere proof that an accident to the passenger has happened. A carrier of passengers is not an insurer of their safety, and therefore liability does not arise from the mere happening of an accident; but the carrier is held to the exercise of the highest degree of care consistent with the mode of carriage and the practical operation of the business, and is liable for an injury resulting from such want of care. A declaration merely alleging the relation of carrier and passenger and an injury would not state a cause of action, but the plaintiff must allege and prove a breach of duty in the failure to exercise the care demanded

by the law. If an injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, or by some defect in machinery, cars or track, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the plaintiff and raises a presumption of negligence. The presumption arises, however, from the nature of the accident and the circumstances, and not from the mere fact of the accident itself. The rule laid down in the instruction that the mere happening of an accident to a car and the resulting injury of a passenger, with proof that the passenger was in the exercise of due care, raises a presumption that the carrier has been negligent, is too broad: 5 Cyc. 628; 5 Am. & Eng. Ency. of Law, 2d ed., 624. In *Chicago City Ry. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238, it was said that the weight of authority is in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not, alone, raise the presumption of negligence on the part of the carrier, but the presumption does arise where the accident is shown to proceed from an act of such a character that when due care is taken in its performance no injury ordinarily results from it, or where it is caused by the mismanagement of a thing over which the ⁵⁷⁴ carrier has either control or for the management or construction of which it is responsible. It has been said that several of the courts have shown a tendency to unduly extend the doctrine, under the lead of Judge Thompson (3 Elliott on Railroads, sec. 1263, note 4), but Judge Thompson, in his work on Negligence (volume 6, section 7636), does not indorse the doctrine of this instruction, and says that the rule relates simply to the probative force of evidence, and does not dispense with the necessity of evidence of the defendant's negligence. He regards it as generally more correct to say that there are cases where the fact that the accident happened under given conditions and in connection with certain circumstances will amount to evidence sufficient to charge the defendant. The maxim was properly applied in *West Chicago Street R. R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140, where it was said that on the trial of an action against a railroad company by a passenger for an injury received through a collision of trains a prima facie presumption of negligence arises against the carrier company; and in the case of *New York etc. R. R. Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809, the court, after detailing the circumstances of an injury to a passenger, stated, as appli-

cable to those circumstances, that the happening of the accident raised a presumption that the carrier had been negligent. The law presumes that the usual and ordinary thing will occur, and if an accident is shown to be due to an agency under the control of the carrier and is of such a nature that it does not occur where due care has been used, it is reasonable to assume that it is chargeable to some want of care in the carrier or some of its agents or servants. The rule as stated in *Chicago Union Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232, where the maxim was applied to the derailment of a car, requires proof of facts showing that the thing which caused the injury is under the management and control of the defendant, and that the accident is such as in the ordinary course of things does not happen if those ⁵⁷⁵ having the management use proper care. Negligence is not presumed from the mere happening of an accident, without proof of such further facts, and an instruction, to state the law correctly, must include such facts. If the cause of an injury is not apparent and it comes within the rule stated, the accident, with the other facts, affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care. In *West Chicago Street R. R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140, the plaintiff did not proceed upon the theory of presumptive negligence, but, like the plaintiff in this case, charged in his declaration specific acts of negligence and introduced evidence tending to prove his charges. An instruction to the same effect as the one in this case was given, and it was held that in view of the declaration it should not have been given. In that case the evidence of negligence was so strong that the judgment was not reversed on account of the instruction, but we cannot say in this case that the evidence was so clear and convincing that the jury could not have found differently. The plaintiff charged the defendant with a specific act of negligence, in that the motorman negligently failed to disconnect the street-car from the power and negligently permitted the car to stand on the crossing without being disconnected, and he offered evidence tending to prove such specific charge. The instruction given was erroneous as a matter of law, and to tell the jury that the happening of the accident raised a presumption of negligence was equivalent to advising them that the act of the motorman was presumed by the law to be negligent. It was a question of fact whether the motorman, under all the circumstances, exercised the degree of care required by the law for the safety of the plaintiff, or whether,

under the conditions which confronted him, he failed to exercise such care, and the instruction practically determined that question in favor of the plaintiff. The doctrine of *res ipsa loquitur* was ⁵⁷⁶ not applicable to the case, and it was error to give the instruction.

The judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court.

Negligence.—*One Who, in a Sudden Emergency*, acts according to his best judgment, or who, by reason of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence: *Donahue v. Kelly*, 181 Pa. 93, 59 Am. St. Rep. 632; *Duane v. Chicago etc. Ry. Co.*, 72 Wis. 523, 7 Am. St. Rep. 879; *Dickson v. Omaha & St. Louis Ry. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429; *Bessemer Land etc. Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17; *Tuttle v. Atlantic City R. R. Co.*, 66 N. J. L. 327, 88 Am. St. Rep. 491.

Presumptions of Negligence from the happening of accidents are discussed in the note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 986. The question when the exercise of care will be presumed is the subject of a note to *Chicago etc. Ry. Co. v. Wilson*, 116 Am. St. Rep. 108.

COWDEN v. TRUSTEES OF SCHOOLS.

[235 Ill. 604, 85 N. E. 924.]

OFFICIAL BONDS—**Estoppel Against Sureties.**—The official reports of a township treasurer, who has for many years been his own successor, conclude his sureties, and they cannot maintain a suit in equity to correct such reports so as to show that defalcations of their principal occurred prior to the time when they became his sureties. (p. 246.)

Livingston & Bach, for the appellants.

Jacob P. Lindley, for the appellees.

⁶⁰⁴ VICKERS, J. Appellants, who were sureties on the official bond of R. S. McIntyre, as township treasurer, filed a bill in the circuit court of McLean county for the purpose of correcting certain official reports made by the township treasurer on June 30 of 1903, 1904, 1905 and 1906, and to enjoin a suit at law on the official bond until this cause is determined. The circuit court sustained a demurrer interposed by the trustees of schools to the bill, and appellants having elected to stand by their bill, the same was dismissed, for want of equity. That decree has been affirmed by the

appellate court for the third district. By their further appeal appellants bring the case to this court for review.

The facts averred in the bill show that McIntyre was appointed township treasurer in 1880 and every two years thereafter, and that he held the office continuously until December 5, 1906, when he died. The bond upon which appellants were sureties covered the term from September 25, 1903, until September 25, 1905. The bill alleges that by his report made June 30, 1903, the treasurer showed cash on hand \$2,391.97, and notes, bonds, etc., on hand \$4,840; and on June 30, 1904, the report showed cash on hand \$2,166.97 notes \$3,450, personal notes \$665, and distributable funds \$41.25. After the death of McIntyre the trustees of schools demanded \$7,647.94 as the balance due from the administrator of McIntyre, who turned over only \$1,210.93, leaving a balance unpaid of \$6,437.01. Appellants charge in their bill that this balance was misappropriated by McIntyre prior to September 25, 1903, and claim that they should not be held liable for any defaults except for such as occurred during the term during which appellants were sureties on his bond.

The questions presented by this appeal have been determined by this court adversely to appellants' contention. In the case of *Morley v. Town of Metamora*, 78 Ill. 394, 20 Am. Rep. 266, the same contention was made that is now presented by appellants. In that case, as in this, the officer was his own successor, and his sureties sought to escape liability on the ground here interposed. In that case it was said: "It is not made to appear very clearly that whatever default occurred took place in the first year the supervisor was in office; but conceding that fact, we do not think it relieves the sureties on the bond upon which this action is brought from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. The report was approved and we must presume it was true. . . . In contemplation of law the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it." That case has been reaffirmed in *Roper v. Trustees of Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60, and *Longan v. Taylor*, 130 Ill. 412, 22 N. E. 745. In the case last above cited the officer whose bond was in suit was a township school treasurer, and in that case it was held that the bondsmen of such officer were concluded by the reports made

by their principal and were estopped from showing that such reports were untrue.

Conceding the law to be as laid down in the foregoing cases, appellants contend that a different rule should apply where sureties file a bill in equity for relief from the false and fraudulent reports made by the officer. This contention is fully met and determined adversely to appellants' view in the case of *Fogarty v. Ream*, 100 Ill. 366. That was a bill in equity filed by sureties for the purpose of being relieved from the payment of money where the default had occurred in the previous terms of the guardian. In disposing of that question this court, on page 377, said: "Had it appeared Lynch still had the trust funds on hand, or other funds with which to replace the same, when complainant became his surety on his official bond, his liability for any waste of such funds thereafter would not be contested. It is sought, however, to prove the guardian did not have in his possession or control the trust funds at the time complainant became his surety, but had previously wasted the same, and was then, and has ever since continued to be, insolvent. This the policy of the law will not permit him to do. It would open a wide door for frauds in such matters. Here the guardian elects to charge himself with the full amount of a claim in his favor for funds belonging to his ward. It is neither a false nor a fictitious claim. The money is absolutely due from the guardian to his ward, and neither the guardian nor his surety will be permitted to deny he has the money admitted to be in his hands. Any other rule would be a most unsafe one, and would lead to results the law will not tolerate. No case exactly analogous with the one at bar has before arisen in this state, but the same principle has been applied to sureties ⁶⁰⁷ of defaulting municipal officers: *Morley v. Town of Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Cawley v. People*, 95 Ill. 249; *Roper v. Sangamon Lodge*, 91 Ill. 518," 33 Am. Rep. 60.

Finding no error in this record, the judgment of the appellate court for the third district is affirmed.

The Liability of Sureties on successive bonds is the subject of a note to *Crawn v. Commonwealth*, 10 Am. St. Rep. 843. Where a county treasurer in his report to the county commissioners states that he has received a sum of money from his predecessor in office, and charges himself therewith, both he and the sureties on his official bond are estopped from showing that he did not receive such sum: *Custer*

County v. Tunley, 13 S. D. 7, 79 Am. St. Rep. 870. But if funds in the control of a re-elected public officer are not actually produced on his settlement for his first term before the approval of his bond, as required by statute, his sureties are not estopped from showing that a defalcation, for which they are sought to be charged, in fact occurred prior to the making and approval of their bond: Independent School District v. Hubbard, 110 Iowa, 58, 80 Am. St. Rep. 271.

The Acts for Which Sureties on Official Bonds are liable are discussed in the note to Feller v. Gates, 91 Am. St. Rep. 497; and the liability of sureties on the bond of an officer after the expiration of his term of office is discussed in the note to Blades v. Dewey, 103 Am. St. Rep. 932.

CASES
IN THE
SUPREME COURT
OF
IOWA.

EMPIRE REAL ESTATE AND MORTGAGE COMPANY
v. BEECHLEY.

[137 Iowa, 7, 114 N. W. 556.]

PROCESS—Service by Publication.—All Statutory Requirements for the institution and prosecution of proceedings to subject to sale the property of nonresidents upon notice by publication, especially such as are of a jurisdictional character, must be strictly and literally observed, in order that the judgment entered thereon shall be of legal force and validity. (p. 249.)

PROCESS—Proof by Interested Party of Service by Publication.—The plaintiff in an action against a nonresident on published notice is disqualified to take the affidavit of the publisher in making proof of the publication; and a judgment based upon such proof of service is without jurisdiction, and a sale of the property thereunder ineffectual. (p. 250.)

QUIETING TITLE.—A Suit to Quiet Title is not Defeated by Evidence that the grantor of the plaintiff possessed less than a full and undivided ownership, since that fact goes to the measure of relief and not to the right to maintain the action. (p. 251.)

QUIETING TITLE—What Relief may be Granted.—In a suit to quiet title against a sheriff's deed void for want of due proof of publication of process, the plaintiff may have his rights in the premises adjudicated, although the defendant may yet amend the proof of service and have a new and valid judgment entered. (p. 252.)

Rickel, Crocker & Tourtellot, for the appellant.

Lewis Heins, for the appellee.

S **WEAVER, J.** The material facts in the case are as follows: In November, 1899, the defendant Beechley brought an action in the district court of Linn county, Iowa, against H. W. Kirby and B. D. Hicks to recover the amount of an alleged indebtedness of thirty-six dollars, and in aid of such action sued out a writ of attachment, which was levied upon the property now in controversy. The only service of the original notice in said proceeding was by publication, on a

showing that said Kirby and Hicks were nonresidents of the state, and the only proof of such service was by the affidavit of one Sherman that he was the publisher of a weekly newspaper printed and issued at Cedar Rapids, Iowa, in which said notice had been duly published for four successive weekly issues beginning December 2, 1899. This affidavit was sworn to before Beechley, the plaintiff in said proceedings, acting as a notary public. On the proof of service thus made and verified a judgment in rem was entered confirming the attachment and ordering a special execution for the sale of the lots. Execution was thereafter issued, and said property was struck off and sold thereunder to said Beechley, and, no redemption being made within a year, the sheriff executed and delivered to him a deed under which he now asserts title. The plaintiff in this proceeding claims title to the lots through a conveyance from Hicks, and contends^a that the attachment proceedings above mentioned were void for want of jurisdiction and that Beechley obtained no title by virtue of the sheriff's deed. This contention is bottomed upon the proposition that, the affidavit of publication of the original notice having been verified before Beechley himself, it did not furnish sufficient proof of service to authorize the court to enter judgment or to order a sale of the property. The defendant avers that the proof of service was regular and sufficient, and that plaintiff's cause of action is barred by the statute of limitations.

1. The statute which permits the property of a nonresident to be seised and subjected to judicial sale upon notice by publication only is a most drastic remedy, and not infrequently results in oppression and injustice. Recognizing this fact, the courts quite uniformly hold that all of the statutory requirements for the institution and prosecution of such proceedings, and especially such as are of a jurisdictional character, must be strictly and literally observed, in order that the judgment entered thereon shall be of legal force and validity: *Priestman v. Priestman*, 103 Iowa, 320, 72 N. W. 535; *Fanning v. Krapfl*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; *Abell v. Cross*, 17 Iowa, 174; *Tunis v. Wethrow*, 10 Iowa, 305, 77 Am. Dec. 117. If, then, there was no sufficient return or proof showing due publication of the original notice in the attachment case, the proceedings based thereon must of necessity be held void. This proof, the statute provides, shall be made by the affidavit of the publisher or his foreman and filed before default is taken: Code, sec. 3536.

We have, then, to inquire whether in such proceedings the plaintiff, who happens to be a notary public or magistrate, may administer the necessary oath. In *Wilson v. Traer*, 20 Iowa, 231, this court held that the acknowledgment of a deed taken by a notary who was interested in the transaction is void, and its record will not impart constructive notice to a subsequent purchaser. The same rule has ¹⁰ since been applied in *City Bank v. Radtke*, 87 Iowa, 363, 54 N. W. 435, and *Smith v. Clark*, 100 Iowa, 605, 69 N. W. 1011. So far as we have noted the precedents all agree to the correctness of this rule. If we are to hold void an acknowledgment taken and certified by a notary who is interested in the transaction, we are unable to conceive upon what principle we may sustain the act of another notary who takes and certifies an affidavit which is essential to the maintenance of an action in which he is himself plaintiff. There appears to be no express statutory prohibition in either case. In the *Wilson* case (20 Iowa, 231), the court said that to permit a party to take acknowledgment of a conveyance in which he is interested "would leave a broad door open to the perpetration of frauds." If this be true in reference to the acknowledgment of written instruments, the opportunity for fraud would be even greater if the party who brings a suit against a non-resident on published notice may administer the oaths and take the affidavits on which the validity of the judgment he obtains must necessarily depend. In New York and some other states, as well as in England, it has frequently been held that one who is interested in a proceeding, either directly or as an attorney, is disqualified to take an affidavit or administer an oath to be used therein: See cases collected in 21 Am. & Eng. Ency. of Law, 3d ed., 570. It is to be admitted that authorities to the contrary may be found; but the rule stated is a safe one, and we are disposed to hold it applicable to the case at bar. It is in harmony with the principles affirmed by us in the decisions already cited, and it imposes no hardship upon any party seeking the aid of the courts for the enforcement of an alleged right. If, as we hold, the defendant was disqualified to take the affidavit, then the court required no jurisdiction to enter judgment or order sale of the property, and the sheriff's deed made pursuant to such sale conveyed no title to the defendant.

2. There is no merit in the plea of the statute of limitations. The action is not primarily a proceeding to ¹¹ set aside the judgment in the attachment proceedings, but to settle and quiet the plaintiff's claim of title to real estate.

Plaintiff has no interest in the controversy, if any, between defendant and Hicks and Kirby, save as it affects such title. If it be true, as appellee argues, that plaintiff's claim belongs to the class in which action is barred within five years, such defense is not here available, for it did not obtain the sheriff's deed on which it relies until within less than five years prior to the commencement of this suit. Moreover, if the plea of the statute means anything, it is apparently an attempt to set up title by prescription, which cannot accrue in less than ten years: Code, sec. 3447; Williams v. Allison, 33 Iowa, 278.

3. Neither can we concede the defendant's proposition that plaintiff has not shown any right or title to the lots, and must therefore fail, even though the defendant's title be defective. It is, of course, an established rule that the plaintiff in such an action must recover, if at all, on the strength of his own position, and not on the weakness of the position of his adversary. Appellee claims the benefit of that rule, because, while the attachment was directed against the property of both Kirby and Hicks, the deed to appellant is from Hicks alone. The point is not well taken. If, as counsel argues, we must assume that the property was the joint or common property of both defendants in the attachment suit, then whatever interest Hicks had in the premises, whether small or great, passed by his deed to the appellant, and the latter may maintain an action to establish that right against the appellee's hostile claim. There was no suggestion in the court below of any defect of parties to the suit, and we need not consider it further than to say that, if Kirby neither had nor claimed in fact any interest in the property, it was not necessary to bring him into the case, and, if the interest of Hicks was anything less than a full and undivided ownership, ¹² that fact went to the measure of the relief to which plaintiff, as his grantee, was entitled, and not to its right to maintain an action.

It is to be admitted that the showing of title in the plaintiff is meager, yet as it claims under conveyance from Hicks, and the defendant claims through an attachment directed against the property of Hicks, both parties are claiming title from or through the same person, and it was unnecessary for either party to trace its chain of title farther than to this common source. If we are to assume, as defendant insists, that Kirby had any interest in the property—a contention upon which we do not attempt to pass—the presumption would be, in the absence of evidence to the contrary, that he and Hicks were tenants in common with equal rights in

the premises, and plaintiff would be entitled to that extent to the relief it demands.

4. Finally, it is said by appellee that, even if the proof of service of the original notice be found fatally defective, it does not invalidate the attachment, which had already been made, and that, although the special execution and the sheriff's sale and deed be wholly void, the attachment will stand as it stood before filing the defective proof of service of notice, and plaintiff may still be allowed to amend such proof and have a new and valid judgment entered for the enforcement of the attachment lien. Even if this be true, it affords no ground for the denial of the plaintiff's demand for the confirmation of his title against the hostile title asserted by defendant under the sheriff's deed. If plaintiff is the owner of the property in whole or in part, it is entitled to have its ownership adjudicated and confirmed, even though, when so confirmed, its title be found to be encumbered by the attachment lien. Whether that lien ever properly attached to the land, and, if so, whether it still exists, is not ascertainable from the record before us. Mention is made of an affidavit of nonresidence of Kirby and Hicks; but there is no showing ¹³ when, if ever, it was filed. So, also, an amended proof of the publication of the original notice, bearing date of November 15, 1905, after the commencement of this action, was offered in evidence; but it is not shown whether it was ever filed in the attachment proceeding. Under such conditions any expression of opinion as to what the right of the parties would be upon the full showing of the facts would be mere dictum.

From what we have said it follows that the decree appealed from must be reversed, and the cause remanded to the district court for further proceedings in harmony with this opinion.

When Service of Process is Made by Publication, the statute must be at least substantially complied with, and most authorities declare that it must be followed strictly: *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 124 Am. St. Rep. 615, and cases cited in the cross-reference note thereto.

A Notary Public Having a Pecuniary Interest in a conveyance is disqualified to take an acknowledgment thereof: *Hayes v. Southern Home etc. Assn.*, 124 Ala. 663, 82 Am. St. Rep. 216. As to whether the acknowledgment of an instrument in which a corporation is interested financially can be taken by a stockholder therein, see *Ogden Building etc. Assn. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330; *Read v. Toledo Loan Co.*, 68 Ohio St. 280, 96 Am. St. Rep. 663; *First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

WALLACE v. WALLACE.

[137 Iowa, 37, 114 N. W. 527.]

DIVORCE on Ground of Antenuptial Pregnancy.—Illicit relations between a man and woman before their marriage will not bar his action for divorce on the ground of her antenuptial pregnancy which she induced him to believe was a result of intercourse with him but which in fact was by another man. (p. 256.)

LEGITIMACY OF CHILD.—The Presumption in Favor of the legitimacy of a child born in wedlock obtains, even though the birth occurs so soon after marriage that it is certainly the result of coition prior thereto. (p. 257.)

LEGITIMACY OF CHILD.—The Testimony of the Wife, in an action against her for divorce on the ground of her antenuptial pregnancy by a man other than the one she married, is not admissible to show access or nonaccess by the latter during the time of the conception. (p. 259.)

DIVORCE—Antenuptial Pregnancy—Evidence.—The testimony of a wife as to intercourse with another man besides her husband before marriage is admissible in an action against her for a divorce on the ground of antenuptial pregnancy. (p. 260.)

Charles S. Macomber, for the appellant.

C. W. Piersol and Johnson Bros., for the appellee.

³⁸ LADD, C. J. The parties hereto married December 12, 1905, he then being twenty years of age and she but seventeen years. They had been attending the local high school, and living with their parents, who had been near neighbors for many years. They cohabited until January 25, 1906, and on February 1st following this suit was begun, praying for divorce on the ground that at the time of their marriage defendant was pregnant by a person other than plaintiff, of which fact he was then ignorant. At the time of the marriage plaintiff knew of her pregnancy, but supposed this was by himself. She gave birth to a child April 2, 1906. The only evidence tending to support the contention that the ³⁹ child was begotten by another was an affidavit of the wife, procured by plaintiff's attorney, describing her relations in detail with another young man, culminating in pregnancy July 13, 1905, because of which she had induced plaintiff to attempt sexual intercourse with her about six weeks later, and again in September following, and still again a month thereafter; these attempts being ineffectual, owing to premature external emissions, but penetration after emission being accomplished in September, and stating that plaintiff was induced to believe himself the cause of her condition and to marry her. Counsel objected to the introduction of this affidavit "as incompetent, immaterial and irrelevant, and for

the reason that it is scandalous, indecent and against public policy." The objection was overruled, and, if rightly so, it may be conceded that the decree entered granting the divorce should be affirmed.

Our statute provides that "the husband may obtain a divorce from the wife . . . when the wife at the time of the marriage was pregnant by another than the husband, of which he had no knowledge, unless such husband had an illegitimate child or children then living, which at the time of the marriage was unknown to the wife": Code, sec. 3175. Independent of statute, the decisions are to the effect that wherever the woman is enceinte by another at the time of marriage, and the husband is not aware of the fact, but supposes her chaste, he may have the marriage declared void. This is on the theory that a woman to be marriageable must be capable of bearing children to her husband, and, if with child by another, she is not in a condition to do so, and concealment of that fact or a misrepresentation thereof is such a fraud on the husband as will avoid the marriage if he was ignorant of her condition and believed her virtuous: *Reynolds v. Reynolds*, 3 Allen (Mass.), 605; *Baker v. Baker*, 13 Cal. 87; *Carris v. Carris*, 24 N. J. Eq. 516; *Ritter v. Ritter*, 5 Blackf. (Ind.) 81. But most of the authorities⁴⁰ are to the effect that, when the husband has had sexual intercourse with the wife before marriage and knew that she was pregnant, though falsely convinced that the child was begotten by himself, and its birth proves it not to be his, he must submit to the bonds of matrimony: *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Scroggins v. Scroggins*, 14 N. C. 535, *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412, 2 Atl. 376; *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. 739; *Hoffman v. Hoffman*, 30 Pa. 417. The theory on which this line of decisions proceeds is that, having participated in the wife's incontinence before marriage, the husband is apprised of her want of chastity, and therefore is not in a situation to complain of being deceived by her false assurances that he was the only participant in her illicit intercourse. The well-recognized exception to this rule is where birth is given to a mulatto, the parties to the marriage being white: *Barden v. Barden*, 14 N. C. 548; *Scott v. Shufeldt*, 5 Paige (N. Y.), 43. This exception is said to be "a concession to deep-rooted and virtuous prejudices of the community on the subject," and to be grounded on the supposition that "the blood of the woman has been tainted by mingling with the first (mulatto) child, and she is incapable

of bearing children that will not show the African blood": See Bishop on Marriage and Divorce, sec. 191.

Aside from exception based on these grounds, we have discovered but one case awarding relief where there has been coition between the husband and wife prior to marriage, and that was by an equally divided court: *Sissung v. Sissung*, 65 Mich. 168, 31 N. W. 770. In that case Morse and Campbell, JJ., were of the opinion that where a young man, inexperienced in the ways of the world and women, had intercourse with a woman then pregnant by another man, and upon her demand married her under the belief that prior to meeting him she had been chaste, with the laudable purpose of repairing the wrong he had done her ⁴¹ and to save her reputation, he was entitled to relief; the former saying: "If the story of complainant is true, he followed the dictates of conscience, and entered into the marriage relation with defendant from worthy motives. The betrayer of the innocent cannot be condemned for marrying his victim. The seduction is a crime to be execrated, but marriage afterward is to some extent a reparation of the wrong, at least, it is the best amendment he can make the injured one. The mere act of sexual intercourse between a single man and an unmarried woman is not a crime at common law, or under any statute of this state. The fault of the complainant in sinning against the moral law does not entitle him to be deceived and defrauded in this manner. Acting from the best of motives, as all must concede, to repair the wrong as best he could under the circumstances, he marries the defendant in the full belief that he has been the means of ruining an innocent and chaste woman, and that the child in her womb is his. This belief has been engendered by the false statements of the defendant, purposely made to procure such marriage. The birth of the child proves conclusively that the woman was unchaste before he met her, that he was unaware of her pregnancy by another, and that she led him to believe that he alone was the author of her shame for the express purpose of accomplishing her marriage with him."

On the other hand, Sherwood and Champlin, JJ., after reviewing the decisions referred to and others, were of the opinion that "when this girl yielded to the lascivious approaches of this complainant, and became defiled by him under the circumstances stated in the bill, she gave him evidence of her true character, and he was bound to take notice, at his peril, that others would be indulged by her under similar circumstances; and, when she engaged him in mar-

riage, and told him she was pregnant by him, he had been sufficiently advised that the paternity of the child was liable to be in another, and if, without making any further investigation ⁴² in the matter, he married her, he knew he did so at the peril of being made the dupe of misrepresentation without remedy, because their entire intercourse up to the time of marriage had been unlawful, and both parties were *particeps criminis*."

The section of the Code quoted contains no provision with reference to the prior relations of the parties to the marriage contract, and, if their attempted coition shall defeat the relief by divorce where the wife is pregnant by a stranger at the time, this must be read into the statute by construction, or must result from holding that, owing to the husband's participation in his wife's incontinency, he has been put on inquiry as to her relations with other men, and cannot complain. But this would leave the unsophisticated and unwary without protection, and condemn him who, with the best of motives, undertakes reparation for his supposed victim and compel him to suffer the consequences and burden of her deception. If the proof be of that character exacted in such cases, there can be no objection on grounds of public policy to granting a decree of divorce whenever it is made to appear that the wife at the time of her marriage was pregnant by another than her husband, of which fact he was unaware. As said by Morse, J., in the Michigan case: "The essence of the marriage contract is wanting when the woman at the time of its consummation is bearing in her womb knowingly the fruit of her illicit intercourse with a stranger; and the result is the same whether the husband is ignorant of her pregnancy and believes her chaste, or is cognizant of her condition, but has been led to believe the child is his."

In our opinion the illicit relations of the husband with his wife before marriage is not a bar to the remedy created by statute. There is no more reason for denying the husband relief in such a case than there would be to refuse to make inquiry concerning the paternity of a child begotten after marriage. In 2 Starkie on Evidence, 196, in discussing ⁴³ the question as to the legitimacy of a child begotten before marriage, the author says: "It seems, however, that in such cases it is competent to prove that it was impossible that the husband could have been the father, for a stronger presumption cannot arise in such a case than is made in favor of a child conceived after wedlock." The latter is not conclusive, but, under well-recognized restrictions, inquiry is permitted

into the parentage of children born in wedlock, and inquiries into the paternity of a child begotten prior thereto can be fraught with no greater danger to the parties interested, to society, or the state. On the contrary, it may operate to shield the confiding, who, though guilty of moral wrong, has not violated the law, and has acted with the best of motives in entering into the marital relation, induced by deception and fraud. Because of this he ought not to be condemned to consort with her whose dupe and victim he is proved to be during life, and to bear the burden of supporting her spurious offspring. There is dicta to the contrary in *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721, but the decision turned on the undisputed evidence showing access of the husband during the period when conception must have occurred. Moreover, no attention was given to this statute in the opinion. In *State v. Shoemaker*, 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589, the husband was informed of his wife's condition, and the court held that by virtue of the marriage the child had been adopted into the family, and the husband as a result stood in loco parentis. The manifest design of the statute is to defeat deception and fraud of the kind mentioned, and the fact of undue intimacy with his wife prior to marriage will not deprive the husband of the benefit thereof by demanding a divorce on the ground of pregnancy by another.

2. But precisely the same rules of evidence obtain in such a case as when it is sought to prove that a child conceived during wedlock is not the offspring of the husband. Born in wedlock the presumption of the legitimacy of the child obtains, even ⁴⁴ though this happen so soon after marriage as to render it certain that it was the result of coition prior thereto: *State v. Shoemaker*, 62 Iowa, 343, 49 Am. Rep. 146, 17 N. W. 589. In other words, antenuptial conception does not weaken the presumption of legitimacy arising from post-nuptial birth: *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *Wilson v. Babb*, 18 S. C. 59; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256; 8 Ency. of Ev. 166. And, when there has been antenuptial coition and the husband has married under the supposition that his wife's pregnancy was by himself, evidence of nonaccess must be of the same conclusive character exacted to bastardize a child conceived during wedlock. In *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644, the court, after reviewing many decisions, said: "Whether it was begotten in or out of wedlock,

where the marriage precedes the birth, the presumption of paternity is the same, and the like evidence is required to bastardize the issue. That evidence is proof of nonaccess; where the husband, or he who subsequently becomes such, has access to the mother of the child, the presumption that he is its father is conclusive": See, also, *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721. Anciently this could not be done, save by showing that the husband was impotent or beyond the four seas, but the modern doctrine is in accord with the conclusion announced in *Hargrave v. Hargrave*, 9 Beav. 552, that this presumption may be rebutted by showing (1) the husband incompetent; (2) that he was entirely absent so as to have no access to the mother; (3) or entirely absent at the period during which the child, in the course of nature, must have been begotten; (4) and present only under circumstances which afford clear and satisfactory proof that there was no sexual intercourse: *Woodward v. Blue*, 107 N. C. 407, 22 Am. St. Rep. 897, 12 S. E. 453, 10 L. R. A. 662, and note; *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498; *Goss v. Froman*, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

⁴⁵ The parties to this action had lived near neighbors, and been acquainted with each other for many years, and there is nothing in the record indicating that he might not have been the father of the child, save her own declarations contained in the affidavit. Anciently such declarations, as appears from Professor Wigmore's work on Evidence (volume 3, section 2063), were received in evidence. But in *Goodright v. Moss*, Cowp. 591, Lord Mansfield declared that "the law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . It is a rule founded in decency, morality and policy that they shall not be permitted to say after marriage that they had had no connection, and therefore the offspring is spurious, more especially the mother, who is the offending party." Since, then, the current of authority in England as well as in this country has been in harmony with the rule as thus stated, regardless of statutory provisions, obviating incompetency on the ground of interest: *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Tioga County v. South Creek Township*, 75 Pa. 433; *Boykin v. Boykin*, 70 N. C. 262, 16 Am. Rep. 776; *Kelley v. Proctor*, 41 N. H. 139; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242, 69 Am. St. Rep. 567, and extended note collecting cases; *Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac.

91, where the court observed, with reference to the statute concerning interest, that "it was not intended to abrogate the rules of evidence founded upon the reason and experience of ages. Nor was it intended to break down a rule founded on decency, morality, and public policy." In so holding we have not overlooked the protest of Professor Wigmore in his valuable work on Evidence (section 2063), but are not persuaded that he, rather than the great array of decisions cited in his notes supporting the rule as stated by Lord Mansfield and all other text-writers, is correct. ⁴⁶ The rule, as we think, is founded on sound public policy, and, being in accord with the current of authority, should be adhered to. Declarations, as well as the evidence of either husband or wife as to access or nonaccess, are excluded whenever the issue of legitimacy is involved, and this includes cases of antenuptial conception. The first ruling on this latter phase of the inquiry was by Sir John Romilly, Master of the Rolls, in 1856 (*Anon. v. Anon.*, 23 Beav. 273), and it has been approved by the consensus of judicial opinion since: *Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91; *State v. Wilson*, 32 N. C. 131; *Tioga County v. South Creek Twp.*, 75 Pa. 433; *Parker v. Way*, 15 N. H. 45.

Some question is raised as to whether the rule should be applied in other than causes in which the question of legitimacy only is involved. In Professor Wigmore's notes it is said to obtain in all cases, and an examination of the authorities sustains this view. Thus in *Parker v. Way*, 15 N. H. 45, such evidence was held to be inadmissible in an action on a promissory note; in *Tioga County v. South Creek Twp.*, 75 Pa. 433, to determine the settlement of a pauper; in *State v. Wilson*, 32 N. C. 131, in bastardy proceeding; in *Commonwealth v. Shepherd*, 6 Binn. (Pa.) 288, 6 Am. Dec. 449, an indictment for fornication resulting in the birth of a bastard; in *Rabeke v. Baer*, 115 Mich. 328, 69 Am. St. Rep. 567, 73 N. W. 242, an action for seduction; in *Simon v. State*, 31 Tex. Cr. 186, 37 Am. St. Rep. 802, 20 S. W. 399, 716, an indictment for incest; in *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654, an action for criminal conversation; in *Tate v. Penne*, 7 Mart., N. S. (La.), 548, suit for the possession of slaves; in *Cross v. Cross*, 3 Paige (N. Y.), 139, 23 Am. Dec. 778, passing on the custody of children in a suit for divorce; in *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255, an indictment for perjury committed in a suit for divorce on the ground of adultery. In *Corson v. Corson*, 44 N. H. 587, such evidence was held not to be

admissible in a suit for divorce on the ground of adultery. It is safe to say, then, in the light of authority, that neither the declarations nor the testimony ⁴⁷ of either spouse may be received in evidence to prove access or nonaccess to the other. This does not mean that a spouse may not give testimony having a tendency to show the offspring to have been begotten by a third person, and under the decisions to which attention has been directed, the wife's evidence of illicit connection with any person other than her husband and her admissions concerning the same are held to be admissible. That which in the interest of society and common decency is excluded is the testimony or declarations of either spouse of access or nonaccess as bearing on the inquiry whether the husband and wife have had sexual intercourse during the period involved in controversy. This suit for divorce is based on the charge that defendant, when married, was with child by another than plaintiff, and, as it was born in wedlock, the declarations of defendant, contained in the affidavit, tending to show nonaccess of her husband during the period when, in the course of nature, it must have been conceived, were inadmissible, and on objection thereto should have been excluded. If, however, the objection may not have been sufficiently specific, a point not raised in argument, her statements with reference to nonaccess are entirely uncorroborated, which, according to the early English authorities ruling that such evidence might be received, is held to be essential: *Rex v. Reading*, L. t. Hardw. 79; *Rex v. Rook*, 1 Wils. 340; *Rex v. Luffe*, 8 East, 193. See 3 Wigmore on Evidence, secs. 20, 63, and notes. So that in any event the petition should have been dismissed. Reversed.

**ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE TO PROVE
ILLEGITIMACY OF CHILD BORN IN WEDLOCK.**

- I. Scope of Note, 261.**
- II. General Status of Children Born in Wedlock with Respect to Their Legitimacy and the Presumptions Arising Therefrom, 261.**
- III. Rebuttability of the Presumption of Legitimacy Arising from Birth During Wedlock, 263.**
- IV. On Whom the Burden of Proof Rests, 264.**
- V. Character of the Proof Necessary to Overcome the Presumption of Legitimacy, 264.**
- VI. Competency and Admissibility of Testimony or Declarations on Part of the Husband or Wife as to the Paternity, 267.**
- VII. What Constitutes Sufficient Evidence to Prove the Illegitimacy of a Child Born in Wedlock.**
 - a. In General, 270.**
 - b. Effect Where Child was Begotten Before the Marriage During Which It was Born, 272.**

I. Scope of Note.

This note is merely supplementary to the note on the same subject appended to *Rubeke v. Baer*, 69 Am. St. Rep. 571. The legitimacy of children born during wedlock was also discussed in the note to *Weatherford v. Weatherford*, 56 Am. Dec. 210. While the admissibility of evidence of nonaccess of husband to the wife to prove a child to be an adulterous bastard was exhaustively considered in the note to *Dennison v. Page*, 72 Am. Dec. 649.

II. General Status of Children Born in Wedlock with Respect to Their Legitimacy and the Presumptions Arising Therefrom.

The child of a married woman by one not her husband is, of course, a bastard: *McLoud v. State*, 122 Ga. 393, 50 S. E. 145. The issue of adulterous intercourse are termed "adulterine." "Adulterine children are regarded more unfavorably than the illegal offspring of single persons. The Roman law refused the title of natural children and the canon law discouraged their admission to orders": 1 *Bouvier's Law Dictionary*, 105. The importance of the question of the status of children born under such unfortunate circumstances lies not only in the violation of the sacredness of the marriage relation, but also in the fact that the husband is placed under the duty of supporting and maintaining a child for whose existence he is not responsible, and under the liability of having a false heir participating in his property after his death. Formerly a child born of a married woman was conclusively presumed to be legitimate, but now legitimacy or illegitimacy is an issue of fact resting upon proof of the impotency or non-access of the husband: *State v. Liles*, 134 N. C. 735, 47 S. E. 750. The policy of the law is to declare children legitimate when it can be fairly done: *Stein's Admr. v. Stein*, 32 Ky. Law Rep. 664, 106 S. W. 860.

"The common-law rule was, that the child of a married woman was conclusively presumed to be legitimate if begotten while her husband was within four seas—that is, within the jurisdiction of the kingdom of England—unless the husband was impotent: *Coke on Littleton*, sec. 244a. "The modern rule was stated by Lord Langsdale in *Hargrave v. Hargrave*, 9 Beav. 552, as follows: 'A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.' And the same rule is supported by the authorities in this country: *Shuman v. Shuman*, 83 Wis. 250, 53 N. W. 455; *Thayer on Evidence*, appendix 'A,' p. 540; 2 *Lewis' Greenleaf on Evidence*, sec. 150. But the above rule does not allow either of the parents to testify to the

fact of nonaccess during cohabitation. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife are living together as such, and the husband not incompetent, is legitimate": *Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91.

Mr. Justice Martin, in *Matter of Matthews' Estate*, 153 N. Y. 443, 47 N. E. 901, in discussing the reason for the rule presuming legitimacy, said: "While the question of legitimacy has most frequently arisen where marriage was claimed or proved, and the nonaccess of the husband or the validity of the marriage was at issue, still it is manifest that the presumption of legitimacy is not limited to cases involving those questions. It has a wider application and applies to every case where the question is at issue. It is based upon broad principles of natural justice and the supposed virtue of the mother. It is a branch of that general rule of equity and justice which assumes the innocence of a person until there is proof of actual guilt; and whenever it is not inconsistent with the facts proved, this presumption is controlling. If a former marriage is necessary to sustain the presumption, it will be assumed until contrary proof is given. When, as in this case, there is evidence on the one side of mere reputation, which is casual, remote and uncertain, and the presumption of legitimacy on the other, it becomes a question of fact, and the decision of the trial court must be treated as final and conclusive upon the parties. It is true that the precise question under consideration was not involved in some of the cases cited; yet the opinions of the learned judges and text-writers, who have so fully recognized and plainly stated the presumption and grounds upon which it rests, are entitled to great weight, and should be regarded as controlling. The existence of such a presumption is in consonance with every correct sense of propriety and justice. Any other rule would be fraught with danger, and produce immeasurable uncertainty. Property rights would be rendered doubtful, and the fair fame of their ancestors might be destroyed by the cupidity of remote heirs and next of kin. There might be others who would be willing to dishonor their ancestors and bastardize their relatives to increase their patrimony. In the absence of this presumption, the protection of property and character would require proof of the marriage and legitimacy of ancestors, however remote, and in cases where it could not be obtained. To hold that this safeguard of the law does not exist would serve no good or proper purpose, and would overrule a beneficent principle of the law as it is now understood. We have no hesitation in adhering to the principle that the law presumes legitimacy; morality, and not immorality; social integrity, and not social dishonor; and in declaring such to be the law of this state."

Hence the courts are unanimous in declaring the rule to be that all children born in wedlock are presumed to be legitimate: *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *Wallace v. Wallace*, 137 Iowa, 37, ante, p. 253, 114 N. W. 527, 14 L. R. A., N. S., 644; *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036; *Lewis v. Sizemore*,

25 Ky. Law Rep. 1354, 78 S. W. 122; *Ezidore v. Cureau's Heirs*, 113 La. 839, 37 South. 773; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084; *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654; *Canaan v. Avery*, 72 N. H. 591, 58 Atl. 509; *Wallace v. Wallace* (N. J. L.), 67 Atl. 612; *Bell v. Territory*, 8 Okl. 75, 56 Pac. 853; *McAllen v. Alonzo* (Tex. Civ. App.), 102 S. W. 475.

In speaking of the reasons for this presumption, the court in *Sargent v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036, observed: "This presumption of the legitimacy of such offspring is founded not alone upon the coincidence of probabilities, but as well upon that policy of the law that forbids either husband or wife testifying to occurrences between them during marriage; also upon its supreme regard for those privileges of the married state that all men instinctively withhold from the public knowledge. If the question of legitimacy were open to such attack, to be sustained or defeated by a mere preponderance of evidence, based largely and most frequently upon circumstances alone, the right of inheritance, the integrity of blood, the pride of ancestry, and its just sense of honor, all would depend upon the most dubious of titles. From the very nature of the case positive evidence in support of the legitimacy must be the most difficult to be adduced. The law does not allow its inquiries to invade the privacy of the connubial couch for any such purpose. When husband and wife enter it, it must be held that its privileges are not subject of investigation, to the end that its reasonable and legitimate fruits may be brought into question. Exceptions to the general rule stated are allowed. For example, where a white woman, married to a white man, gives birth to a negro child; or when the husband and wife have been constantly apart, living in separate localities, not being together for a longer time than the period of gestation (*Pittsford v. Chittenden*, 58 Vt. 49, 3 Atl. 323; *Rex v. Maidstone*, 12 East, 550); or where the circumstances shown are such that it would have been impossible for the husband to have been the father (*Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553), the presumption of legitimacy is overcome."

III. Rebuttability of the Presumption of Legitimacy Arising from Birth During Wedlock.

The presumption that a child born during wedlock is legitimate is not a conclusive but a rebuttable presumption: *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631; *Ezidore v. Cureau's Heirs*, 113 La. 839, 37 South. 773; *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084; *Smothers v. State* (Neb.), 116 N. W. 152; *Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719; *Bunel v. O'Day*, 125 Fed. 303.

In Kentucky, the presumption is said to be a conclusive one: *Buckner's Admrs. v. Buckner*, 120 Ky. 596, 87 S. W. 776. But see *Sargent v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036, which admits exceptions to the presumptions. In California, under a statute which provided that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate,"

it was held that the word "cohabiting" means the living together of a man and woman ostensibly as husband and wife, and hence, though illegitimacy may be proved, it cannot be proved by the evidence of a husband or wife that while living together they did not have sexual intercourse. The court approved the rule laid down by Lord Langsdale in *Hargrave v. Hargrave*, 9 Beav. 552, that: "A child born of a married woman is in the first instance presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances, which only create doubt and suspicion, but it may be wholly removed by proper and sufficient evidence showing that the husband was, (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." And after so approving the rule the court observed: "But the above rule does not allow either of the parents to testify to the fact of nonaccess during cohabitation. Nor is the rule inconsistent with the conclusive presumption that a child begotten and born while the husband and wife are living together as such, and the husband not impotent, is legitimate": *Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91.

IV. On Whom the Burden of Proof Rests.

The burden of proving that a child born in wedlock is an illegitimate child is upon the person asserting such illegitimacy: *Matter of Matthews' Estate*, 153 N. Y. 443, 47 N. E. 901; *Bunel v. O'Day*, 125 Fed. 303.

V. Character of the Proof Necessary to Overcome the Presumption of Legitimacy.

The presumption of legitimacy is one of the strongest known to the law: In *re Kelly's Estate*, 46 Misc. Rep. 541, 95 N. Y. Supp. 57. Evidence which merely amounts to suspicion or rumor is not sufficient to overcome the presumption of legitimacy: *Lewis v. Sizemore*, 25 Ky. Law Rep. 1354, 78 S. W. 122; *Mace v. Mace*, 24 App. Div. 291, 48 N. Y. Supp. 831; *Scott v. Hillenberg*, 85 Va. 245, 7 S. E. 377. The evidence in rebuttal of the presumption should have a tendency in a reasonable mind to establish impossibility of access, absolute nonaccess, abandonment or circumstances equally conclusive: *Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719. There should be the clearest and most conclusive evidence of nonaccess: *Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848. The allegations of illegitimacy will not be deemed to have been sustained by a mere preponderance of the evidence. It must be shown that the husband of the mother could not possibly have been the father of the child: *Sergeant v. North Cumberland Mfg. Co.*, 112 Ky. 888, 66 S. W. 1036. Indeed, it is asserted in New York that one who alleges the illegitimacy of the issue of a married woman must show incontrovertibly by irrefragable proof—

i. e., so clearly and certainly as not to admit of denial, dispute or controversy—that there was no access to the wife on the part of the husband: *Mayer v. Davis*, 122 App. Div. 393, 106 N. Y. Supp. 1041; *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874.

Mr. Justice Hatch, of the Hawaiian court, in *Godfrey v. Rowland*, 16 Haw. 377, observed: "The presumption of legitimacy cannot be destroyed by a mere probability. The proof must be clear, distinct and convincing. It need not go to the extent of showing the absolute impossibility of legitimacy in order to be strong enough to overcome the presumption. A showing merely that it was improbable that the husband was the father of the child is not sufficient. No child born in lawful wedlock can be decreed a bastard in any showing of circumstances which only create doubt and suspicion: *Shuman v. Shuman*, 83 Wis. 250, 53 N. W. 455. A balance of probabilities is not enough: *Morris v. Davis*, 5 Clark & F. 265; *Stegall v. Stegall*, 2 Brock. 256, Fed. Cas. No. 13,351; *Phillips v. Allen*, 2 Allen, 453; *Caujolle v. Ferrie*, 23 N. Y. 90; *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159, 21 N. E. 430, 4 L. R. A. 434. . . . We understand this modern rule to be that proof of nonaccess need not go to the extent of showing the impossibility of the husband being the father; neither is it necessary that the proof should be clear beyond every reasonable doubt. If it is once held that the presumption may be rebutted at all, there seems to be no logical reason why the fact of illegitimacy should be required to be proved in any other manner than is any other fact in a court of justice."

The different views of respectable courts as to the weight of the proof necessary in cases of this sort was shown in *Bell v. Territory*, 8 Okl. 75, 56 Pac. 853, where the court approves the rule which was announced in *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721, and which we believe to be a very satisfactory and sound one. The court, speaking through Mr. Chief Justice Burford, said: "As to the weight or sufficiency of the evidence to rebut and overcome the presumption of legitimacy, the authorities are not in harmony. It was early held in England that this presumption could only be overcome by showing that the husband was beyond the seas during the period when the child must have been begotten, but the learned English judges discovered the folly and injustice of this rule, and it has been modified from time to time, until it is now permissible, for the purpose of rebutting the presumption of legitimacy, to prove any fact or state of circumstances which renders it impossible that the husband could have been the father of the child. The rule in this country has never been strict as in England, and is not now the same in all the states. In the celebrated case of *Patterson v. Gaines* (decided by the supreme court of the United States), 6 How. 550, 12 L. ed. 553, Mr. Justice Wayne said: 'Once the marriage is proved, nothing shall be allowed to impugn the legitimacy of the issue short of proof of facts showing it to be impossible that the husband can be the father.' Chief Justice Marshall in the case of *Stegall v. Stegall* (tried in the circuit for Virginia), 2 Brock. 256, Fed. Cas. No.

13,351, after an exhaustive review of all the cases at his command, stated that he was not satisfied with the rule that required the evidence to rebut the presumption of legitimacy to show the absolute impossibility of nonaccess; that he did not think it sufficient to show mere probability of nonaccess; hence, he adopted the rule that the evidence must be sufficient to establish the negation beyond a reasonable doubt. The supreme court of Massachusetts, in *Phillips v. Allen*, 2 Allen, 453, adopted the rule that nonaccess must be proved beyond a reasonable doubt. Michigan has followed the same rule: *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260, 6 N. W. 654. In *Wright v. Hicks*, 12 Ga. 155, 56 Am. Dec. 451, the Georgia court adopted the rule that a preponderance is sufficient. But we think the Iowa supreme court has announced the better and safer rule and one which does not go to the extreme either of strictness or liberality. In the case of *State v. Romaine*, 58 Iowa, 46, 11 N. W. 721, that court said: 'It appears to us that the true rule adduced from the authorities, as well as from principle, is that a child born in wedlock, whether begotten before or after marriage, is presumed to be the child of the husband, but that such presumption may be rebutted by strong, satisfactory and exclusive evidence that the husband did not have access to the mother of the child, when it was begotten. . . . The jury should have been instructed that the presumption of legitimacy was so strong that it could only be overcome by distinct, strong, satisfactory and conclusive evidence to the contrary.' This case follows *Hargrave v. Hargrave*, 9 Beav. 552."

This same rule was also approved in the principal case and applied to a case of antenuptial conception in which it was claimed that the husband was not the father of the child: *Wallace v. Wallace*, 137 Iowa, 37, ante, p. 253, 114 N. E. 527, 14 L. R. A., N. S., 644.

In *Indiana* a married woman is made by statute a competent witness to prove the illegitimacy of her own child in a bastardy proceeding, but the court in *Evans v. State*, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 2 L. R. A., N. S., 619, in answering the arguments of counsel, observed: "We will, however, say in passing that the prevailing presumption that a child born in wedlock is legitimate is a just and salutary rule that should not be lightly regarded. It is not the duty of a court or jury in all cases to find the nonaccess of the husband proved upon the testimony of the wife alone. On the contrary, the court should always carefully scrutinize the testimony of a married woman, and when it is shown that the parties were still living together in the period when the child must have been begotten, and the husband had opportunity, proof of the principal fact viewed in the light of all the surrounding facts and circumstances, should be direct, clear and convincing to justify the court in charging the defendant, and in placing the badge of dishonor upon the offending offspring of the mother. The fact, however, should be determined, like any other fact, from a consideration of all the evidence submitted, giving due weight to all collateral facts that reasonably and naturally affect the value of the testimony."

VI. Competency and Admissibility of Testimony or Declarations on Part of the Husband or Wife as to the Paternity.

Though the testimony of the husband or wife to the effect that the child given birth to by the wife was illegitimate has been allowed in a few cases, the better rule appears to be that such testimony is incompetent if the husband and wife were living together when the child was begotten.

In the principal case (*Wallace v. Wallace*, 137 Iowa, 37, ante, p. 253, 114 N. W. 527, 14 L. R. A., N. S., 644) the court, after reviewing the authorities, announced the rule that the declarations, as well as the evidence of either husband or wife as to access or nonaccess, are excluded whenever the issue of legitimacy is involved, but the court also said: "This does not mean that a spouse may not give testimony having a tendency to show the offspring to have been begotten by a third person, and under the decisions to which attention has been directed, the wife's evidence of illicit connection with any person other than her husband and her admissions concerning the same are held to be admissible. That which in the interest of society and common decency is excluded is the testimony or declarations of either spouse of access or nonaccess as bearing on the inquiry whether the husband and wife have had sexual intercourse during the period involved in controversy. This suit for divorce is based on the charge that defendant, when married, was with child by another than plaintiff, and, as it was born in wedlock, the declarations of defendant, contained in the affidavit, tending to show nonaccess of her husband during the period when, in the course of nature, it must have been conceived, were inadmissible, and on objection thereto should have been excluded."

The question also arose in *Bell v. Territory*, 8 Okl. 75, 56 Pac. 853, and the court said: "It has been the well-settled rule from the earliest times, as appears from the Roman, English and American law-writers, that neither husband nor wife will be allowed to give evidence tending to bastardize the offspring of the wife born or begotten during wedlock. The supreme court of Wisconsin, in *Mink v. State*, 60 Wis. 583, 50 Am. Rep. 386, 19 N. W. 445, properly stated the rule thus: "The law is well settled that the wife, on the question of the legitimacy of her children, is incompetent to give evidence of the nonaccess of her husband during the time in which they must have been begotten. This rule is founded on the very highest grounds of public policy, decency and morality. The presumption of law is, in such a case, that the husband had access to the wife, and this presumption must be overcome by the clearest evidence that it was impossible for him, by reason of impotency or imbecility, or entire absence from the place where the wife was during such time, to have had access to the wife, or to be the father of the child. Testimony of the wife, even tending to show such fact, or of any fact from which nonaccess could be inferred, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case, and such nonaccess and illegitimacy must be clearly proved

by other testimony': *Haddock v. Boston & M. R. R. Co.*, 3 Allen, 298, 81 Am. Dec. 565; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Cross v. Cross*, 3 Paige, 139," 23 Am. Dec. 778.

The history of the rule in respect to the competency of the wife to testify to nonaccess of the husband was given in *Evans v. State*, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 2 L. R. A., N. S., 619, in construing a statute which made the mother of a bastard child a competent witness even if she was married at the time of the birth of the child. The court was inclined to favor the rule of competency. Mr. Justice Hadley in the opinion on rehearing observed: "In 1734 Lord Hardwicke arbitrarily, in *R. v. Reading*, in a filiation proceeding—that is, to charge a bastard's father with its support—declared that a wife was a competent witness to prove the adultery between herself and the defendant, because the secrecy of the act would admit of no other proof; but that it was improper, on account of the interest of the wife in relieving her husband of the burden, to charge the maintenance of the child against the defendant upon the mother's sole and uncorroborated testimony of the nonaccess of the husband: 3 Wigmore on Evidence, sec. 2063, p. 2761. This declaration of Lord Hardwicke was accepted and followed by the courts of England down to 1777, when Lord Mansfield, in *Goodright v. Moss*, Cowp. 591, announced as the law of England, founded in decency, morality and policy, that neither husband nor wife would be permitted as a witness to bastardize the issue of the wife after marriage by testifying to the nonaccess of the husband. Under the doctrine of Lord Mansfield, a married mother's testimony was no longer a question of corroboration, but one of competency in relation to access of the husband. It was a doctrine which, as against the husband and wife, conclusively presumed the legitimacy of the child, but recognized the wife's right to testify to the illicit connection, to the birth of the child before marriage, or within a month after marriage; but denied her the right to be heard that her husband was continuously absent in the army for two years next before the birth of the child. 'Such inconsistency,' says Professor Wigmore in his treatise on Evidence, 'is obviously untenable. . . . The truth is that these high-sounding "decencies" and "moralities" are mere pharisaical after-thoughts, invented to explain an otherwise incomprehensible rule, and having no support in the established facts and policies of our law. There never was any true precedent for the rule, and there is just as little reason of policy to maintain it': 3 Wigmore on Evidence, sec. 2064, p. 2768.

"There has been much diversity among the American courts as to which of the two English rules was the soundest. In the early part of the last century the tide was decidedly in favor of the Hardwicke view, while later on the Mansfield rule seems to have attracted the most attention and found the most favor among the courts in states where the matter has not been regulated by statute."

So, also, in *Shuman v. Shuman*, 83 Wis. 250, 53 N. W. 455, a much cited case, the court said: "No rule of evidence is better settled than

that husband and wife are alike incompetent witnesses to prove the fact of nonaccess while they lived together: 1 Greenleaf on Evidence, sec. 28; 2 Greenleaf on Evidence, sec. 151; 1 Bishop on Marriage and Divorce, 6th ed., secs. 447, 547, and cases cited in those authorities; 3 Ency. Brit., tit. 'Bastard.' See, also, 2 Am. & Eng. Ency. of Law, 149, and cases cited in note 3; Mink v. State, 60 Wis. 583, 50 Am. Rep. 386, 19 N. W. 445; Watts v. Owens, 62 Wis. 512, 22 N. W. 720. Most of the rulings of the court rejecting testimony offered to prove nonaccess of Andrew Ingle to his wife about the time Frances M. must have been begotten and before and after that time, which are assigned as error, are in strict accord with the above rule.

"It is clear that the complaint and the testimony of Andrew Ingle, in his independent action for a divorce, were properly excluded as evidence of nonaccess. These are nothing more than sworn statements of the husband, and their character is not changed by the fact that they were made in the course of a judicial proceeding which resulted in the divorce judgment. Such judgment was admissible, and was admitted to show the status of the parties to the action. That is, that they ceased to be husband and wife on November 15, 1884, but not to prove that a child begotten during the coverture is a bastard, or would have been such but for the subsequent intermarriage of her mother with Alexander Shuman. The letters of Lelia M. to her last husband were properly ruled out for the same reason; that is, they were mere admissions of the wife of the paternity of Frances M."

Evidence as to the chastity of a wife before marriage and after her child's birth is incompetent to prove the illegitimacy of a child born during wedlock.

The evidence of a wife tending to bastardize her own child is not made competent by a statutory provision declaring that neither the parties nor other persons who have an interest in the event of an action or proceeding are excluded as witnesses, nor by another provision to the effect that the presumption of legitimacy can be disputed only by a wife or husband or the descendants of one or both, and that illegitimacy in such case may be proved like any other fact: *Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 9.

But a few courts have allowed proof of declarations of the husband or wife to show the status of the child as to its legitimacy. Thus in *Goss v. Froman*, 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102, the court said: "If such proof of conduct, declarations, etc., were not admitted as proof, it would be almost impossible to prove that the husband and wife had declined to have sexual intercourse with each other. It is a fact that husbands and wives, though living in the same house or on the same farm, have often so lived, not as husband and wife, but in fact in a state of separation; so in the absence of proof of constant watch over them, night and day, it would be impossible to prove nonaccess unless the proof of conduct, declarations, etc., were admitted as evidence."

So, also, the fact that a husband and wife frequently quarreled about the child, the father claiming it was not his, has been allowed in evidence on the issue of legitimacy: *Erwin v. Bailey*, 123 N. C. 628, 31 S. E. 844. In *State v. Liles*, 134 N. C. 735, 47 S. E. 750, the evidence of the husband to the effect that he did not have intercourse with his wife before marriage was allowed; the child had been begotten some four or five months before the marriage. In *Wallace v. Wallace* (N. J. L.), 67 Atl. 612, the evidence of both the husband and wife was received by the trial court in a case of this kind without objection; the appellate court, though adverting to the question whether such evidence was admissible, left the question open.

VII. What Constitutes Sufficient Evidence to Prove the Illegitimacy of a Child Born in Wedlock.

a. **In General.**—It has been shown in the fore part of this note the evidence must be very strong in order to prove the illegitimacy of a child born in wedlock. Many of the cases which apparently are cases in which the legitimacy of a child born in wedlock is raised are really cases in which the real issue is whether the parents were in fact married at the time of the birth of the child.

The presumption that the husband is the father of his wife's children is overcome where the evidence shows no possibility of access to her on his part at the time of conception. Thus, where a man who knew he had a wife living married a woman who had a husband living, although she believed her husband to be dead, bore children by the man with whom she was cohabiting, and the evidence shows that her lawful husband during all these times was living in a distant state married to another woman, the children will not be deemed the legitimate children of the distant husband: *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631. Where it is shown that the husband is impotent, the presumption of his paternity is overcome regardless of whether he had access to her: *Bunel v. O'Day*, 125 Fed. 303.

But general recognition by a putative father is not sufficient to overcome the presumption of legitimacy arising from birth during wedlock: *Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848. And this presumption of legitimacy is not rebutted by mere proof of adultery on the part of the wife during the period of gestation: *Cannan v. Avery*, 72 N. H. 591, 58 Atl. 509; *Godfrey v. Rowland*, 16 Haw. 377. Nor can it be rebutted by general reputation that the child was an illegitimate child: *Erwin v. Bailey*, 123 N. C. 628, 31 S. E. 844. The fact that during the period when the child would, according to the laws of nature, have been begotten, the husband was for forty-seven days in a hospital, where access was shown not to have been possible, will not rebut the presumption of legitimacy, where it is also shown that for twelve days previous to being placed in the hospital he was at his mother's house and there was a possibility of access there: *Mayer v. Davis*, 122 App. Div. 393, 106 N. Y. Supp. 1041. In *Wallace v. Wallace* (N. J. L.), 67 Atl. 612, the court

held the evidence insufficient to show the child to be an adulterous bastard. The court in reviewing the evidence said: "The presumption is, and as I understand the law to be, that a child born in wedlock is the child of the married people. Of course this presumption may be overcome, as it is sought to overcome it in this case, by proof of nonaccess at a time when it makes it impossible to believe that the husband was the father of the child. That nonaccess is sought to be sustained in this case, first, by the testimony of the husband. He is clear in his statement that he did not have access to his wife from a period commencing Christmas Eve until May, 1905. He also seeks to corroborate that statement by the testimony of two witnesses, a Mr. Stone and a Mr. Price, who are both strangers to these parties and apparently disinterested witnesses; and so far as I can judge from the manner in which they gave their testimony, I think they are intending to tell the truth.

"The whole question, therefore, if we are to rely upon these two witnesses, depends upon the question whether or not they may not be mistaken—whether these two men being called upon to testify to a fixed condition of affairs existing from December, 1904, until May, 1905, their attention not being called to the circumstances until recently, may not be mistaken.

"The wife, on the other hand, says that the husband did have access to her. Her testimony is clear and unambiguous, and is as positive as the husband's, and she details with much particularity the circumstances and times under which the connection was had between herself and husband which resulted in the conception of this child. It becomes necessary, therefore, to gather in the outlying circumstances. In the first place, there is the testimony of the mother and the father of this defendant that the petitioner did visit their daughter, and did stay with her in her room on occasions during the months of January and February, 1905. If this is true, as they corroborate the defendant, the fact of the nonaccess would be disproved. I am disposed, in view of the serious consequences which might result from a decree in favor of the petitioner, here to hold that the husband did have access to her within the time mentioned. I think that we cannot be too cautious in making a decree which would result in separating this woman from her husband, thus convicting her of being an adulteress, and making the child born in wedlock illegitimate. It is a serious thing to do, and the court, before doing it, ought to be very well satisfied that there is no possible escape from the conclusion that the charge made by the petitioner is true. Nor do I feel that I can be wrong about this in view of the conduct of the petitioner. When he was told of his wife's condition, and it is proved that she wrote to him shortly after she discovered her condition, which was in March, 1905, he does not cease to visit her, but continues his visits to her, and goes with her to the physician in April to ascertain whether her supposed condition is the correct one, or whether she had some other internal infirmity which might have produced the symptoms

which had induced her to believe that she was pregnant. He admits that he went to see her. He does not deny it, nor does he deny visiting her, and the proof is full and complete. The colored man, the servant of Mrs. Wallace, says that the husband came there in the daytime and stayed with his wife. Thus the access is proven. He testifies that the husband entered the house with his own night key, and that he went up to his wife's room. Whether it is nighttime or daytime makes no difference. The access, I think, is fully proven."

The case of *Adger v. Ackerman*, 115 Fed. 124, 52 C. C. A. 558, was one in which a doctor, sixty-three years of age, who had sustained illicit relations, while married, with a woman whom it was claimed sustained similar relations with other men, married the woman after the divorce of his wife. The doctor had been addicted to drink. The testimony showed that he had suffered from gonorrhea and had made declaration to the effect that he was impotent or sterile. His divorced wife had borne him no children, although she had borne children during a former marriage. The medical experts were equally divided as to whether he was capable of begetting a child. He lived for three years with the mother of the child before his birth. He attended the mother at the birth of the child, registered himself as its father at its baptism, and recognized the child as his own until his death, some six years after its birth. The court held the evidence insufficient to bastardize the child.

The presumption that children born in wedlock are legitimate cannot be overcome by the evidence of their mother that, though residing in the same house with her husband, she did not have sexual intercourse with him for a series of years antedating their birth, but did, with the knowledge of her husband, during such years, submit to such intercourse with a man who lived at their home: *Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91.

b. Effect Where Child was Begotten Before the Marriage During Which It was Born.—In the principal case (*Wallace v. Wallace*, 137 Iowa, 37, ante, p. 253, 114 N. W. 527, 14 L. R. A., N. S., 644) the court, in speaking of the rule applicable in case the child was begotten before the marriage, said: "But precisely the same rules of evidence obtain in such a case as when it is sought to prove that a child conceived during wedlock is not the offspring of the husband. Born in wedlock the presumption of the legitimacy of the child obtains, even though this happen so soon after marriage as to render it certain that it was the result of coition prior thereto: *State v. Shoemaker*, 62 Iowa, 343, 17 N. W. 589, 49 Am. Rep. 146. In other words, antenuptial conception does not weaken the presumption of legitimacy arising from postnuptial birth: *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *Wilson v. Babb*, 18 S. C. 59; *Zachmann v. Zachmann*, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180; 8 Ency. of Ev. 166. And where there has been antenuptial coition, and the husband has married under the supposition that his wife's pregnancy was by himself, evidence of nonaccess must be of the same conclusive char-

acter exacted to bastardize a child conceived during wedlock. In *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644, the court, after reviewing many decisions, said: 'Whether it was begotten in or out of wedlock, where the marriage precedes the birth, the presumption of paternity is the same, and the like evidence is required to bastardize the issue. That evidence is proof of nonaccess; where the husband, or he who subsequently becomes such, has access to the mother of the child, the presumption that he is its father is conclusive.'

The mere fact that, during the time when a child was conceived, the mother was the wife of a man from whom she obtained a divorce twenty days before the child was born, is not sufficient to overcome the presumption that the child is the legitimate offspring of the man whom she married immediately after the divorce, and who was her husband at the time of the birth of the child, the child being born fifteen days after her marriage with the second husband: *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256. Where a putative father marries the woman who charges him with being the father of her child in a bastardy proceeding, the courts will assume that if he doubted his paternity he would have resisted the proceeding and refused to marry the woman: *Hall v. Gobbert*, 213 Ill. 208, 72 N. E. 806.

We think, however, that in cases of antenuptial conception, the observation made by Mr. Justice Lumpkin in *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687, in a case of this sort, is entitled to thoughtful consideration. After reviewing the authorities on the general subject of the presumption arising from birth during wedlock, he said: "I venture to suggest another observation. While the law presumes every child legitimate which is born within wedlock, still, in questions of this sort, there is, and should be, a difference between post and ante nuptial conceptions; in the latter, much slighter proof should be required to repel the presumption of legitimacy arising from marriage. For here it is the marriage only, and not the presumed sexual intercourse resulting from marriage, which creates the presumption. Every child begotten and born within wedlock is rightly presumed to be the offspring of the husband. But such presumption does not necessarily arise where the child is begotten before marriage. Another man may as likely be the father as the future husband, as no one was entitled to sexual intercourse."

HOWARD v. KELLY.

[137 Iowa, 76, 114 N. W. 544.]

EXECUTION SALE.—Strict Redemption can be Made from an execution sale only as prescribed by statute; and where the statute provides that redemption by a lienholder shall be by paying the necessary amount into the clerk's office and filing an affidavit of the nature and amount of the lien, merely paying such amount to the purchaser's attorney does not satisfy the law. (p. 275.)

EXECUTION SALE.—Assignment of Certificate.—An Attorney who has by execution sale acquired for his client a sheriff's certificate to the property has no implied power to assign it or accept the amount represented thereby from a lienholder. (p. 276.)

H. H. Stilwell, for the appellants.

H. E. Taylor and D. J. Murphy, for the appellees.

77 DEEMER, J. C. O. Howard at one time owned the property in controversy upon which defendant Kelly had a mechanic's lien for labor performed thereon. Howard sold the property to Gustave and William Doehler, taking a mortgage of four thousand dollars thereon to secure that much of the purchase price. The Doehlers became bankrupt, and action is now pending to foreclose the mortgage. Kelly foreclosed his mechanic's lien, making C. O. Howard and the Doehlers parties defendant to the action, and secured judgment and decree in the year 1904. In August of the year 1904 the property was sold at execution sale under the foreclosure decree, and a certificate of purchase was issued to Kelly, who placed the same for safekeeping in the hands of his attorney, one J. P. Conway, Esq. Howard died intestate in **78** September of the year 1904, and plaintiffs are his successors and heirs at law. In April of the year 1905 plaintiffs, through their attorney (Stilwell) paid to Conway, as Kelly's attorney, the amount necessary to redeem the property, he (Conway) agreeing to have the certificate of purchase assigned and delivered to Stilwell. Conway notified Kelly of the receipt of the money, and asked him for an assignment of the certificate that he might comply with his agreement, but Kelly refused to accept the money and to assign the certificate. No further attempt at redemption was made, and Kelly assigned his certificate to defendant Doehler, who in due season obtained a sheriff's deed to the property, and it is this deed which plaintiffs seek to have set aside. The record presents but two questions for our consideration: 1. Did the payment of the money to Conway operate as a statutory redemption from the sale? and 2. Did the transac-

tion amount to a payment of the amount due Kelly as represented by the certificate of sale?

It is elementary that strict redemption may be made only as prescribed by statute: *Logan County v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406, 101 N. W. 991. By section 4056 of the code it is provided that redemption by a lienholder shall be by paying into the clerk's office the amount necessary to effect the same, and filing an affidavit stating the nature of his lien and the amount due thereon. It will be observed that Howard was simply a lienholder at the time the foreclosure decree was entered and the sale had, and that the Doehlers were the then owners of the property. Stilwell did not follow this statute in his attempt to redeem, but paid the money to Kelly's attorney in the foreclosure proceeding, and no affidavit was filed for or on behalf of Howard as the statute requires. Manifestly there was no statutory redemption: *Jack v. Cold*, 114 Iowa, 349, 86 N. W. 374.

There being no statutory redemption, it is clear that defendant Kelly's rights are not to be extinguished, unless ⁷⁹ what was done amounted to a payment to him of the amount due as represented by the certificate of sale. Conway had no implied authority as an attorney for Kelly to sell and assign the certificate of purchase to another. His authority, if he had any, was to collect the amount due as represented by the certificate. Section 4058 provides for an assignment of the certificate by the holder when redemption is made under the statute, but not otherwise, thus leaving the matter of the transfer thereof subject to assignment by agreement or contract. Having no authority to make a contract for the sale of the certificate on behalf of his client, Conway's act in receiving the money is not binding upon defendants, unless we find implied authority upon his part to accept the same as payment of the amount represented thereby. Doubtless an attorney has implied authority to accept payment of a judgment obtained by him for and on behalf of his client; but when that judgment is satisfied as it was in this case, by a sale of the property, and the amount thereof is represented by a new form of lien, which is in itself the subject of contract, and which gives new and added rights and privileges, no implied authority exists in the attorney procuring the judgment with reference thereto. In order to defeat the certificate, or to destroy its efficiency, the statute with reference to redemption must be followed, or it must be transferred by contract or agreement to another who succeeds to the rights of the original holder. The original judgment becomes

functus officio, and the holder thereof is given new rights and privileges which did not pertain either to the original claim or to the judgment thereon. Reduced to its final analysis, the question is: May the attorney for one who has, through judgment and execution sale, acquired a sheriff's certificate of sale, accept in payment the amount of money represented thereby, when that certificate is in the hands of his client, who was the purchaser at the execution sale?

⁸⁰ In the case before us, while the certificate was in the hands of the attorney, it was left with him for safekeeping, and the situation is no different than it would have been had it been in the hands of the client. The parties who seek to take advantage of the payment in the instant case were not the owners of the land, but lienholders who had no other rights in the premises save to redeem from the sale. This makes the case much easier of solution than if it were the owners of the land who were insisting upon the proposition that the transaction amounted to a payment of their debt. A lienholder has no right as against the holder of a certificate of sale, save as the statute gives him the privilege of redeeming; and, in order to secure this privilege, he must follow the statute. This, of course, plaintiffs' attorney was bound to know. With this knowledge he, instead of following the statute with reference to redemption, paid the money to the attorney for the certificate holder, who procured the foreclosure judgment. The attorney had no authority, of course, to assign the certificate or to make a contract to do so, and the lienholder had no right, save as the statute gave it, to pay the amount represented by the certificate of sale. A kindred question was presented to the supreme court of Minnesota, and that court held in *Re Grundysen*, 53 Minn. 346, 55 N. W. 557, that after a foreclosure sale and the issuance of the proper evidences thereof the attorney in the foreclosure action had no authority to receive the money represented thereby. And in *Cottrell v. Wheeler*, 89 Iowa, 754, 57 N. W. 433, we held that an attorney had no implied authority to sell a judgment obtained by him. None of the cases cited by appellants' counsel run counter to the views here expressed save *Erwin v. Blake*, 8 Pet. (U. S.) 18, 8 L. ed. 852, and what is there said apparently to the contrary is clearly dictum. Moreover, in that case there was no attempt at redemption by a lienholder. Appellants' counsel argue that, as the original judgment was against Howard, he and his successors had the right to pay ⁸¹ it off, as well as to redeem from the sale. The fallacy in this lies in assumption that the judg-

ment was in existence when the money was paid to Conway. That is not true in fact. The judgment had been satisfied by the sale of the property and Howard's liability thereunder had become extinguished. The only right he held after the sale was to redeem.

The decree of the district court is right, and it is affirmed.

The Right of Redemption from a Judicial Sale, being purely statutory, can be exercised only in the manner prescribed by the statute: *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231; *Teabout v. Jaffray & Co.*, 74 Iowa, 29, 7 Am. St. Rep. 466.

SCOTT v. SCOTT.

[137 Iowa, 239, 114 N. W. 881.]

LIFE TENANT—Security for Preservation of Estate.—If a testator, in creating a life estate with remainder over, has not required the life tenant to give security for the benefit of the remaindermen, courts are not authorized to require it in the absence of any showing of danger or liability to waste, for otherwise the intention of the testator that the life tenant shall enjoy the property will be frustrated; yet when the estate consists of moneys or securities, courts act with greater caution in guarding the interests of the parties than in other cases, and may require security of the life tenant if he is not kindly disposed toward the remaindermen, and does not exhibit the prudence in managing the property essential to its preservation. (p. 281.)

Tom H. Milner, for the appellant.

Ponham & Havner, for the appellees.

²³⁹ LADD, C. J. The will of James Scott was construed in *Scott v. Scott*, 132 Iowa, 35, 109 N. W. 293, to bequeath three thousand dollars to his widow, ²⁴⁰ Nancy R. Scott, and the use of the residue of the estate during life, with remainder over to his heirs, who are the appellees in this case. The estate consisted of personal property save a one-fourth interest in a hotel at Andes, New York, consisting of money and mortgages amounting to eighteen thousand six hundred dollars. After deducting the legacy to her there remained fifteen thousand six hundred dollars' worth of property, of which she is entitled to the use, and to the principal of which the appellees are entitled at her death. She was appointed executrix without bond, as recommended in the will, and has filed her final report asking her discharge as such and that she

retain the three thousand dollars absolutely and the residue subject to the title in the remaindermen. As a condition to so doing they demanded that security be exacted, and the district court required the execution of a bond in the sum of twenty-five thousand dollars, with sureties, to be approved by the clerk of court, conditioned that upon her death all property coming into her hands as life tenant will be promptly turned over to those entitled thereto.

The early practice in England was to require security from the life tenant for the protection of the remainderman before allowing the former the possession of personal property of any character to the use of which he had become entitled by bequest, but a distinction later was drawn between specific bequests of property and those of the residue of an estate; and the rule may be regarded as firmly established that, where specific articles are left to legatees for life, with remainder over, all required, in the absence of a showing of danger of loss or waste, is that an inventory thereof be indorsed by the life tenant, with acknowledgment that these are held for life only, with title in the remainderman: See *Foley v. Burnell*, 1 Brown Ch. 249. Where that of which the use for life is bequeathed is money or its equivalent, or is the residue of an estate which is money or its equivalent, or is such property as must be converted into money, a different rule obtains. Unless it is to be inferred from the language of the will that the legatee is to have possession, he ²⁴¹ will be entitled to no more than the income to be derived from a proper investment of the funds by the executor or a trustee to be appointed: *Hetfield v. Fowler*, 60 Ill. 45. The will before us, however, plainly indicates the intention of the testator that his widow shall have custody of and manage the property during her life. The third clause reads: "The rest, remainder and residue of my property of every kind and nature I will, devise and bequeath to my beloved wife, Nancy R. Scott, to have, hold, use and enjoy during the term of her natural life, except that I will, devise and bequeath her the sum of three thousand dollars absolutely, and the balance to her exclusive use, benefit, behoof and enjoyment during the term of her natural life as aforesaid." The words "have" and "hold" as here employed manifest an intention that she receive the property into her custody and retain the same during the period named: *Gee v. Hasbrouck*, 128 Mich. 509, 87 N. W. 621; *Rountree v. Dixon*, 105 N. C. 350, 11 S. E. 158; *Stansbury v. Hubner*, 73 Md. 228, 25 Am. St. Rep. 584, 20 Atl. 904, 11 L. R. A. 204. But there is no intimation in

the instrument that she may encroach at her discretion on the principal, in which event no security should be exacted: *Pierce v. Stidworthy*, 81 Me. 50, 16 Atl. 333; *In re Will of Ryerson*, 26 N. J. Eq. 43; *In re Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485. At her death the bequest is of "the rest, residue and remainder of my property of every kind and nature to my legal heirs, share and share alike." The expression "rest, residue and remainder" is that portion of the estate not given to testator's wife absolutely in the previous clause. Had the previous clause given her the use only of the entire estate, the right of diminishing the property while in her hands might be implied: See *In re Garrity's Estate*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; *Markley's Estate*, 132 Pa. 352, 19 Atl. 138; *Warren v. Webb*, 68 Me. 133; *Martin v. Martin*, 69 Miss. 315, 13 South. 267. But it had given her a part and the use for life of the remainder, so that the expression has direct application of the portion undisposed ²⁴² of—i. e., the corpus of that portion of the estate to which she is given the life use. The language employed furnishes no intimation of any exemption or requirement of security from the life tenant. That she was exonerated from executing a bond as executrix is not alone sufficient to warrant the inference that he also intended that no security should be exacted upon the determination of her duties as such and when she assumed the management of the property herself and as trustee for the remainderman. There being no ambiguity in the language employed, parol proof of the declarations of the deceased as to his purpose was rightly excluded.

We have, then, the naked question whether, in the absence of any intimation on the subject in the will, security should be exacted from the life tenant for the protection of the remainderman when money or its equivalent is bequeathed to the former, with remainder over. The rules on the subject are clearly stated in *Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200, 14 Atl. 197: "A gift of the use of personal property for a lifetime, with a gift over, as it is here, is to be regarded according to the nature of the property and other circumstances. If of perishable articles, the use of which consists in their consumption, it amounts from necessity to an absolute gift of the property. If of articles which may depreciate by using, but which will not necessarily be consumed or worn out in that way, a full title thereto is not given; but the life legatee, under ordinary circumstances and risks, is allowed to retain possession of the articles without giving

security for their preservation. Circumstances may, however, alter the case as to such property. Where the use of money is given, the gift is of the interest only; and, as such property may be easily lost or wasted, the general rule is that the legatee must give some reasonable security to safely preserve the funds of the remainderman, or the money may go into the hands of a trustee, of whom a bond would be required": In *re McDougall*, 141 N. Y. 21, 35 N. E. 961; ²⁴³ 18 Am. & Eng. Ency. of Law, 2d ed., 790. In 2 Woerner's American Law of Administration, section 456, the author says: "Where a testator bequeaths a residue consisting of money or property whose use is the conversion into money, with the remainder to another, it is the duty of the executor to take security from the life tenant protecting the interest of the remainderman, or to convert the fund into cash and invest it for the benefit of all who are entitled under the will. So where the executor is himself the devisee for life, he may be compelled, after completing his duties as executor, to give security for the benefit of the remainderman, although relieved from bond as executor."

In many of the authorities, however, the matter of exacting security is regarded as discretionary with the court, for, the testator having directed that the life tenant have possession of, and management of, the property without suggesting indemnity, the fair inference seems to be that none was thought necessary. Thus it was said in *Re Camp*, 126 N. Y. 377, 27 N. E. 799, that "generally, before making an order for such security, there must be facts alleged and proved tending to show the property would be unsafe and insecure in the hands of the tenant for life." In *Re Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485, the court observes that: "The rule is one of equity, established by courts for the protection of the remainderman, in the absence of any direction in the will; but the rule thus established must yield to the terms of the will, and if it appears from a proper construction of the will that it was the intention of the testator that the property should be placed in possession of the life tenant without security, such intention will be carried out. It is to be assumed that the testator intended the life tenant to have the full enjoyment during his lifetime of the property bequeathed to him, and that this enjoyment shall not be impaired, except for the protection of the remainderman. The testator has the right to make the life tenant the trustee of the property bequeathed, without requiring any security from him; and very slight indications ²⁴⁴ in the will will be con-

strued as showing that the testator intended the life tenant, rather than the executor, to be the trustee, subject, of course, to the general rules applicable to the obligations of a trustee to his cestui que trust. If the testator has not required such security to be given by the life tenant, courts are not authorized to require it, in the absence of any showing of danger or liability of waste; otherwise, the will of testator that the life tenant shall enjoy the property will be frustrated": See *Langworthy v. Chadwick*, 13 Conn. 42; *Hodge v. Hodge*, 72 N. C. 616; *Cheshire v. Cheshire*, 37 N. C. 569; *Howard v. Howard's Exr.*, 16 N. J. Eq. 486. We are inclined to regard this the more reasonable rule, for it is to be inferred from the giving the life tenant the management of the residue of the estate without fixing condition or requiring security that the testator intended to repose confidence in his fidelity.

But the interest of the remainderman in moneys or securities is more precarious than that in specific articles of personal property, because ordinarily more readily lost, secreted, abstracted or converted, and the courts will act with greater caution in guarding the respective interests of the parties. The record before us shows that the life tenant is not kindly disposed toward the remaindermen; that she has no property of her own save some household goods and the three thousand dollars left her under the will; that she does not maintain a home, but rooms while in the state; that she spends a large portion of her time in the state of New York, and expects to do so in the future; that she has buried her husband there, and expects to be buried at his side; that all her relatives live there; that she had considered moving there but was not decided. There is no proof of loss in her care of the estate as executrix, nor that any of the funds in her hands as executrix has been unwisely invested. But it does appear that loans have been made without personal investigation or inquiry as to the security, and that at least six thousand dollars has been paid by her for stock in the German-American Coffee Company, a corporation ²⁴⁵ with headquarters in Mexico, without any adequate inquiry as to its value. Possibly these investments are safe, and there is nothing in the record to show that they are or to justify a contrary conclusion, but the manner of making them does not exhibit the care and prudence ordinarily essential for the preservation and conservation of property. Indeed, they suggest the thought that the funds would be safer and she would be better assured of a continuing income were they in other hands. But the testator plainly indicated that she might have their custody and

management, and in view of this the district court rightly ordered that they be delivered to her upon the giving of ample security that the corpus of the legacy be turned over to the remaindermen upon her death. While she testified that she was undecided as to whether she would leave the state, it was not denied but that she had and expected to pass most of her time in New York. In view of this, her feeling toward the appellees and her manner of handling the funds intrusted to her care, we are not inclined to disturb the order of the trial court.

Affirmed.

Security from Life Tenant.—The practice has obtained to some extent in equity of requiring the tenant for life in a legacy to give security to the executor as a condition precedent to his right to demand a delivery of the property. Generally speaking, however, if the testator has not required such security to be given, the courts are not authorized to require it, in the absence of a showing that there is danger that the estate will be impaired or suffer waste in the hands of the life tenant. Otherwise the will of the testator that the tenant for life shall enjoy the property will be frustrated: 1 Ross on Probate Law and Practice, 107; *Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200.

DOUGHERTY v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[137 Iowa, 257, 114 N. W. 902.]

RAILROAD—Liability for Injury to Child Invited to Ride on Hand-car.—A railroad company is not answerable for injuries sustained by a child, while riding in a dangerous position on a hand-car at the invitation of sectionmen, no matter how gross their negligence, if the injuries are not inflicted wantonly, purposely or maliciously, since the men are acting outside their authority, and the injury is not due to the dangerous character of the car but to the negligence of those in charge of it. (p. 284.)

Howell & Elgin, for the appellant.

F. S. Payne and Cook, Crocker, Loomis & Tourtellot, for the appellee.

258 DEEMER, J. The alleged grounds of negligence are "in permitting the said minor plaintiff to board the said car and ride the same at the front edge thereof in an exposed position, without aid or protection of any kind," and "that shortly before the plaintiff was injured, and while the hand-car was stationary, said section boss saw said infant sitting

in a position of peril on said car, and, so seeing, ordered the other persons on said car, who were under the direction of said [boss], to start up said car, which was done." The record shows that plaintiff is a boy seven years old, living with his parents close to the defendant's right of way. One Hull was defendant's section foreman in charge of the hand-car which injured the plaintiff. As the car was coming to the station where it was kept, conveying the men from the ²⁵⁹ place where they had been working during the day, and as it passed the house where the boy lived, he was seen standing close to the track, and one of the sectionmen invited him to get upon the car. Pursuant to the invitation, the foreman stopped the car, and ordered the men to help the boy thereon. The car proceeded to the depot, where some tools were to be loaded to be taken to the toolhouse, and all the men got off the car. After the tools were loaded two men got on one end of the car and the little boy got on the other. The foreman did not get upon the car, but ordered the men to take it to the toolhouse, and seeing the boy on the car, remarked, "Hold on tight." The boy said in his testimony that he had hold of the handle bars of the car, and kept hold for a little while until he got dizzy and then let go, resulting in his falling from the car after it had gone three hundred or four hundred feet, and receiving the injuries of which he complains. It is manifest, of course, that the boy was not a passenger, and that defendant's liability cannot be predicated upon that theory. The injury was due to the wrong of defendant's employés entirely outside of the scope of their employment, and defendant cannot be held responsible therefor.

The only possible theory upon which there could be a recovery is that the boy was either a licensee or a trespasser, and that defendant was charged with the duty of not wantonly or purposely injuring him. But to this proposition there are several answers. In the first place, the original wrong for which defendant was in no way responsible was the proximate cause of the injury to the boy. Again, there is no evidence of any such wanton or malicious conduct upon the part of defendant's agents as would justify a recovery. And lastly, as to the employés who injured the boy, he was not a trespasser, for they invited him upon the car, and, although defendant is not responsible for the conduct of these men in extending the invitation, it cannot be charged with the negligence of the sectionmen, no matter how gross, in ²⁶⁰ injuring the boy, after they had themselves placed him in the danger-

ous position. In all that they did they were acting outside of the scope of their authority and for some purpose of their own, and defendant should not, under the circumstances, be held liable for their negligence: *Keating v. Michigan Cent. R. R. Co.*, 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346. Defendant should not be held liable either for their original wrong or for the consequences thereof. If the boy had got upon the car without the consent of the sectionmen, he would have been a trespasser, and defendant would only be held responsible in such a case if they wantonly or purposely injured him, after discovering his presence. The rule in the so-called turntable cases, as announced in *Edgington v. Burlington etc. Ry. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561, has no application whatever.

Appellant contends, however, that the car was a dangerous agency, and that defendant is responsible for the acts of its agents in charge thereof. This rule has no application to the case at bar. The injury to plaintiff was due not to the dangerous character of the car, but to the negligence of those having it in charge, and it was not such negligence as to render defendant responsible: *Foster-Herbert C. S. Co. v. Pugh*, 115 Tenn. 688, 112 Am. St. Rep. 881, 91 S. W. 199, 4 L. R. A., N. S., 804; *Schulwitz v. Delta Lumber Co.*, 126 Mich. 559, 85 N. W. 1075; *Houston etc. Ry. v. Bolling*, 59 Ark. 395, 43 Am. St. Rep. 38, 27 S. W. 492, 27 L. R. A. 191; *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751, 18 N. E. 722. It is a general rule that an act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master: *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359, 38 N. E. 498, 27 L. R. A. 173; *Gillett v. Missouri Val. Ry.*, 55 Mo. 315, 17 Am. Rep. 653; *Formall v. Standard Oil Co.*, 127 Mich. 496, 86 N. W. 946; *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100.

There is no testimony to show that the injuries were ²⁶¹ either wantonly, purposely or maliciously inflicted, and no possible grounds are shown for holding the defendant liable: See, as sustaining these conclusions, *Smith v. Louisville etc. R. R.*, 124 Ind. 394, 24 N. E. 753; *Noblesville etc. Gravel Road Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224.

The judgment is therefore affirmed.

The Owner of a Wagon Who Places It in Charge of a Skillful Driver is not liable for the death of a child who climbs on the vehicle at the invitation of the driver and is killed in alighting therefrom, if

the driver is without authority to extend such invitation and his act is not within the scope of his employment or in furtherance of his employer's business: *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688, 112 Am. St. Rep. 881. For a servant driving a dumpcart to invite a boy to drive it for the latter's pleasure is not within the scope of the former's authority, and the master is, therefore, not answerable for injuries received by the boy while so driving: *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523. See, also, *Morris v. Brown*, 111 N. Y. 318, 7 Am. St. Rep. 751. And if a boy leading a colt belonging to his master invites another boy to ride thereon, and the latter, accepting the invitation, is injured by the colt, the master cannot be held answerable, unless the invitation was given in the course of the work or for the purpose of accomplishing it: *Bowler v. O'Connell*, 162 Mass. 319, 44 Am. St. Rep. 359.

SWARTZ v. ANDREWS.

[137 Iowa, 261, 114 N. W. 888.]

DOWER—Power of Attorney in Husband to Convey.—Dower cannot be alienated by the husband under a power of attorney from the wife, where the statute provides that such estate cannot be the subject of contract between them. (pp. 286, 287.)

CURATIVE STATUTE—Interference with Vested Rights.—A curative statute which interferes with rights vested before its passage is unconstitutional. (p. 287.)

CURATIVE STATUTE—Correction of Irregularities in Conveyance.—If a legalizing act simply makes effectual as against the parties a conveyance otherwise ineffectual on account of some irregularity or omission not involving substantial right, the parties affected are not in a situation to complain, nor can those who claim under them by virtue of transactions taking place after the passage of the act assert any rights which the parties themselves could not have asserted. (p. 287.)

DOWER—Statute Legalizing Conveyance.—A statute intended to legalize a conveyance of dower which has been made by a husband under a power of attorney from his wife is unconstitutional, where the law denies to her any capacity to execute such a power of attorney. (p. 288.)

DOWER—Statute Legalizing a Conveyance.—A statute intended to legalize a conveyance of dower by a man under a power of attorney from his wife is unconstitutional in case her estate has become vested by his death before the passage of the act. (p. 289.)

DOWER.—The Curative Act of Iowa relating to conveyances by one spouse of the inchoate interest of the other under a power of attorney does not apply to a letter of attorney executed by the wife alone, but only to a joint instrument involving mutual rights and benefits. (pp. 289, 290.)

Shull, Farnsworth & Sammis, for the appellant.

E. J. Stason, for the appellees.

²⁶² McCLAIN, J. In March, 1886, Anna F. Buxton, by written instrument duly signed and acknowledged, appointed her husband, N. B. Buxton, to be "her true and lawful attorney . . . to grant, bargain, sell and convey any real estate in whatever state or territory situated . . . which I own or hereafter acquire, or any interest therein, including my dower, homestead, or any other interest as the wife of said N. B. Buxton in and to any real estate wherever situated now owned or hereafter acquired by the said N. B. Buxton." In April, 1888, said N. B. Buxton, being the owner of the land in controversy, executed a warranty deed therefor, purporting to convey the same to this plaintiff, in which deed there was a relinquishment of the dower interest of Anna F. Buxton. The deed was signed by N. B. Buxton and "Anna F. Buxton by N. B. Buxton, her attorney in fact," and acknowledged by him personally and as attorney in fact. In June, 1900, N. B. Buxton died intestate, leaving Anna F. Buxton his surviving widow, and she, in August, 1902, conveyed an undivided one-third interest in the property to defendant A. M. Andrews, from whom defendant Joseph H. Hill has acquired, by conveyance, an undivided one-half of such undivided one-third interest. In 1902—that is, after the death of the said N. B. Buxton and before the conveyance of a one-third interest in the property by his widow—chapter 237 of the acts of the Twenty-ninth General Assembly was passed, legalizing certain conveyances in ²⁶³ the following language: "No conveyance of real estate heretofore made, wherein the husband or wife conveyed or contracted to convey the inchoate right of dower of the other spouse, acting as the attorney in fact, by virtue of a power of attorney executed by each spouse, such power of attorney not having been executed as a part of a contract of separation, shall be held invalid as contravening the provisions of section three thousand one hundred and fifty-four (3154) of the Code, but all such conveyances are hereby legalized and made effective."

1. The power of attorney given by Anna F. Buxton to her husband was invalid under the provisions of code, section 3154, which is in the following language: "When property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them nor such interest as will make the same liable for the contracts or liabilities of the one not owner of the property, except as provided in this chapter." The conveyance of N. B. Buxton was ineffectual, therefore, to cut off the dower interest of Anna F. Buxton, and the deed to plaintiff had no greater effect

at the time it was executed than if there had been no provision therein relinquishing the dower interest of Anna F. Buxton: *Sawyer v. Biggart*, 114 Iowa, 489, 87 N. W. 426. It is conceded that, unless the conveyance by N. B. Buxton to plaintiff was made effectual to cut off his wife's dower interest by the subsequent legalizing act above referred to, defendants have a good title to one-third of the land in controversy.

2. The consideration of the efficiency of the legalizing act, on which plaintiff relies to make her title perfect to the entire interest in the land owned by N. B. Buxton involves, first, the constitutionality of the statute, and, second, its interpretation. The validity of a curative or legalizing act to make effectual a conveyance, which, but for such legislative action, ²⁶⁴ would be ineffectual, turns on the question whether any vested rights are thereby destroyed. If a right which is already vested before the passage of the act is interfered with by the application of the statute, then the statute deprives the owner of such vested right of his property without due process of law, and is unconstitutional under article 1, section 9, of our state constitution and under the fourteenth amendment to the federal constitution. If, on the other hand, the legalizing act simply makes effectual as against the parties a conveyance which would otherwise have been ineffectual on account of some irregularity or omission not involving substantial rights, the parties affected are not in a situation to complain, nor can those who claim under them by virtue of transactions which take place after the passage of the curative act assert any rights which the parties themselves could not have asserted, in view of the effect of the act. Thus it is said in *Goshorn v. Purcell*, 11 Ohio St. 641, with reference to a conveyance of property by a married woman which was not in conformity to the statutory provision as to the recital in the granting clause of the name of such woman as grantor, she having joined with her husband in the execution of the deed: "The act of the married woman may, under the law, have been void and inoperative; but, in justice and equity, it did not leave her right in the property untouched. She had capacity to do the act, in a form prescribed by law for her protection. She intended to do the act in the form prescribed. She attempted to do it, and her attempt was received and acted on in good faith. A mistake, subsequently discovered, invalidates the act; justice and equity require that she should not take advantage of that mistake; and she has, therefore, no just right to the property. She

has no right to complain if the law, which prescribes forms for her protection, shall interfere to prevent her reliance upon them to resist the demands of justice. She has no vested right to do wrong: *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135. As said in a recent case, 'laws curing defects, which would otherwise operate to frustrate what must be presumed to be ²⁶⁵ the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the equity and justice of the case: *State v. Newark*, 27 N. J. L. 185.' "

It has frequently been held that curative acts making valid, as to married women, deeds in which they have joined with their husband to relinquish dower, although the acknowledgments of such deeds have not been in the form prescribed by statute, do not interfere with any vested right on the part of the woman whose attempted relinquishment is not effectual under the statute existing when made, and are constitutional: *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691, 35 L. R. A. 226; *Dengenhart v. Cracraft*, 36 Ohio St. 549; *Tate v. Stooltzfoos*, 16 Serg. & R. 35, 16 Am. Dec. 546; *Johnson v. Richardson*, 44 Ark. 365; *Watson v. Mercer*, 8 Pet. (U. S.) 88, 8 L. ed. 876. On the other hand, it has been held that if the act attempted to be legalized was one which a married woman had no power under the existing law to do, so that it was ineffectual, not merely because of irregularity in the method in which the power was attempted to be exercised, but for the entire lack of power to do such an act in any manner, a legalizing act could not make valid as to her that which she had no capacity to do: *Lane v. Soulard*, 15 Ill. 123; *Russell v. Rumsey*, 35 Ill. 362; *Miller v. Hine*, 13 Ohio St. 565; *Shonk v. Brown*, 61 Pa. 320.

The invalidity of the conveyance to plaintiff by N. B. Buxton as to his wife's right of dower was not due to any mere informality or defect in the conveyance itself. Buxton had no authority to relinquish his wife's right of dower, for the pretended power of attorney from his wife to him was invalid. And the invalidity of this power of attorney was not by reason of any defect in its execution, but because the law as then existing, and as it still exists, denied to her any capacity to execute such an instrument, or by the execution thereof to confer any such authority upon her husband. ²⁶⁶ We reach the conclusion that the curative act above quoted was unconstitutional, in that it was attempted thereby to make valid an instrument affecting the dower right of Buxton's

wife which was wholly invalid for lack of power to execute it at the time it was executed.

Another consideration leads to the same result. If, after the execution of the deed to plaintiff by Buxton and prior to the passage of the curative act, anyone acquired by change of situation and condition a vested right which did not exist at the time of the conveyance, the curative act, as applied to such conveyance with the effect of defeating the vested right subsequently acquired, would be unconstitutional: *Brinton v. Seevers*, 12 Iowa, 389; *Newman v. Samuels*, 17 Iowa, 528; *State v. Squires*, 26 Iowa, 340. On the death of Buxton, which took place before the passage of the curative act, his widow became vested with an absolute right to an undivided one-third interest in his real property which had not been relinquished by any action on her part valid by the law up to that time. Her contingent right of dower was converted into a title of which the legislature had no power to deprive her by any subsequent enactment: *Burke v. Barron*, 8 Iowa, 132; *Potter v. Worley*, 57 Iowa, 66, 7 N. W. 685, 10 N. W. 298; *Botterff v. Lewis*, 121 Iowa, 27, 95 N. W. 262; *Randall v. Kreiger*, 2 Dill. 444, Fed. Cas. No. 11,554; on appeal, 23 Wall. (U. S.) 137, 23 L. ed. 124. It follows that, irrespective of the validity of the curative act as applied to a case where the coverture still continued at the time the act was passed, there is reason in the case before us for holding the act unconstitutional as to the vested dower right of Anna F. Buxton, under whom defendants claim.

3. The language of the curative act refers to a case where the husband or the wife acts as attorney in fact for the other "by virtue of a power of attorney executed by each spouse" in the attempt to relinquish the dower right of the other. The power of attorney relied on in this case was not executed ²⁶⁷ by "each spouse," but only by Anna F. Buxton, and we hold that the curative act has no application to such power of attorney. At first sight this may seem to be a somewhat technical construction of the act, but the case of *Sawyer v. Biggart*, 114 Iowa, 489, 87 N. W. 426, was decided not long before the curative act in question was passed relating to mutual powers of attorney executed by both husband and wife, and it is reasonable to suppose that the statute was passed with reference to such a case. That this is not an unusual form of curative act, and that such an act is to be limited in its application to such an instance as is described, appears from what is said in *Randall v. Kreiger*, 23 Wall.

(U. S.) 137, 23 L. ed. 124, and *Dengenhart v. Cracraft*, 36 Ohio St. 549. There may be good reason in public policy for validating a joint instrument involving mutual benefits and obligations which would not apply to a mere power of attorney under which, without consideration, the husband or wife is authorized to act for the other. If the curative act could be given effect in any case, it still would not be applicable to the case before us.

Something is said in argument of counsel as to the impropriety of granting a partition to the defendants on their cross-bill, but as the court dismissed the cross-bill in this respect, and refused to grant relief by way of partition, we have no occasion to consider this question on the plaintiff's appeal.

The decree is therefore affirmed.

A Curative Statute Enacted to Correct and Validate Conveyances is ordinarily valid if it does not undertake to interfere with vested rights: *Steger v. Traveling Men's Building Assn.*, 208 Ill. 236, 100 Am. St. Rep. 225, and cases cited in the cross-reference note thereto. See, also, *McManus v. Hornaday*, 124 Iowa, 267, 104 Am. St. Rep. 316; *Fuller v. Hager*, 47 Or. 242, 114 Am. St. Rep. 916.

Statutes Affecting Dower and Curtesy are discussed in respect to their constitutionality in the note to *Rose v. Rose*, 84 Am. St. Rep. 437.

The Conveyance of a Wife's Dower by virtue of a power of attorney is discussed in *Security Savings Bank v. Smith*, 38 Or. 72, 84 Am. St. Rep. 756; *Wronkow v. Oakley*, 153 N. Y. 505, 28 Am. St. Rep. 661. The general rule is that a man cannot, by any act of his, prejudice his wife's right of dower: *Chase v. Angell*, 148 Mich. 1, 118 Am. St. Rep. 568.

VAN BUREN COUNTY v. AMERICAN SURETY COMPANY.

[137 Iowa, 490, 115 N. W. 24.]

SURETY COMPANY—Contracts in Nature of Insurance.—The business of corporations organized for profit in assuring performance of contracts partakes largely of the nature of insurance, and is governed by essentially the same principles of law. (p. 294.)

SURETY COMPANY—Notice of Default—Strict Compliance.—A condition in a surety bond requiring notice of default pertains to the remedy, and though precedent to the maintenance of an action, is not so strictly construed by the courts as are conditions involving the essence of the agreement. (p. 294.)

SURETY COMPANY—Notice of Default—Time for Giving.—The notice of default required by a surety bond is not due until the fact of which the surety is to be apprised is known to the insured, or until he should have known it in the exercise of reasonable diligence. (p. 294.)

SURETY COMPANY—Notice of Default in Construction of Bridge.—Where a corporation employed by a county to construct a bridge secretly substitutes materials different from and inferior to those agreed upon, notice thereof to a surety company that has undertaken to insure the county for the faithful performance of the contract is not due until the fraud is or should have been discovered in the exercise of reasonable diligence. (p. 300.)

SURETY COMPANY—Release by Overpayment to Contractor. The rule that if the obligee in a bond to secure the performance of a construction contract pays installments before they are earned, or in excess of the amount due, the surety is released, does not apply where a county is induced to make overpayments by the fraud of the contractor participated in by the county engineer. (p. 303.)

SURETY COMPANY—Notice of Breach of Contract.—Where a contractor in erecting a county bridge substitutes materials inferior to and different from those contracted for, the county cannot be charged with notice because of the knowledge of its engineer who is acting in collusion with the contractor. (pp. 305, 306.)

SURETY COMPANY—Release by Change of Contract.—A surety company which has undertaken to insure a county for the faithful performance of a corporation's agreement to construct a bridge is not released, on the theory of material changes in the principal contract, where the contractor fraudulently substitutes materials different from and inferior to those agreed upon. (p. 306.)

GUARANTY—Notice of Principal's Default.—If a guaranty is absolute, the liability of the guarantor is as broad and complete as that of a surety; and if it is conditional, a failure to give notice of the principal's default will not discharge the guarantor in the absence of any prejudice to him from the laches. (p. 306.)

H. F., F. A. and H. F. Pennington, Mitchell & Hunter, and R. R. McBeth, for the appellant.

E. L. McCoid, county attorney, and W. M. Walker, for the appellee.

⁴⁹¹ **WEAVER, J.** On June 20, 1900, the American Bridge Company entered into written contracts with Van Buren county to erect two steel bridges known in the record as the "Selma bridge" and the "Kilburn bridge." The agreed price of the Selma bridge was eleven thousand nine hundred and fifty dollars, and of the Kilburn bridge was fourteen thousand nine hundred and fifty dollars—the former to be completed on November 19, 1900, and the latter on December 1, 1900. In other respects the two contracts are substantially identical in their terms and conditions, to which, so far as material to the present controversy, more specific mention will be hereinafter made. To secure the faithful performance of these contracts, the bridge company executed and delivered to the ⁴⁹² county its two several bonds with the appellant herein as security. On March 30, 1901, the county brought an action at law upon said bonds to recover damages for the

alleged failure of the contractor to construct the bridges according to the terms of the agreement. While the petition originally specified various particulars, in respect to which it was alleged that the bridges had not been constructed according to contract, all seem to have been eliminated, except the claim that the bridge company fraudulently substituted lighter and less valuable materials in the construction of each of said bridges than were called for by the contract, with the result that the amount of metal in the completed structures is less by many tons than it would have been had the contracts been fairly and honestly performed. A jury being waived, the cause was tried to the court, which found the charge of fraud as above indicated in the substitution of lighter and inferior materials in said bridges had been established by the evidence, and that the county had been damaged thereby in the sum of four thousand eight hundred and forty-five dollars and twenty-four cents. It appearing, however, that the county still had in its hands an unpaid balance of the contract price of the bridges to the amount of three thousand nine hundred and five dollars and sixty-seven cents, the court applied this sum in reduction of the proved damages, and entered judgment in plaintiff's favor for the difference, nine hundred and thirty-nine dollars and sixty-seven cents.

1. The bonds in suit attach certain conditions to the liability of the surety company, among which are the following: "1. That, in the event of any default on the part of the principal in the performance of any of the terms or conditions of said contract, written notice thereof, with a verified statement of the facts showing such default and the date thereof, shall, within ten days after such default, be mailed to said surety at its office in the city of Chicago, No. 704 Marquette Building; 2. That no suit, action or proceeding shall be brought or maintained against the principal or surety upon or by reason of any such default, after the expiration of four months after such default, nor, ⁴⁹³ in any event, after the first day of April, 1901." This action was begun March 30, 1901.

It is the claim of appellant that plaintiff failed to give notice of the contractor's default within the time thus fixed, and therefore this action cannot be maintained. It is also claimed that, so far as the plaintiff's demand has reference to the construction of the Selma bridge, the action was not begun within four months after the alleged default, and is therefore barred by the contract limitation. That the surety

in a bond may prescribe reasonable conditions for notice of the principal's default, and for the release and discharge of such bond upon failure to comply therewith, may be admitted for the purposes of this case; but the question what shall be deemed due notice within the true meaning and intent of the contract is another consideration, which requires more particular examination of the proved or conceded facts. The trial court has found that the Selma bridge was not completed until some time in January, 1901, when a majority of the board of supervisors, acting individually only, undertook to accept it, and caused the county auditor to issue warrants to the bridge company for the remainder of the agreed price of that structure, but such acts were done by the supervisors without any knowledge or notice of the fraud which had been practiced by the contractor. The other bridge was not completed or tendered to the county until after March 1, 1901. Prior to that date, and immediately prior to February 14, 1901, the wrongful substitution of the lighter and less valuable materials in the construction of the bridges was discovered by the county, and thereupon and within less than ten days it caused written notice of the fact to be given to the surety company. Unless the action of the supervisors above mentioned with respect to the Selma bridge is to be construed as an acceptance, neither structure has ever been formally accepted, though both have ever since been in use as part of the public highway.

The contention of the appellant that the aforesaid written ¹⁹⁴ notice of the contractor's fraud was not given within ten days after the default complained of is sought to be maintained on the following grounds: It is first said that, as the contract was by its terms to be completed on or before November 19, 1900, notice should have been given the surety of the failure so to do, and, such notice not having been given within ten days from said date, the surety was thereby discharged; or, in any event, that action as to the Selma bridge is barred by the contract limitation of four months. We do not so construe the undertaking. It is true that the contract named November 19, 1900, as the date for the completion of the Selma bridge, but it evidently contemplated the possibility, if not probability, that the work would be hindered or delayed, and that the actual completion might not be accomplished until a later date. To provide for such contingency, it was agreed that for any delay beyond the time fixed the contractor should be subject to a stated per diem penalty. To hold the surety for such penalties, it may be that notice of

the failure to complete the bridge within the stipulated time should have been promptly given, but the appellee is making no claim in this court for any recovery on that ground, and the judgment appealed from includes no allowance of that nature. Nor would the four months limitation begin to run as between the county and the contractor until the fraud on which recovery is claimed was discovered, and the surety in this respect occupies no stronger position than the principal.

It is further argued, if we understand counsel, that the default, if any, of the contractor occurred when the inferior materials were delivered on the ground or placed in the bridges, and that, to hold the surety liable, notice thereof should have been given within ten days thereafter.

Preliminary to a discussion of these propositions, it is to be said that, while the relation of appellant herein is spoken of as that of surety or guarantor, counsel upon both sides cite and rely upon precedents afforded by the decisions ⁴⁹⁵ of this and other courts in actions growing out of contracts of life, accident, fire and fidelity insurance. These authorities are fairly in point, for the business of corporations organized for purposes of profit in assuring the performance of contracts of various kinds partakes largely of the nature of insurance, and is carried on in much the same manner: *Getchell & Martin Lumber etc. Co. v. Peterson*, 124 Iowa, 599, 100 N. W. 550; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. Rep. 552, 42 L. ed. 977; *Shakman v. United States Credit S. Co.*, 92 Wis. 366, 53 Am. St. Rep. 920, 66 N. W. 528, 32 L. R. A. 383; *Fenton v. Fidelity & C. Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *People v. Rose*, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; 1 *Joyce on Insurance*, sec. 12.

Following an analogy afforded by the law of insurance, we first note that the condition requiring notice to the surety is one to be performed after the occurrence of the loss or damage for which recovery is sought, and is not essential to the binding force of the contract while it is running prior to any default. Conditions of this class pertain to the remedy, and, though precedent to the maintenance of an action, are not ordinarily as strictly construed by the courts as are those conditions involving the essence of the agreement: *Perpetual Building etc. Assn. v. United States Fidelity & G. Co.*, 118 Iowa, 729, 92 N. W. 686; *W. H. Coffee Co. v. Insurance Co.*, 110 Iowa, 425; *Peele v. Provident Fund Soc.*, 147 Ind. 543, 44 N. E. 661, 46 N. E. 990.

The clear intent of the parties is not to be violated or ignored; but such intent is to be gathered from the language

of the instrument fairly read in the light of all the circumstances attending its making and the apparent purpose it was intended to serve: *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, 20 N. W. 782. A surety bond or contract of indemnity would be farcical if made subject to conditions which are impossible of performance, or conditions which deprive it of all real force and effect as ⁴⁹⁶ surety. By the bond in suit the surety company undertook to stand good for the faithful performance of the bridge company's contract. This obligation extends not alone to defaults which are chargeable to the contractor's incompetency or lack of financial ability, but also those which are chargeable to its duplicity and fraud. Fraud is the product of deceit and concealment, and to hold that a party who demands and receives a bond against injury therefrom is bound to discover the secret wrong as soon as it is committed, and give notice thereof at the risk of destroying his security, is so unreasonable that the court will not attach such construction to its terms, unless the clear meaning of the language imperatively requires it. Referring again to the bond, it will be seen that the same condition which requires the written notice requires that it shall be accompanied with a statement of the facts showing the default and the date thereof. Similar conditions are not infrequent in insurance policies, accident policies, fidelity bonds, and other contracts of indemnity, and the weight of authority supports the reasonable proposition that the notice thus required is not due within the meaning of the provision until the fact of which the insurer or surety is to be apprised is known to the other party, or until, in the exercise of reasonable diligence, he ought to have known it.

It has also often been held that, where circumstances render a condition affecting the remedy impossible of performance, it will not be allowed to defeat recovery on a meritorious claim. Such was our holding in *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652, where the production of invoices and bills of goods destroyed was made a condition of the defendant's liability upon its policy, and, upon a showing made that insured could not produce them, we said: "We think she was not required to do an impossible thing, and if it can be shown that without any default or fraud on her part compliance is rendered impossible, she may recover without performing the condition." A like condition ⁴⁹⁷ was similarly construed in *Bumstead v. Dividend Mut. Ins. Co.*, 12 N. Y. 81, where the court, speaking by Allen, J., says: "What shall be considered a performance so as to entitle a

party to insist upon payment of a loss within the terms of the policy depends upon the true construction of the contract of the parties. A strict interpretation of the language employed would not unfrequently prevent a recovery against the company, as no exceptions are made to the requirements to furnish the inventory, and to produce the books and vouchers. The inventory required is one strictly accurate, not approximating to accuracy, and made according to the best knowledge the party may have. Such a statement, though made out with all care and honesty and really affording the insurers all the information they could reasonably desire, would not be an inventory of the property within the literal meaning of the condition. So the nonproduction of books and vouchers destroyed by the very fire against which the party had sought indemnity would effectually defeat his claim under the policy. Such an interpretation would be unreasonable, and cannot be supposed to have been in the minds of the contracting parties at the time the insurance was effected. The construction of these conditions should be reasonable, and as near the apparent intent of the parties as may be consistent with the terms employed, taking into consideration the motive that led to their insertion in the contract and the object intended to be effected by them."

After citing the long-established rule requiring such restrictive clauses to be liberally construed in favor of the person contracting for indemnity, the court further adds: "If this has been found necessary in former times in order to give effect to the contract of insurance as a real, and not illusory, contract of indemnity, it is still more necessary now, when, with the multiplication of companies holding themselves out as insurance companies and bidding for risks, legal ingenuity and practical experience and skill have been exerted to the utmost to devise terms and conditions by which the nominal underwriters may guard against a legal liability in case of loss of the property insured by the perils ⁴⁹⁸ proposed to be insured against." Discussing the same question, it has been said that: "The courts have looked to the circumstances, and required no more information of the party than what appeared to be within his control": *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow. (N. Y.) 645; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 245; *Nason v. Harvey*, 8 Ex. 819.

Conditions requiring "immediate notice" upon the occurrence of loss or default have been held satisfied by notice given within two days to two months, the time varying with

the circumstances of the particular cases: Perpetual Building etc. Assn. v. United States Fidelity & G. Co., 118 Iowa, 729, 92 N. W. 686; Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 49 Am. St. Rep. 467, 41 N. E. 658; Niagara F. Ins. Co. v. Scammon, 100 Ill. 644; Wooddy v. Old Dominion Ins. Co., 31 Gratt. 362, 31 Am. Rep. 732; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Kentzler v. American Mut. Acc. Assn., 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002. In *Peele v. Provident Fund Soc.*, 147 Ind. 543, 44 N. E. 661, 46 N. E. 990, the contract of indemnity was against accidental injury, and made subject to the condition that written notice of the injury with statement of the particulars of the accident should be given to the insurer, and that "failure to give such notice within ten days from the date of either injury or death shall invalidate any and all claim under this certificate." The insured person was drowned, and, while the fact of such death was known to his wife immediately after its occurrence, yet she did not know its accidental character until more than ten days had elapsed; but when she ascertained the truth, she acted promptly, and notice then given was held to satisfy the condition. In reaching this conclusion, the court lays considerable stress upon the provision, similar to the one in the case at bar, which requires the notice to be accompanied by a showing of the particulars or circumstances of the alleged default, or loss for which indemnity is claimed, and, after saying that, in the interpretation of such conditions, courts are disposed ⁴⁹⁹ to look to the intention and substantial rights of the parties, adds: "A distinction has been made between conditions preceding the loss or accident and upon which the question of liability primarily rests, and conditions which relate to matters following such loss or accident. The former are more usually of the essence of the contract, and are therefore generally interpreted more strictly. When, however, the liability has once accrued, such conditions as relate to the giving of notice, making proofs of loss, etc.—that is, conditions subsequent to the capital fact of liability—have, in general, been interpreted as requiring what is reasonably possible on part of the beneficiary." Applying the rule to the case then being heard, the court further says that as the particulars of the accident could not be given until, acting with reasonable diligence, plaintiff obtained knowledge of them, the notice given "was reasonably sufficient as within the terms contemplated by the parties when the contract was entered into." In overruling a petition for rehearing in the

same case (147 Ind. 543, 44 N. E. 661, 46 N. E. 990), the court repeats: "A notice before full particulars were known would not have been a compliance with the condition. Before the coroner's verdict, it was not known, and could not be known, that Mr. Peele's death was accidental, to say nothing of being able to give the particulars of such accident. The notice was given at the earliest date possible, and was in full compliance with the object and purpose of the condition as it must have been understood by the parties at the time of the contract." The same rule was applied in a parallel case by the New York court—*Trippe v. Provident Fund*, 140 N. Y. 23, 37 Am. St. Rep. 529, 35 N. E. 316, 22 L. R. A. 432. There the insured was accidentally killed, but the fact and the circumstances of his death were not known to a certainty for a period of several days thereafter. Within ten days after such discovery, but more than ten days after the accident, notice was given and held to be sufficient. The court says: "The parties having contracted ⁵⁰⁰ that the notice should be accompanied by full particulars of the manner in which it occurred and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice was to be given did not begin to run from the date of the accident, but from the time when the body was found, and the important fact of death with the circumstances and particulars under which it occurred." The same principle has been recognized by the supreme court of the United States, and applied to policies of fire insurance (*Germania Ins. Co. v. Boykin*, 79 U. S. 433, 20 L. ed. 442), where it is said that, if the insured party is so insane as to be incapable of an intelligent statement, that of itself would excuse the performance of a condition requiring him to give notice and proof of loss within a fixed period. To the same effect, see *Indemnity Co. v. Fletcher*, 5 Ohio C. C. 636, 3 Ohio Ct. Dec. 308; *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 20 S. E. 691. Among many other cases holding to the same liberal interpretation of conditions of this nature are *Konrad v. Union C. & S. Co.*, 49 La. Ann. 636, 21 South. 721; *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644; *Coventry etc. Ins. Co. v. Evans*, 102 Pa. 281; *Ward v. Assn.*, 4 Week. Rep. 605; *Mandell v. Fidelity & C. Co.*, 170 Mass. 173, 64 Am. St. Rep. 291, 49 N. E. 110; *McElroy v. John Hancock Mut. L.*

Ins. Co., 88 Md. 137, 71 Am. St. Rep. 400, 41 Atl. 112; McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. 475.

In the last-cited case payment of a life policy was conditioned upon the presentation of notice of claim and proof of death within ninety days after the decease of the insured. Knowledge of his death was not obtained by the party entitled to the insurance for nearly a year after its occurrence, when she at once gave notice. In overruling ⁵⁰¹ the defense based on the condition for notice within a fixed limit of time, the court says: "It is perfectly clear that the rule was made for ordinary cases where the existence of the policy and the death of the insured are known, or might or should be known, in time to comply with the rule. It cannot reasonably be supposed that the holder of the policy could be required to give proof of a fact of which he himself was ignorant."

Now, in the case at bar, we have already noticed that the alleged default in the performance of the contract was of a secret and fraudulent character. The court found—and, the evidence not being preserved, we must presume the finding correct—that the bridge company for which appellant became surety, having procured the contract, fraudulently prepared new specifications for the manufacture of the materials to be used, which, while preserving the general features of the agreed plan as to form and appearance, systematically scaled down the amount and weight of the several parts composing the bridges, so that, when completed, said structures and substructures contained less steel than was contracted for to the amount of one hundred and thirty-three thousand nine hundred and ninety-two pounds, valued at four thousand eight hundred and forty-five dollars and twenty-four cents. It is thus established that the contract was violated at the very outset, and that the fraud of the contractor marked each successive step from the manufacture of the material to the completion of the work. The concealment of the imposition from the county was accomplished, as we shall hereinafter see, by a corrupt combination or conspiracy between the contractor and the agent or engineer, who was supposed to be acting in the county's behalf. There is nothing in the contract which casts upon the county the duty to discover this fraud until the bridges were completed and tendered for its acceptance and reasonable time given to ascertain the facts. Indeed, if the county was to carry such risk, there was no occasion for any bond any more than a property owner could have occasion for insurance ⁵⁰² against fire if in the end he

is to be charged with the very risk against which his policy nominally indemnifies him. The contracts in question call for completed bridges, and it is the condition and quality of these completed structures which are to be considered in determining whether the contractor has faithfully performed its agreement. That is the earliest date at which the county could have maintained an action of this character, and if, acting with reasonable diligence, the fraud was not known until later, the limitation upon such right of action, whether by statute or by contract, would not begin to run until such discovery: *Read v. State Ins. Co.*, 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, 20 N. W. 782; *Matt v. Iowa Mut. Aid Assn.*, 81 Iowa, 135, 25 Am. St. Rep. 483, 46 N. W. 857; *Kiisel v. Mutual R. L. Ins. Co.*, 131 Iowa, 54, 107 N. W. 1027; *McConnell v. Iowa Mut. Aid Assn.*, 79 Iowa, 757, 43 N. W. 188. In each of the cases here cited it was held that a limitation requiring the action to be brought "within one year from the date of death" or "within six months from the happening of the death on account of which the action is brought," or "within six months next after the fire," or "six months next after the occurrence of the loss," does not begin to run according to its literal terms at the date of the death, loss or injury, but at the date when the right of action for the indemnity matures. While these cases are not entirely parallel with the one at bar, they are not without analogy thereto, and afford instructive illustration of the principles which the courts are disposed to apply to cases of this nature. Following the rule of the authorities to which attention has been called, we think the trial court was not in error in holding that the notice to the surety was given in due time.

As the Kilburn bridge was not yet completed when the fraud was discovered and notice promptly given to the surety, there is no room for doubt that such notice was timely. The Selma bridge had been completed, and a few days had intervened, before the truth as to its defective condition was ascertained by the county and the surety apprised thereof.⁵⁰³ Whether the county had been reasonably diligent and acted with reasonable promptness was a question of fact; and, the evidence not having been preserved, we are bound to assume the correctness of the trial court's finding thereon.

2. The next defense seriously urged upon our attention is that the county paid the contractor in excess of the installments provided by the contract and before the amounts so paid were due, thus releasing the surety from liability.

The facts bearing upon this contention are as follows: Each contract contained the provision that, in consideration of the performance thereof, the county would pay the agreed price of the work in installments as follows, to wit: "Seventy-five per cent of cost of materials on their delivery and acceptance, provided, however, the same does not exceed the sum of seventy-five per cent of contract price, and the balance on the completion and acceptance of said work." From time to time, as the work progressed, the contractor made out bills purporting to show the delivery on the ground of materials such as were called for by the specifications. These bills were indorsed as approved by one Booth—an engineer employed by the county and supposed to be acting in its interest—and, being thereafter indorsed or O. K.'d by one of the board of supervisors, the county auditor issued warrants thereon, which were paid by the treasurer. These bills, in pursuance of the fraud which permeated the entire work, were made to show materials furnished of the weight and value contemplated by the contracts. Except in a single instance, which we shall hereinafter mention, the payments made during the progress of the work were not in excess of seventy-five per cent of the cost of the materials furnished as shown by these falsified bills, but as it now appears, each was in excess of seventy-five per cent of the actual cost thereof by reason of this substitution of the lighter materials. The exception to this statement has reference to a bill presented showing an expenditure for materials of two thousand nine hundred and fifty dollars and twenty cents, ⁵⁰⁴ on which a county warrant was issued to the bridge company for more than seventy-five per cent of the sum named. Soon thereafter the bridge company refunded a large part of the sum so obtained, thus making the net payment considerably less than seventy-five per cent of the bill presented. Taking these facts into consideration, and still omitting any reference to the complicity of the engineer, Booth, in the transaction to the effect, if any, of his agency upon the rights of the parties, we have to inquire whether the excessive payment thus secured will operate to release the surety who has undertaken to stand sponsor for the faithful performance of the contract.

For the purposes of this case, it may be conceded to be the general rule that, if the obligee in a bond to secure the performance of a building contract fails to retain the reserve which by the terms of the contract he is to withhold until the work is completed, or until certain conditions are complied with, or if he pays the contractor installments of the

agreed compensation before they are earned or become due, the surety will be discharged. But is such rule applicable in the case before us? The bridge company undertook to construct the bridges of materials of a definite kind, character and quality, and was entitled to receive seventy-five per cent of the cost of such materials as the same were from time to time delivered upon the ground in readiness to be used in the work of construction. To insure the faithful performance of this as well as all other stipulations of the agreement by said company, the appellant became surety upon its bond. The company did not faithfully perform its contract but substituted lighter and inferior materials, and by false vouchers showing apparent compliance on its part induced the officers of the county to issue to it warrants in excess of seventy-five per cent of the real cost of the materials, but not in excess of what was due on the showing made by such vouchers. If we were to hold that this operates to discharge a bond given to secure the performance ⁵⁰⁵ of the contract, it is equivalent to saying that the surety may reap advantage by the default of the very party against whose failure he has undertaken to indemnify the obligee. That this may not be done is a fundamental principle in the law of suretyship: *Ryan v. United States*, 86 U. S. 514, 22 L. ed. 172; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104.

The contract for the performance of which appellant became surety was not merely to construct certain bridges according to certain plans. By the express terms and necessary implication of the writing, the company undertook to present true and correct bills of the cost of materials furnished from time to time as a basis for payments to be made. If, in violation of that contract obligation, it presented claims or vouchers which concealed the fraudulent substitution of the inferior materials, and thereby obtained payment in excess of the sum really due, we see no reason why an action will not lie upon the bond against both principal and surety to make good the injury thus inflicted. The decisions in *Commissioners of Morgan County v. Branhan* (C. C.), 57 Fed. 179, and *St. Mary's College v. Meagher*, 11 Ky. Law Rep. 112, 11 S. W. 608, are not, as we read them, inconsistent with this conclusion. In the former the payments were to be due upon estimates to be made by the plaintiff itself or by its own engineer; and the court held, in effect, that its negligence in failing to perform this requirement on its part, and in making payments upon a false statement to

the commissioners that the money had been earned, released the surety. The latter case holds the same rule, saying that, under the terms of the contract, it was the duty of the owner not to pay until the work was inspected and approved by a man of its own selection. As applied to the facts involved in those cases, we are not disposed to quarrel with the results there reached. *Goodin v. Ohio*, 18 Ohio, 6, is also cited as authority for the proposition that a settlement between a county treasurer and board of supervisors will release the ⁵⁰⁶ sureties upon the treasurer's bond, even though the settlement be obtained by his fraud. If such be the holding of the cited case, we think it unsound in principle, and we cannot consent to follow it: See *Township of Milford v. Morris*, 91 Iowa, 198, 51 Am. St. Rep. 338, 59 N. W. 274. That there was a substantial failure to complete the bridge according to contract admits of not the slightest doubt. This capital fact established, the liability of the surety follows as of course, unless it had been released by some act or omission on part of the county. The payments made by the county were in strict accord with the contract, and they now appear to have been overpayments simply because of the violation of that contract by the principal in wrongfully substituting inferior materials in the structures, and in presenting false vouchers of their cost. It would be a reproach to the law to validate such a defense.

This conclusion is strengthened and emphasized when we take the next step, and consider the further proposition that the county employed Booth as an engineer to inspect the bridge materials and to protect the interests of his principal therein, and that he approved the bills on which the payments were made, from which circumstances it is argued that the county is estopped, as against surety at least, to recover for the alleged default of the contractor in this respect. The trial court found, and we must take it as established, that Booth, while professing to represent and serve the county, entered into a conspiracy with the bridge company, acting by its president, one Wetherell, to defraud the county by permitting said company to construct the bridges of inferior materials, and to conceal the fraud from the county; and that, in pursuance of such corrupt combination, Booth did certify to the correctness of the false vouchers presented by the contractor, knowing them to be false, and thereby induced and procured the payments to be made thereon. It would be a travesty on justice for us to hold that the surety for the performance of a contract is released from his obliga-

tion because his principal corrupted the agent ⁵⁰⁷ of the obligee, and thereby induced the latter to act upon the theory that the work had been faithfully done. In *Ryan v. United States*, 86 U. S. 514, 22 L. ed. 172, a bond was given for the transportation of certain boxes of tobacco which were the subject of a revenue tax to a government warehouse in New York. On arrival at the warehouse, the boxes were found to be filled with brickbats and other refuse, instead of the prescribed goods, and suit was brought upon the bond. Among other defenses it was urged that the officer whose duty it was to inspect the goods before shipment did it so negligently that the success of the fraud should be charged to his carelessness, and that the sureties were thereby released. To this proposition the court, by Miller, J., says that, even conceding the alleged negligence, it would not release the sureties from the obligation they had voluntarily assumed. "The very purpose of the bond was to secure the United States against the fraud of their principal, and the fraud was committed by him in the matter which the bond was designed to guard against. To say that the carelessness of the revenue officer made this fraud easier of accomplishment cannot release the sureties from their obligation." If negligence in the inspector employed by the obligee will not release the surety from liability to answer for the fraud of his principal, how much less will such surety be heard to claim a release because his principal succeeded in corrupting the inspector. In *Modern Steel S. Co. v. Van Buren County*, 126 Iowa, 606, 102 N. W. 536, we had to deal with the same contracts which are here involved and the circumstances under which the payments thereon were made. We there held that the county could in no event be bound or estopped by the act of the engineer in collusion with the contractor. True, the surety was not a party to that litigation, but we are unable to see any good reason for refusing to apply the principle there approved to the issues here made. To hold otherwise is to make it to the interest of every surety on a bond of this character that his principal for whose faithful ⁵⁰⁸ performance of contract obligations he has undertaken to stand good shall defraud the obligee in such performance, and successfully conceal the same for a period of ten days, or shall obtain a payment which is in excess of the amount due only because of his concealed fraud in the character of the work performed. Stripped of all unnecessary verbiage, and stated in briefest terms, the position of appellant upon this phase of the case is that, while the payments made by

the county during the progress of the work were not in excess of seventy-five per cent of the cost of the materials, had they been such as the contract contemplated, and such as were shown by the vouchers presented, yet, being in excess of seventy-five per cent of the cost of the inferior materials wrongfully and secretly substituted by the party for whose faithful performance of the contract the bond was executed the surety thereon is released from liability. We are not willing to affirm such a rule.

There is another and very proper ground upon which the claim of appellant to be discharged because of the payments to the contractor may well be overruled. Even if we take the construction of the bond for which counsel insist, the payments, even if excessive as compared with the actual cost of the substituted materials, were made upon the engineer's estimate, and were therefore in strict accord with the contract. If those estimates were fraudulently exaggerated in the interest of the bridge company, it is not in position to refuse to be bound thereby, nor can its surety take advantage of it: *Finney v. Condon*, 86 Ill. 78.

3. The appellant further claims to be relieved from its obligation as surety because of material changes in the contract between the county and the bridge company. This defense is grounded upon the alleged fact that the county permitted the bridges to be erected of materials of a substantially different kind and character from those provided for in the original agreement. It is undoubtedly a correct proposition of law that, if the obligee ⁵⁰⁹ in the bond materially modifies or changes the contract with the principal without the consent or waiver of the surety, the latter is thereby released from further liability; but we find nothing in the facts of the case before us calling for an application of the rule thus invoked. It is true that the bridges as erected were not such as the contractor undertook to construct, and it is that very fact which affords the basis of the claim sued upon in this case. If the changes were made with the knowledge and consent of the county, of course there can be no recovery against either principal or surety on the bond. The trial court found that the county did not consent to or have knowledge of the act of the contractor in making the changes and substituting inferior materials in such construction; and with this conclusion we are not authorized to interfere. The county cannot be charged with notice because of the knowledge of its engineer, who was acting in collusion with the

contractor in the scheme to defraud his employer: *Modern Steel S. Co. v. Van Buren County*, 126 Iowa, 606, 102 N. W. 536; *Hummel v. Bank of Monroe*, 75 Iowa, 689, 37 N. W. 954.

We are not prepared to admit the correctness of the position advanced by counsel, to the effect that, under the terms of the contract, it was the duty of the county to know the progress of the work and the kind and character of the bridges that were being erected, and, on peril of discharging the surety, discover each default of the contractor as it occurred during the progress of the work, and give notice thereof to the surety within ten days from the act complained of. This subject has already been sufficiently treated in a previous paragraph of this opinion, and it is unnecessary to further extend its discussion.

In the reply brief for the appellant suggestion is made that the obligation of the surety company upon the bond in suit is that of guarantor, rather than of surety, and that one who occupies the former relation will be released from his obligation by the negligence or fault of the obligee under circumstances which ⁵¹⁰ might not be sufficient to release a surety. Conceding, for the purposes of the present case, that the distinction thus made is technically correct, we cannot see how it can be made to avail for the release of the appellant from its bond. If the guaranty be absolute, the liability of the guarantor is as broad and complete as that of a surety, and, if it be conditional, it is a fundamental rule that failure to give notice of the principal's default will not discharge the guarantor in the absence of any showing of prejudice to the latter resulting from the laches. As we have already noted, the conditions relied upon are not precedent to the appellant's liability, but, assuming the existence of such liability, they go solely to the question whether the appellee has forfeited or lost its right to enforce it. If the obligee in such a bond has acted in good faith and with reasonable diligence, if by no default on its part has the obligor been prejudiced, and especially if the delay, if any, has been caused by the secret and fraudulent character of the violation of the very contract for the faithful performance of which the bond was given, we think there is nothing in the law of suretyship or of guaranty which requires us to hold that the obligation is thereby discharged.

Other questions argued by counsel, so far as they are within the record before us, are fairly governed by the conclusions already announced.

No reversible error has been shown, and the judgment of the district court is affirmed.

Where a Policy of Insurance Requires Notice of a loss or liability to be given immediately, this requirement is complied with if notice is given within a reasonable time: Aetna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 232, and cases cited in the cross-reference note thereto; note to First National Bank v. Fidelity etc. Co., 100 Am. St. Rep. 789, where this rule is applied to contracts of fidelity insurance. As to whether failure to give notice of a liability can be excused by want of information, see Johnson v. Maryland Casualty Co., 73 N. H. 259, 111 Am. St. Rep. 609, and cases cited in the cross-reference note thereto.

COCHRAN v. ZACHERY.

[137 Iowa, 585, 115 N. W. 486.]

BILLS AND NOTES—Parol to Vary Rate of Interest.—In an action to recover on a promissory note, parol evidence is not admissible to show that the rate of interest expressed in the instrument is not the one actually agreed upon. (p. 308.)

CONTRACT—Recovery for Gratuitous Services.—Where one renders services under an express assurance that he will make no charge, he cannot recover therefor on the ground that he would have made a charge had he not believed that another agreement between the parties would have been carried out. (p. 308.)

WILLS—Contract to Defeat Probate, When Void.—A contract by beneficiaries in a will to compensate the executor and trustee named therein if he will defeat its probate, so that the estate will descend to them in fee and thereby cut off an interest in remainder created by the will in favor of one not a party to the agreement, is against public policy and no recovery can be had thereon. (p. 310.)

WILLS—Agreement to Contest, When Champertous.—A contract whereby the executor and trustee in a will agree, for a consideration, to contest the probate of the testament is void as a species of champerty or maintenance. (p. 311.)

Sullivan & Sullivan and Cragan Bros., for the appellant.

Bailey & Stipp, for the appellee.

586 **McCLAIN, J.** The balance claimed by plaintiff as due to her from defendant on the note in suit was the difference between interest at six per cent and interest at eight per cent on the face of the note. By its terms the note drew eight per cent interest, but defendant alleged in his answer that through accident and oversight the note by its terms was made to read with interest at eight per cent. The assignment of error with reference to this branch of the case is the sustaining by the court of plaintiff's objection to the question asked him as a witness by his counsel whether there was any agreement between him and the payee of the note with ref-

erence to the rate of interest. The objection was on the ground that the question called for testimony tending to vary ⁵⁸⁷ by parol the terms of a written instrument. There was no error in sustaining this objection. No issue was made as to reformation of the note, and it is plain that, in an action at law on a written instrument, parol evidence is not admissible to show a prior or contemporaneous agreement contrary to the terms of the instrument. The citation of authorities is unnecessary to support so elementary a proposition.

2. A portion of defendant's counterclaim was for services rendered to the plaintiff, who is his sister, and her husband, in collecting certain claims held by the husband. In the first place, there is no evidence that the plaintiff undertook to assume liability for any indebtedness of her husband in this respect. In the second place, it clearly appears in the evidence that the services were voluntarily rendered, and with the express assurance that no charge would be made therefor. Defendant testifies that, had he not believed the plaintiff would carry out the terms of an agreement hereinafter to be referred to, he would have made a charge for these services. But, as against his assurance to plaintiff and her husband that no charge was intended, defendant cannot rely on some unexpressed purpose in his own mind with reference to the matter.

3. The real controversy in this case is as to the right of defendant to recover two thousand dollars alleged to be due him under an agreement with plaintiff, by which she undertook to pay him that amount, if he, acting in conjunction with plaintiff and other heirs of their deceased father, L. E. Zachery, should secure the setting aside of the will of said deceased. The will disposed of real property of the aggregate value of about two hundred and fifty thousand dollars in the following manner: As to one portion specifically described it was provided that the net annual rents and profits, with right of possession and enjoyment for life, should go to the defendant, and, after his death, be divided for the term of twenty years between his issue and his widow, the ⁵⁸⁸ share of the widow on her death or remarriage to be added to the share of the issue, and, on the expiration of said twenty years, the property should vest in said issue in fee simple. If, at the expiration of this period, there should be no living issue of defendant, all the interest that his issue would have taken was to go to testator's other children, or their issue. Similar provisions were made with reference to other specifically described portions of testator's property in

behalf of plaintiff and another daughter of testator and another son, and another portion was given in trust to defendant to hold for the benefit of another son, his widow, and issue on substantially the same terms. We are not called upon to interpret the rather intricate provisions of this will; but from what has been said with reference thereto it is apparent that four of the children of testator were to take the rents of specific portions of testator's real property for life, and that fee-simple title was to vest in their issue at the expiration of twenty years from the death of each child, respectively, or, in the event of no issue surviving at that time, the title was to go by descent to the other children of testator or their issue, and that defendant, as trustee, and his successors were to hold one portion for another son.

Under these circumstances, the children of the testator conceived the idea that they should prefer to take fee-simple title to their father's property by descent rather than the life interest given to them, respectively, with remainders over to vest in their issue after the lapse of twenty years from the time they should die. And accordingly they agreed, as defendant alleged, to join with him in contesting the probate of their father's will on the ground that he was not of sufficient testamentary capacity, and each of the four others agreed to pay him two thousand dollars in the event that the contest of the will should be successful, and each should acquire his share in the father's estate by descent. It is evident that this arrangement was intended to cut off any vested interest in the issue of these five children, and to prevent the defendant ⁵⁸⁹ from becoming trustee for the son whose share was left to him in trust. Defendant, being named as executor in a codicil to the will, was to receive the amounts agreed to be paid to him in lieu of the compensation which he would be entitled to as executor and trustee if the provisions of the will should be carried out.

It appears that, in pursuance of this mutual agreement among the heirs of the father of plaintiff and defendant, the probate of their father's will was successfully contested, and the court refused to admit it to probate on the ground of want of mental capacity of the testator. In the proceeding for the probate of the will in which the contest was made, as already indicated, there was no appearance of parties asking to have the will admitted to probate, save by a guardian of the heirs of one son, then deceased, who admitted in behalf of said minors the execution of the will, but denied the allegations of the contestants. The order denying the probate

of the will recites that all of the parties in interest named in said will and all heirs at law of the testator having had due and timely notice of the proceedings and being present in court in person or by counsel, and the court, having heard the evidence, finds that said instrument is not the last will and testament of the testator, and sets it aside and holds it for naught. The contention of plaintiff in the lower court was that the contract between the heirs of her father, under which, assuming it to have been made, which she denied, she undertook to pay two thousand dollars to the defendant in the event that the will should be set aside, was void as against public policy. This contention was sustained by the trial court, and we believe that its conclusion was undoubtedly correct. The plain and avowed purpose of the agreement was to defeat the interest of the issue of these parties who were by express provisions of the will made beneficiaries thereunder. By the adjudication that the will was not valid for want of testamentary capacity the issue of these parties, then born or to be born, during their lives or within twenty years thereafter, ⁵⁹⁰ were to be absolutely defeated. Such an agreement cannot be sustained.

An agreement among all the beneficiaries of a will for different distribution of the testator's property than that provided for in the will may be sustained if the interests devised under the will are fully vested: *In re Garcelon's Estate*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. 414, 32 L. R. A. 595. But an agreement to resist the probate of a will and procure it to be set aside so as to cut off the interest of one who is not a party to such agreement is against public policy: *Gray v. McReynolds*, 65 Iowa, 461, 54 Am. Rep. 16, 21 N. W. 777. In this case it was said that such a contract was against public policy as tending to thwart justice, and that no recovery could be had under such a contract as between the parties thereto. For similar reasons, it has been held that an agreement among children to thwart a disposition which the parent may afterward make of his property is invalid: *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694.

The alleged agreement on which defendant seeks to recover was void on other grounds of public policy. It contemplated the abandonment by defendant of a trust and the defeating of such trust without regard to the interests of those for whom he was appointed to act as trustee, and it was also in violation of the trust reposed in him by his father in naming him as an executor to carry out the provisions of the will. Defendant had not, it is true, assumed any obligations

as executor or trustee, for the will had not been admitted to probate, but we believe it was in violation of public policy that he should speculate on the advantages which would accrue to him as executor and trustee, should the will be admitted to probate, and make the relinquishment of those advantages the consideration for an agreement to secure a pecuniary consideration: *Staunton v. Parker*, 19 Hun (N. Y.), 55; *Adams v. Outhouse*, 45 N. Y. 318; *Forsyth v. Woods*, 11 Wall. (U. S.) 484, 20 L. ed. 207; *Bowers v. Bowers*, 26 Pa. 74, 67 Am. Dec. 398; *Danielwitz* ⁵⁹¹ v. *Sheppard*, 62 Cal. 339. Any contract which involves a fraud on the rights of others is against public policy: *Ray v. Mackin*, 100 Ill. 246.

It seems to us, also, that the contract was void as a species of champerty or maintenance, for the defendant was to have a specific consideration for securing a specific result in a legal proceeding, not as an attorney rendering services herein, but as one who might or might not, as he saw fit, assist in sustaining the proceeding by giving or procuring testimony therein: *Greenhood on Public Policy*, 394; 6 Cyc. 850. Even an attorney is not allowed to have a specific pecuniary interest in the result of a litigation by agreeing to pay the judgment rendered or contracting to have the benefit of a judgment which he may secure: *Adye v. Hanna*, 47 Iowa, 264, 29 Am. Rep. 484; *Donaldson v. Eaton*, 136 Iowa, 650, 125 Am. St. Rep. 275, 114 N. W. 19, 14 L. R. A., N. S., 1168. The purpose of the contract being against public policy, the whole contract is void, and no relief can be had thereunder, although the contract itself has been fully executed: *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 531, 24 N. E. 71, 8 L. R. A. 511; *Hazelton v. Sheckels*, 202 U. S. 71, 26 Sup. Ct. Rep. 567, 50 L. ed. 939.

The judgment is affirmed.

An Agreement Between the Father and Grandfather of an Infant Legatee, on one side, and an heir at law, not a legatee, on the other, that the latter should resist and the former should not insist on probate, and if the will should be set aside the heir should pay the infant the amount of his legacy, the object being to defeat a residuary legatee, is held void in *Gray v. McReynolds*, 65 Iowa, 461, 54 Am. Rep. 16. And in *Mercier v. Mercier*, 50 Ga. 546, 15 Am. Rep. 694, where the defendant, desiring to marry against the wish of his father, and being threatened with disinheritance, entered into a verbal agreement with the plaintiff, his sister, that in case the father should will his entire property to either, that one would divide with the other, and the entire property was afterward willed to defendant, it was decided that the agreement was against public policy, and that a bill for specific performance would not lie. An agreement not to make a will is held enforceable in *Jones v. Abbott*, 228 Ill. 34, 119 Am. St. Rep. 412.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

MOUNT v. TREMONT LUMBER COMPANY.

[121 La. 64, 46 South. 103.]

NEGLIGENCE—Death by Wrongful Act—Adopted Child.—A right granted by statute to a surviving father or mother to recover damages for the death of their child caused by wrongful act is a right granted to the actual father or mother of such child, and not a right granted to an adopting parent. (p. 313.)

Price, Roberts & Warren for the appellant.

Stubbs, Russell & Theus, for the appellee.

65 NICHOLLS, J. Plaintiff appeals from the judgment of the district court sustaining an exception of no cause of action. Plaintiff and her husband brought this suit to recover damages for the death of their adopted son, alleging that his death resulted from the fault of the defendant company, in whose employment he was at the time of his death. The husband died after the institution of the suit, leaving the wife as the sole plaintiff.

In the brief filed in her behalf, her counsel says: "The sole question presented by the appeal is the right of the adopting parent to sue and recover damages for the death of her adopted son by wrongful act: Rev. Civ. Code, art. 2315. . . . Does the language of article 2315, to wit, 'The right of this action shall survive in case of death in favor of . . . the surviving father or mother. . . . The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child'—confer any rights upon the parents by adoption? Was he the child, and is she the mother, within the meaning of the statute?" *Vidal v. Com-magere*, 13 La. Ann. 516; *Succession of Hossier*, 37 La. Ann.

839; Succession of Haley, 49 La. Ann. 709, 22 South. 251; Cunningham v. Lawson, 111 La. 1024, 36 South. 107; Rev. Civ Code, art. 214.

Defendant contends that article 2315 of the Civil Code, as amended, must be strictly construed, and the exceptional right of action granted therein should be restricted to the classes of persons specially designated as beneficiaries. All classes not included are excluded: Vaughan v. Dalton-Lard Lumber Co., 119 La. 61, 43 South. 926; Lynch v. Knoop, 118 La. 611, 118 Am. St. Rep. 391, 43 South. 252, 8 L. R. A., N. S., 480; Walker v. Vicksburg, S. & P. R. R. Co., 110 La. 718, 34 South. 749.

2. That an adopted child does not have all the rights of a legitimate child, and adoption confers no benefit on the adoptant: Rev. Civ. Code, art. 214; Succession of Unforsake, 48 La. Ann. 546, 19 South. 602; In re Brown, 120 La. 50, 44 South. 919.

The question submitted to us is not *res nova*. The ruling of the district court was ⁶⁶ correct, and based upon the decisions of this court on the subject. We see no reason for departing from them.

The judgment appealed from is hereby affirmed.

The Right of an Adopting Parent to inherit from the adopted child is discussed in the note to Van Derlyn v. Mack, 109 Am. St. Rep. 676.

Actions for the Wrongful Death of a Human Being are considered in the note to Brown v. Electric Ry. Co., 70 Am. St. Rep. 669. As to whether the stepfather of a child may maintain an action for its death, see Hennessy v. Bavarian Brewing Co., 145 Mo. 104, 68 Am. St. Rep. 554; Marshall v. Macon Sash etc. Co., 103 Ga. 725, 68 Am. St. Rep. 140; and as to whether the mother of an illegitimate child may bring an action for its death, see Lynch v. Knoop, 118 La. 611, 118 Am. St. Rep. 391; McDonald v. Southern Ry., 71 S. C. 352, 110 Am. St. Rep. 576.

NATIONAL FIRE INSURANCE COMPANY v. BOARD OF ASSESSORS.

[121 La. 108, 46 South. 117.]

TAXATION—Situs of Credits for.—Debts due on an open account to a nonresident are taxable at the domicile of the debtor, if they arise out of a business carried on in the state levying the tax and form part of the capital of such business. (p. 319.)

Parkerson, Bruenn & Breazeale, for the appellant.

F. C. Zacharie, H. P. Sneed, G. H. Terriberly, and H. G. Dupre, assistant city attorney, for the appellees.

¹⁰⁸ PROVOSTY, J. The National Fire Insurance Company, plaintiff in this suit, is a corporation of Connecticut, and domiciled at Hartford, in that state. It carries on its business in this state through a general agent in New Orleans. This agent employs subagents throughout the state. The company extends no credit to its customers. The premium must be paid in cash to the agent at the delivery of the policy; and whether it is paid or not, the agent owes the amount to the company from that moment as if paid. But the agent, as a matter between himself and the customer, extends thirty, and sometimes sixty, days' credit to the customer. The agent, however, settles with the company only every thirty days; so that, while the company is at no ¹⁰⁹ time the creditor of its customers, it is all the time the creditor of the general agent for premiums on policies which have been issued but not yet settled for.

For the year 1906 the board of assessors for the parish of Orleans fixed the average amount thus due to the plaintiff company by the agent for premiums issued in the course of the business done in this state at thirty-seven thousand five hundred dollars. Whether the amount thus fixed was too large or too small is not shown by the record, and is not a question in this case, since this is not a suit for reduction of assessment.

The plaintiff has brought this suit to set aside this assessment on the ground that it has no credits situated in the state of Louisiana.

The fact of plaintiff's having the said credits against the said general agent is not denied; and hence the question is not as to whether the plaintiff has the credits, but as to whether they are taxable.

It will be noticed that the thing assessed is not a particular item of indebtedness, but the average amount due to the plaintiff in this state as the result of the business done in this state, and representing, therefore, an amount of capital constantly kept invested by the plaintiff in the business done in this state. The first question is whether the fact that the credit, instead of being extended directly to the customers, is extended to the agent, who in turn extends it to the customers, makes any difference. We do not think it does. The credit still represents a value, or an amount of capital, invested in the business in this state. The interposition of the agent does not alter the situation. The value represented by the credits is still in the business. If the credit were not extended to the agent, the amount in question would not be here

to aid the business of the plaintiff in its competition with the business of the resident insurance companies. The probability ¹¹⁰ is that, if the plaintiff did not extend this thirty days' credit to the agent, he, in turn, could not extend it to the customer.

The next question arising is whether the revenue law requires the taxing of credits of the character of those here involved; that is to say, not isolated or transitory credits, but the constant average of the credits arising out of a business done in this state. The revenue law is Act No. 170, page 346, of 1898. It provides as follows: "Section 1. All rights, credits, bonds, and securities of all kinds, promissory notes, open accounts, and other obligations."

And after a long and exhaustive enumeration of every possible and imaginable kind of property, rights and credits, it concludes with the following generalization: "And all movable and immovable, corporeal and incorporeal articles or things of value, owned and held and controlled within the state of Louisiana by any person in any capacity whatsoever."

Section 7: "Provided, further, that in assessing mercantile firms the true intent and purpose of this act shall be held to mean, the placing of such value upon the stock in trade, all cash, whether borrowed or not, money at interest, open accounts, credits, etc., as will represent in their aggregate a fair average on the capital, both cash and credit, employed in the business of the party or parties to be assessed. And this shall apply with equal force to any person or persons representing in this state business interests that may claim a domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business here without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations or credits arising from the business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent or representative. It shall be the duty of the assessor to examine into and acquaint himself with the insurance carried upon the property, and in determining the value of said stock or assets the average amount of insurance carried by the assured during the twelve months preceding the date of valuation of same shall be by the assessor considered in determining the value of said property.

"Every insurance company doing business in this state shall, on or before the first day of March, in each year, render to the Secretary of State a report, signed and sworn to by

its president ¹¹¹ and secretary, of its condition upon the preceding thirty-first day of December, which shall include a detailed statement of its assets and liabilities on that day, the amount and character of business transacted in this state, moneys received and expended during the year, and such other information and in such form as he may require."

Section 91: "The term 'credit' includes every claim and demand for money, labor, merchandise and other valuable things.

"The word 'person' or 'persons,' 'taxpayer' or 'taxpayers,' shall be held to include firms, companies, associations and corporations; all words importing the masculine gender shall apply to females also, and all words in the plural number shall apply to single individuals in all cases in which the spirit and intent of this act require it."

This law, it is argued, applies only to the assessment of mercantile firms. But how could this be, when there comes immediately after the first proviso, which in its terms has reference only to mercantile firms, the following: "And this shall apply with equal force to any person," etc.—and when, again, a special paragraph in the same section is devoted to insurance companies by name? If, therefore, there is any meaning to the English language, this section 7 has reference to all "persons, firms, companies, associations and corporations" doing business in the state, irrespective of what may be the character of their business, and has reference especially to insurance companies.

Next, it is said that the settled jurisprudence of this state and of the country is to the effect that credits like those here in question—that is to say, not evidenced by the written acknowledgment of the debtor—cannot be said to be situated in the state when due to a nonresident, and as a consequence are not taxable in this state, since the state has not the right to tax property not situated within its borders.

There can be no doubt that a state has not the right to tax property not situated within its borders, and for the nonce it may be conceded that isolated or transitory credits may ¹¹² be taxed only at the residence of the creditor; but between an assessment of an isolated or transitory credit, and an assessment of the average credits standing on open account in a permanent business and representing that much capital permanently invested in the business, the later jurisprudence has established a distinction. Thus, in the recent work of Gray on Limitations of Taxing Power, paragraph 89, we find the following: "In other recent cases it has been held that

credits in the form of notes, choses in action, and book accounts, belonging to a foreign corporation doing business in the taxing state, which credits resulted from its business operations in the state, are taxable."

The learned author, when he uses the expression, "In other recent cases it has been held," etc., is desirous evidently of being extremely guarded and conservative in his language; for we find the result of the decisions stated by other recent law-writers as follows: "A foreign corporation, which is liable for personal taxation for sums invested in this state is taxable upon credits and bills receivable which are in this state and are due the corporation for merchandise sold by it in the transaction of business in this state: *People v. Barker*, 23 App. Div. 524, 48 N. Y. Supp. 553, affirmed 155 N. Y. 665, 49 N. E. 1103"; *Hammond on Taxation of Business Corporations*, p. 22, par. 29.

"And it is well settled that choses in action, whether book accounts, promissory notes, or other credits due in the regular course of business carried on by a foreign corporation within a state, are taxable": *Beale on Foreign Corporations*, p. 647, sec. 488.

But it is said that the jurisprudence of this court is to the contrary effect, and to a certain extent the statement is true; but this court has greatly receded from the advanced position it once occupied on the question of the taxability of credits, and the constantly recurring cases, both in the supreme court of the United States and in this court, show very clearly that, on these questions of taxation, the jurisprudence of the country is yet in an unsettled condition—in fact, that it is trying to keep pace with the nonresident ¹¹³ corporations in their shifts for evading the taxation which home institutions with which they are in competition have to bear.

The first or leading case in this court is *Barber Asphalt Co. v. City of New Orleans*, 41 La. Ann. 1015, 6 South. 794. The credits there involved were paving certificates; that is to say, were evidenced by writings of a very high evidentiary character, having, indeed, almost the force of judgments. This court held broadly that credits, or other incorporeal rights, were taxable only at the domicile of the creditor. The court made no distinction between incorporeal rights that are in concrete form and those that are not.

The next decisions in order of time were *London etc. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 South. 91, 16 L. R. A. 56, and *Railey v. Board of Assessors*, 44 La. Ann. 765, 11 South. 93, which were companion cases involving the

same kind of credits, namely, credits due for premiums on fire insurance policies. On the authority of *Barber Asphalt Co. v. City of New Orleans*, 41 La. Ann. 1015, 6 South. 794, the court decided that the credits had their situs at the domicile of the creditor and were not taxable here. But the court, on the authority of the decision of the supreme court of United States in the case of *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, 21 L. ed. 179, qualified the doctrine of the *Barber Asphalt Co.* case to the extent that it admitted that incorporeal rights might assume such a concrete form as to be taxable at the place where the concrete evidence of the debt was situated, as in the case, for instance, of "bank notes, public securities, and possibly negotiable promissory notes, bills of exchange, or bonds."

In *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306, the court set aside an assessment of credits arising from deposits of money in bank subject to check. The court cited the ¹¹⁴ decisions just mentioned, and said it could not distinguish between a debt arising from a deposit in bank and one due from any other cause.

But in the next case in order of time (*Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 South. 627), this court held bank deposits to be taxable, putting its decision on the solid ground that the taxability of credits should not be made to depend upon any mere fanciful fictions as to the situs of debts, but upon the question of fact whether or not the capital represented was or was not permanently invested or employed in the business transacted in this state. The court distinguished *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306, and in fact, though not in terms, overruled *Barber Asphalt Co. v. City of New Orleans*, 41 La. Ann. 1015, 6 South. 794, *Liverpool etc. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 South. 91, 16 L. R. A. 56, and *Railey v. Board of Assessors*, 44 La. Ann. 765, 11 South. 93, since those decisions were founded upon the legal fiction "*Mobilia sequuntur personam*," and upon absolutely nothing else.

Next in order of time came *Parker v. Strauss*, 49 La. Ann. 1173, 22 South. 329, which involved the same kind of credits as *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306,—that is to say, arising from the bank deposits to be drawn against in the purchase of cotton for export. The court maintained the assessment, on the authority of *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 South. 627. The decision is not very satisfactory in its rea-

soning. It seems to hold that if the thing taxed had been a mere credit, it would not have been taxable, but that, inasmuch as it was not a mere credit, but was cash in bank, it was taxable. The latter proposition is contrary to the plain fact and the recognized doctrine, and contrary, moreover, to what was expressly held in *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306. So plain is it that money deposited in bank subject to check ceases to be the property of the depositor, and that after having made the deposit the depositor¹¹⁵ has no other property than a credit upon the bank, that the court can hardly be supposed to have intended to hold the contrary, but must be supposed to have simply intended to express the idea which served as the foundation of the *Bluefields Co.* decision, namely, that capital employed in business in this state is taxable here, although in the form of mere credits.

The next case in order of time was *Liverpool etc. Ins. Co. v. Board of Assessors*, 51 La. Ann. 1028, 72 Am. St. Rep. 483, 25 South. 970, 45 L. R. A. 524. There can be no denying that in this case the court went back to the doctrine of the cases that had preceded *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 South. 627, and *Parker v. Strauss*, 49 La. Ann. 1173, 22 South. 329—that is to say, reinstated the fiction of “*Mobilia sequuntur personam*” as a guiding principle in the matter of the exercise of the taxing power, and abandoned the idea that the question as to the situs of the credit was one purely of fact, to be determined from the circumstances of each case; but in the later cases of *Metropolitan Life Ins. Co. v. Board of Assessors*, 115 La. 698, 116 Am. St. Rep. 179, 39 South. 846, 9 L. R. A., N. S., 1240, and *Monongahela Coal & Coke Co. v. Board of Assessors*, 115 La. 546, 112 Am. St. Rep. 275, 39 South. 601, 2 L. R. A., N. S., 637, this court went back to the doctrine of *Bluefields Banana Co. v. Board of Assessors*, 49 La. Ann. 43, 21 South. 627, and *Parker v. Strauss*, 49 La. Ann. 1173, 22 South. 329, and the court prefers to adhere to this later jurisprudence: See decisions in *General Electrical Co. v. Board of Assessors*, 121 La. 116, 46 South. 122, where the question involved in this case is more elaborately considered.

Judgment affirmed.

Nicholls, J., concurs in the decree.

Breaux, C. J., and Monroe, J., dissent.

The Rule as to the Situs of Debts for the purpose of taxation announced in the principal case was reaffirmed in *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 South. 122; and in *New England etc. Ins. Co. v. Board of Assessors*, 121 La. 1068, 47 South. 27. For other recent cases on this question, see *Metropolitan Life Ins. Co. v. Board of Assessors*, 115 La. 698, 116 Am. St. Rep. 179; *Buck v. Beach*, 164 Ind. 37, 108 Am. St. Rep. 272; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134. The general subject of the situs of personal property for purpose of taxation is the subject of a note to *Buck v. Miller*, 62 Am. St. Rep. 448.

RIVET v. GEORGE M. MURRELL PLANTING AND MANUFACTURING COMPANY.

[121 La. 201, 46 South. 210.]

EXEMPTIONS—Estoppel to Claim Double Exemptions.—If a debtor has selected two of four mules attached as exempt from seizure under execution and voluntarily transferred them to a third person pending the litigation, and the attachment is thereafter dissolved, but the plaintiff obtains judgment, he is entitled to seize the remaining two mules under a writ of fieri facias, as the defendant is estopped from claiming such mules as also exempt from execution. (p. 321.)

EXEMPTIONS—Successive Exemptions.—A debtor is not entitled to successive or double exemptions as against the same creditor. (p. 321.)

EXECUTIONS—Dissolution of Injunction—Attorney's Fees.—On the dissolution of an injunction directed against the execution of a money judgment, attorney's fees may be allowed as damages for not more than twenty per cent on the amount of the judgment without proof of the value of the services rendered. (p. 322.)

EXECUTIONS—Statutory Damages—Dissolution of Injunction. Statutory damages may be allowed on the dissolution of an injunction against the sale of specific property seized in execution of a money judgment. (p. 322.)

Sanders & Gilbert, J. H. Pugh and Marks & Wortham, for the appellant.

E. B. Talbott and P. G. Barron, for the appellee.

202 LAND, J. In August, 1906, the Murrell Company sued Henry Rivet, a tenant, for advances made on his crop, and caused the crop, four mules, and one cart to be attached. In his answer Rivet alleged that two mules and one wagon, which were exempt under the constitution and laws of the state, had been seized. Thereupon the attorneys of the attaching creditor ordered the sheriff to release the property claimed to be exempt. Rivet selected two young mules, worth two hundred and twenty-five dollars each, and they, with the

cart, were released from seizure. In April, 1907, judgment was rendered in favor of the company for five hundred and fifty-three dollars, with interest and costs, and in favor of the defendant, dissolving the attachment, with two hundred and forty-six dollars as damages. In May, 1907, a writ of fieri facias issued on said judgment for the balance due the company, under which the two mules that had been held under the attachment were seized and advertised for sale. The record does not show that these two mules were surrendered to Rivet after the dissolution of the attachment.

In June, 1907, Rivet brought the present suit, enjoining the sale of the mules on the ground that they were exempt from seizure under article 244 of the constitution of 1898. The defendant pleaded that Rivet, having claimed and received under the homestead law two of the four mules, could not claim as against the plaintiff that the two remaining mules were also exempt. This contention was sustained by the judgment below, and the plaintiff has appealed.

It appears from the testimony of Rivet that he turned over the two mules, which had been released as exempt, to one Wathen, his vendor. On the trial of the attachment suit, Rivet testified that he owed Wathen one hundred dollars on account of the purchase price of these two mules. In the instant case Rivet testified ²⁰³ that the balance due on the mules was one hundred and thirty-five dollars. The evidence does not explain this transaction by which property worth four hundred and fifty dollars was apparently transferred to pay a debt of one hundred dollars or one hundred and thirty-five dollars. There is nothing to show that Rivet, pending the suit, was forced to dispose of this property. At the termination of the litigation, the same creditor is met with another claim of exemption as to the remaining two mules, which were admittedly liable to seizure when the suit was instituted.

The allowance of this additional claim would practically result in the exemption of four mules, instead of two, as provided by law. The debtor is not entitled to successive or double exemptions. "If the property allotted to the debtor has been taken from him without fault on his part, or has been consumed in maintaining himself or his family, a subsequent exemption may be claimed": 18 Cyc. 1485.

In the case at bar, the plaintiff, after selecting the two mules as exempt, voluntarily turned them over to another creditor, whose claim amounted to about one-fourth of the

value of the mules. The plaintiff either pocketed the difference or donated it to the vendor of the mules. He is estopped in equity from claiming an additional exemption: 18 Cyc. 1489.

The case of *Garner v. Freeman*, 118 La. 184, 118 Am. St. Rep. 361, 42 South. 767, has no application. In that case the question was as to the status of the debtor, and we said: "Exemption laws must be construed with reference to the condition of things existing at the date of seizure." We therefore are of the opinion that the injunction was properly dissolved.

Appellant complains of the allowance of twenty per cent as damages on the amount of the judgment enjoined, on the grounds (1) that statutory damages were not prayed for, and (2) because the judgment itself was not assailed, and the injunction was only directed against the sale of specific property.

²⁰⁴ The defendant alleged and prayed for damages in the sum of fifty dollars for attorney fees for dissolving the injunction. There was no evidence adduced as to the value of the services rendered by defendant's counsel; but the judge is directed by the statute, on the dissolution of an injunction against the execution of a judgment for money to condemn the plaintiff and his surety to pay to the defendant "not more than twenty per cent as damages, unless damages to a greater amount be proved": Code Prac., art. 304. Where damages are claimed for attorney fees, the judge may allow the same without proof, to an amount not exceeding twenty per cent upon the judgment enjoined: *Brown v. Lambeth*, 2 La. Ann. 822. The statute predicates a claim for damages by the defendant in injunction, and directs the judge to assess the penalty when such a demand is made.

It has been held that the statutory damages will be allowed on the dissolution of an injunction against the sale of specific property seized under a writ of fieri facias: *Betts v. Mougin*, 15 La. Ann. 52. In the absence of proof of greater special damages, no more than the statutory amount can be allowed: *Williams v. Close*, 14 La. Ann. 737.

Judgment affirmed.

An Execution Debtor, No Matter What Other Property He may have, has a right to select and claim particular property as exempt up to the limit fixed by the statute. To secure the benefit of a statute of exemptions, the debtor must, by timely interposition, select and reserve such property as he claims to be exempt when the officer seeks to take it in satisfaction of his writ: Thibault v. Lennon, 39 Or. 280, 87 Am. St. Rep. 657. As to the loss of the right to claim an exemp-

tion by estoppel or waiver, see *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 486; *Sturges v. Jackson*, 88 Miss. 508, 117 Am. St. Rep. 754.

The Exemption of Property from Attachment is not Waived by a motion to dissolve the attachment, nor by mere delay in making a claim, provided it is made within a reasonable time before the sale: State v. Gardner, 32 Wash. 550, 98 Am. St. Rep. 858. Where a debtor disclaims ownership in exempt property seized in attachment, and the attachment is dissolved, he may nevertheless claim his exemptions when a second writ is levied on the property: *Coe v. Cleghorn*, 10 Idaho, 166, 109 Am. St. Rep. 199.

CHERRY v. LOUISIANA AND ARKANSAS RAILWAY COMPANY.

[121 La. 471, 46 South. 596.]

RAILROADS—Warnings at Crossings.—A railroad company by leaving its cars so near a public crossing as to obstruct the view of an approaching traveler thereby increases the danger to him, and assumes the duty of taking extra precautions for guarding against accidents, and, failing in this, it is negligent, and must respond in damages in case of accident. (p. 326.)

RAILROADS—Public Crossings—Negligence.—One who, on a public highway, approaches a railroad track, and after stopping can neither hear nor see any indication of a moving train approaching, is not chargeable with negligence in assuming that there is none sufficiently near to make the crossing dangerous. (p. 326.)

H. Moore and White, Thornton & Holloman, for the appellant.

Sandlin & Robertson and Stewart & Stewart, for the appellees.

472 PROVOSTY, J. The plaintiffs sue the defendant railway company for the death of their two little boys, one six and the other ten years old, who were killed upon the Cemetery street crossing of the defendant's railway in the town of Minden by being run over by one of the locomotives of the defendant company. Cemetery street is forty feet wide, and crosses the yard of the defendant company. It runs east and west, and the tracks upon the yard run north and south. There are four of them—three sidetracks and one main track. The two lads, at about 2 o'clock in the day, were going west upon Cemetery street in a one-mule wagon driven by their grandfather, Mr. Johnson. They were seated on the floor of the wagon at the tail end, facing back, with their feet dangling, while the grandfather and his twelve-year old son

were seated upon the spring seat in front. As Johnson approached the tracks there was to his right, or north, and flush with the first track, and twenty feet from the crossing, a large warehouse obstructing his view in that direction, that is to say, in the direction from which the locomotive was coming. At the north end of this warehouse, about five hundred feet from the crossing, was a planer-mill, making the usual noises of such an establishment. When Johnson reached the first track he stopped, looked, and listened. As he thus stood, with the head of his mule pointing west and within a few feet of the first track, there were cars obstructing his view on both sides of the crossing. On his right, or north, side there were the following: On the first track, some cars, thirty or ninety feet from the crossing; on the second track, some flat cars loaded with logs, beginning about twenty or thirty feet from the crossing; on the third track, that next to the main track, a long train of cars loaded with logs, beginning some five feet upon the crossing and extending a long distance north. The testimony conflicts as to the number of cars on the left of Johnson, or south of the crossing. According to Lee Griffin, whose testimony we ⁴⁷³ have adopted in the matter of the number and location of these cars, there was but one car below the crossing, and it stood twenty or thirty feet or more from the crossing. Not seeing and not hearing anything, and thinking the way safe, Johnson ventured upon the tracks. The distance from the outer rail of the first track to the outer rail of the fourth track was forty-nine feet. He passed the first, second and third tracks safely; but on the fourth track, on the other side of the long train of cars which stood upon the third track, a locomotive with tender was coming, and was so close to the crossing when the mule and wagon appeared from behind the cars that stood on the third track that a collision was inevitable. The locomotive was backing. Johnson says he did not hear it, and we can well believe the statement, as he would not otherwise have cast under its wheels his own life and the other precious lives in his keeping. His not hearing is accounted for by the fact that the planer-mill to his right was making some noise, but more especially by the fact that the track was downgrade and smooth, and the locomotive had shut off steam two hundred and seventy-five yards back, and was coming almost noiselessly, the only noise being the rumbling of the wheels.

The seriously contested facts in the case are as to the speed of the engine and as to whether the usual signals by bell and whistle were given.

The crew of the locomotive and one witness who first saw it when within thirty feet of the crossing, say it was going at from six to ten miles an hour; but if by this is meant that it was not going faster than was usual upon the yard, the testimony stands in opposition to that of a large number of witnesses whose attention was attracted to it. These witnesses lived in the neighborhood of this yard, and were accustomed to the noises and movements upon it, and the speed of this particular engine would not likely have attracted ⁴⁷⁴ their attention, if it had not been unusual; and the effect upon the wagon shows that the blow must have been quick and sharp. Every spoke was broken in the two hind wheels, where the wagon was struck. One witness, of more than twelve years' experience as a locomotive engineer, says that his attention was attracted to the engine by the rapidity of its exhaust; that it shut off steam about two hundred and seventy-five yards from the crossing, and that he continued to observe it until it was about seventy-five yards of the crossing, and it was still going about twenty-five miles an hour. How far beyond the crossing the locomotive ran after the collision it is impossible to know definitely from the conflicting testimony.

The occupants of the wagon were hurled in the air and forward, how far is variously stated by the witnesses. Johnson was found senseless, but with no serious injury. His son was unhurt. The other two boys fell on the track and were run over. One had a hand and a foot cut off, and the other a leg; and both were otherwise wounded and severely bruised and lacerated. Both died before the next morning.

It is inconceivable that if the whistle was blown near enough to the crossing to serve for a warning, or if the bell was rung continuously, these signals would not have been heard by Johnson and by so many persons whose attention was attracted to this engine by its unusual speed. The theory that will best reconcile the conflicting testimony on these points is that the whistle was blown too far up the track to serve as a warning, and the bell was begun to be rung too near or too late.

Defendant has an elaborate argument with diagrams to prove that the smokestack of the locomotive protruded one and one-half feet above the long train of log piled-up cars on the other side of which the locomotive was coming, and that Johnson could have seen it. But the best proof that Johnson could not see it is that he ⁴⁷⁵ stopped and looked and did not see it, although he had good eyes and was familiar with the crossing.

Defendant's learned counsel argue that Johnson stopped at the wrong place to look and listen; that he should not have stopped before going upon the first track, but should have waited until he had gone upon tracks 1, 2, and 3. We do not agree with that view. The four tracks were only forty-nine feet across. Johnson could see and hear just as well where he stopped as nearer to the fourth track, and had he gone upon the tracks and stopped there, and been injured, defendant would have been the first to construe his act into negligence.

We are satisfied that the true cause of the accident was the negligence of the employés of defendant in charge of the locomotive in not giving the proper warnings by bell and whistle, and in coming upon this crossing, one of the most frequented of the town, at a negligent speed, especially in view of its obstructed condition from the cars standing upon and near it. The engineer frankly admitted on the witness-stand that he did not know the cars stood so near the crossing, or, in other words, that the crossing was so obstructed or so dangerous. This engineer, by the way, was a mere fireman, with very little experience in running engines, who had taken charge that very day in the absence of the regular engineer on leave. The same fireman, acting engineer, was discharged twice for negligence between the date of this accident, May, 1906, and the date of the trial, June, 1907.

By leaving these cars so near the crossing and obstructing the view, defendant increased the danger, and thereby assumed the duty of taking extra precautions for guarding against accidents: *Eichorn v. New Orleans etc. Co.*, 112 La. 237, 104 Am. St. Rep. 437, 36 South. 335.

Defendant not only took no extra precautions, ⁴⁷⁶ but neglected even the ordinary ones. It ran this locomotive at extra speed and noiselessly on the other side of a train of cars, thereby laying a sort of trap, and gave imperfectly, if at all, even the ordinary signals of bell and whistle.

One who, on a public highway, approaches a railroad track, and can neither hear nor see any indication of a moving train, is not chargeable with negligence in assuming that there is none sufficiently near to make the crossing dangerous: *Tabor v. Missouri Valley R. R. Co.*, 46 Mo. 353, 2 Am. Rep. 517; *Kennayde v. Pac. R. R. Co.*, 45 Mo. 255. See, also, *Correll v. Burlington etc. R. R. Co.*, 38 Iowa, 120, 18 Am. Rep. 22, and *Pennsylvania R. Co. v. Weber*, 76 Pa. 157, 18 Am. Rep. 407; *Louisville etc. R. R. Co. v. Commonwealth*, 13 Bush (Ky.), 388, 26 Am. Rep. 205.

Plaintiffs claim damages as follows: For the great shock to them, and for their pain, sorrow, anguish and distress, \$10,000; for deprivation of comfort, society, companionship and assistance of their boys, who were their only children, \$10,000; for the pain, torture and anguish suffered by the boys, and which they inherit from them, \$15,000; punitive damages, \$10,000—total, \$45,000. The jury allowed \$30,000, without specification of what they made the allowance for.

This case is not one for the allowance of punitive damages: *Parker v. Crowell & Spencer*, 115 La. 463, 39 South. 445. Touching the proper amount of damages to allow in a case of this kind we find no occasion for adding anything to what was said in the case of *Bourg v. Brownell-Drews Lumber Co.*, 120 La. 1009, 124 Am. St. Rep. 448, 45 South. 972. In *Buechner v. City of New Orleans*, 112 La. 599, 104 Am. St. Rep. 455, 36 South. 603, 66 L. R. A. 334, for the death of a child, this court allowed the parents \$6,000. A like amount for each of the children will in this case satisfy the ends of justice.

The judgment appealed from is reduced to ⁴⁷⁷ \$12,000, and, as thus reduced, is affirmed. Plaintiffs to pay costs of appeal, and defendant those of lower court.

A Person About to Cross a Railroad Track is ordinarily bound to stop, look and listen for approaching trains: *Scott v. St. Louis etc. Ry. Co.*, 79 Ark. 137, 116 Am. St. Rep. 67; *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 677, 113 Am. St. Rep. 332; *Carlson v. Chicago etc. Ry. Co.*, 96 Minn. 504, 113 Am. St. Rep. 655. As to the application of this rule where the view to the track is obstructed, see *Queen Anne's R. Co. v. Reed*, 5 Penne. (Del.) 226, 119 Am. St. Rep. 301; *Weller v. Chicago etc. R. R. Co.*, 164 Mo. 180, 86 Am. St. Rep. 592; *Passman v. West Jersey etc. R. R. Co.*, 68 N. J. L. 719, 96 Am. St. Rep. 573; *Studer v. Southern Pac. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39; *Bollinger v. Texas etc. Ry. Co.*, 47 La. Ann. 721, 49 Am. St. Rep. 379.

GAUTHREAUX v. THERIOT.

[121 La. 87, 46 South. 892.]

ESTOPPEL Against State by Acts of Officers.—The state is bound by the acts of its taxing officers in placing property previously forfeited to the state for unpaid taxes on the taxing rolls for succeeding years, and receiving taxes from the former owner for ten years, he remaining in undisturbed possession. Such acts are in equity a waiver of the prior forfeiture and binding on the state and its assign. (p. 331.)

Sanders & Gilbert and Guion & Guion, for the applicant.

C. F. Wortham and M. L. Levy, for the respondents.

872 LAND, J. This is a petitory action to recover two small tracts of land brought by the plaintiffs as the heirs of their deceased parents, Clet Gauthreaux and Celina Laundry. It appears that the mother, who owned one of the tracts, died in 1879. The father died in the year 1902.

In 1890 Clet Gauthreaux paid the taxes for 1889 on both tracts, which were assessed to him. The taxes for 1890 were not paid, and the property was adjudicated to the state on August 10, 1891. The lands continued to be assessed to Gauthreaux for the years from 1891 to 1901 inclusive, and he regularly paid the taxes thereon to the state, parish and levee board, from year to year. Gauthreaux remained in actual possession of the property until his death. During the year 1902 Gauthreaux and his heirs held possession through a tenant.

The defendant claims title under the tax adjudication of 1891 by the following chain of conveyances, to wit: State to Atchafalaya levee board, June, 1895, recorded November, 1896; levee board to South Louisiana Land **873** Company, October, 1902; land company to A. Klotz; and Klotz to Eno Theriot, January 7, 1903. It seems that early in 1903 the tenant on the place agreed to attorn to the defendant.

The defendant pleaded the prescription of three years under article 233 of the constitution of 1898, and set up the title acquired by him under the tax adjudication.

There was judgment in the district court in favor of the defendant. This judgment was reversed by the court of appeal, which rendered judgment in favor of the plaintiffs. The case is before us on a writ of review.

The court of appeal, after citing *Pitre v. Schleslinger*, 110 La. 234, 34 South. 425, *Booksh v. Wilbert Sons etc. Shingle Co.*, 115 La. 351, 39 South. 9, and *Gilmore v. Schenck*, 115 La. 386, 39 South. 40, said: "Applying these principles to the case

at bar, we conclude that as the property was regularly assessed to plaintiffs' father, the tax debtor, and the collector received taxes from him for the years 1891, 1892, 1893, 1894, and 1895, that the state had taken nothing by the adjudication made to it in 1891, and, when the auditor made title to the levee board, the state had no title to give, and is forever estopped from controverting plaintiffs' title, and that the defendant and his vendors occupy no better position than the state."

In *Pitre v. Schleslinger*, 110 La. 234, 34 South. 425, the plaintiff having acquired certain lands from the state, which the state in turn had acquired at tax sale, brought suit, under article 233 of the constitution of 1898, to quiet his tax title. The defendant attacked the tax sale on the ground of want of notice. This defense was sustained. The plea of the constitutional prescription of three years was overruled on the ground that plaintiffs' title was only one month old, and that he could not avail himself of prescription while the title was in the state, because the state was estopped from invoking prescription. The court said: "After the tax sale, the state, through its officers, continued to assess the property to the ⁸⁷⁴ former owners, and to collect taxes from them on the property. This estopped the state from availing herself of prescription against the former owners. Delay could not run in favor of the state while she was by those acts of her officers acknowledging the title of these former owners of the property: *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. Rep. 944, 35 L. ed. 546. The former owners continued to claim ownership and possession of the property, and the tax collector, by collecting taxes from them, admitted their claims."

In *Booksh v. Wilbert Sons etc. Shingle Co.*, 115 La. 351, 39 South. 9, the plaintiff, claiming ownership and possession of a certain tract of land supposed to be entirely situated in the parish of Iberville, brought suit for slander of title. The defendant claimed ownership and possession of two hundred acres of the same tract, alleged to be in the parish of West Baton Rouge, and set up title through mesne conveyances from a tax adjudication to the state of Louisiana made in 1886. Defendant further pleaded the curative prescription of three years provided by article 233 of the constitution of 1898. The undisputed facts were that the tract of land as a whole had been for years regularly assessed in the parish of Iberville, and the taxes thereon regularly paid by the owners. On this ground the adjudication to the state was declared to be null and void. The court, however, assigned additional reasons,

as follows: "Considered from another point of view, the state having continuously, since 1885, assessed the property to the plaintiff and his author and collected taxes thereon, waived the prior forfeiture or adjudication to herself."

In *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. Rep. 944, 35 L. ed. 546, the court said: "The state is bound by the act of her officers in placing the lot on the tax-books for the years 1885 and 1886, and receiving from the appellees the taxes for those years. Equity will treat the transaction as a waiver of the prior supposed forfeiture, and will regard the tax paid from 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest": See, also, *Pitre v. Schleslinger*, 110 La. 234, 34 South. 425.

⁸⁷⁵ In *Gilmore v. Schenck*, 115 La. 386, 39 South. 40, the defendant claimed title, though mesne conveyances, from the state of Louisiana, to which the property had been adjudicated in 1886, for the unpaid taxes of 1885, assessed in the name of Morales. This tax title was in December, 1890, conveyed by the auditor of the state to one Corbin, the author of the defendant. Corbin, at the time of his purchase, paid taxes on the property up to December, 1890. Gilmore, the plaintiff, purchased the same property in July, 1890, from the heirs of another person, and in October, 1890, paid the taxes thereon for 1887, 1888, 1889, and 1890.

The tax adjudication of 1886 was disposed of by the court as follows: "The tax collector, in receiving payment for taxes on the land from Gilmore in 1890, recognized that the state had taken nothing by the adjudication made to it in April, 1886, in an assessment made in the name of Morales, admitted Gilmore's possession of the property at that time, and his liability for the taxes."

The court cited *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. Rep. 944, 35 L. ed. 546, and added: "The state is as much estopped by her acts as any individual, and she is bound by the acts of her officers acting as tax collectors."

In *State v. City of New Orleans*, 112 La. 408, 36 South. 475, certain real estate assessed to Sam Boyd was adjudicated to the city for the taxes of 1891 and 1892, and the tax deed was duly recorded, but the city did not take possession of the property. Subsequently the same property was assessed to Sam Boyd for the years 1893 and 1894, and in 1895 was advertised and sold by the city treasurer for city taxes under said assessment. The tax purchaser recorded his tax title, took possession of the property, and paid taxes thereon. The city of New Orleans contended that the city treasurer

had no authority to sell for current taxes property which had already been adjudicated ⁸⁷⁶ to the city for delinquent taxes. The court held that the city of New Orleans was estopped to set up its title as against that of its vendee or to assert a claim for the taxes of 1891 and 1892. It was not pretended that the city treasurer had any authority to list the property for the years 1893 and 1894, or to make the tax sale of 1895, but it was held, notwithstanding, that the city, having presumably received the proceeds of the sale, and having (through its officers) assessed the property to the adjudicatee, could not be heard to say that the action of the treasurer was unauthorized. In the same case the court recognized the difference between the public or private property of a municipal corporation and "that which is held merely as a means of collecting the taxes assessed against it"; citing *State v. City of New Orleans*, 110 La. 405, 34 South. 582. In *Breaux v. Negrotto*, 43 La. Ann. 426, 9 South. 502, the court held, in effect, that the title resulting from a tax adjudication was imperfect and inchoate while the tax debtor remained in actual adverse possession of the property, paying taxes thereon.

The adjudication to the state in 1891 was made under the revenue act of 1886, which made it the imperative duty of the tax collector to take actual possession of the property, and to lease it out. The same act made it the duty of the assessor to list the property separately as having been adjudicated to the state. Neither official performed the duty required of him.

In 1891, the property was assessed to Gauthreaux as usual, and he paid the taxes thereon in February, 1902. If the tax collector had taken actual possession, or had the property been separately listed to the state, or had the taxing officers informed Gauthreaux of the true situation, he would have received notice of the tax sale in ample time to redeem the property. As it was, he remained in undisturbed possession of the property, ⁸⁷⁷ and paid taxes thereon, for ten years.

In *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. Rep. 944, 35 L. ed. 546, under a similar state of facts, it was held that the state was bound by the acts of its taxing officers, and that such acts constituted in equity a waiver of the prior supposed forfeiture. In the same case it was further held that the purchaser from the state took the property subject to the same equities and defenses. The doctrine of that case has been thrice expressly affirmed by this court, and has be-

come a rule of property. The principle of *stare decisis* forbids a change of jurisprudence on this subject matter.

The assessment of 1890 was invalid, because one of the two tracts, assessed in the name of Clet Gauthreaux, belonged to the succession of his deceased wife, whose separate ownership antedated the marriage and was shown by the public records.

The state lost nothing by the failure of its officers to assert a tax title invalid in its inception.

We, however, rest our decision in this case on the grounds previously stated.

It is therefore ordered that the judgment of the court of appeal be affirmed, and that the defendant pay costs in this court.

Breaux, C. J., and Nicholls and Monroe, JJ., concur.

Provosty, J., dissented.

A State is Ordinarily not Estopped by the Acts of One of Its Officers: State v. Jahraus, 117 La. 286, 116 Am. St. Rep. 208; Carolina Nat. Bank v. State, 60 S. C. 465, 85 Am. St. Rep. 865.

A State is not Estopped from Taxing the Property of a charitable institution by the fact that for many years it has not taxed such property, and that in reliance upon the exemption from taxation the corporation has borrowed money, and made a mortgage on its property to secure its repayment, and agreed to pay all taxes on such mortgage: Hibernian Benevolent Soc. v. Kelly, 28 Or. 173, 52 Am. St. Rep. 769.

CITY OF NEW ORLEANS v. CHAROULEAU.

[121 La. 890, 46 South. 911.]

MUNICIPAL CORPORATIONS—Police Power—Destruction of Cattle Affected with Tuberculosis.—Delegation of power to a city "to maintain the city's cleanliness and health, and to this end to regulate the location of and the inspection and cleaning of dairies, and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health, and to prevent the spread of disease," vests in the city plenary power in the exercise of its police power to pass an ordinance requiring cows in cities to be inspected, and if found to be affected with tuberculosis, to be destroyed without compensation to the owner. (p. 334.)

MUNICIPAL CORPORATIONS—Exercise of Police Power—Delegation of Power.—A city may exercise its police power expressly given it through the agency of its board of health. (pp. 334, 338.)

MUNICIPAL CORPORATIONS—Police Power—Destruction of Property Without Compensation or Judicial Inquiry.—If a city is given plenary police power to require, by ordinance, dairy cows to be

inspected when necessary or expedient for the protection of health and to prevent the spread of disease, it has power to provide that when, by a test recognized to be practically infallible, a cow is found to be afflicted with tuberculosis by its inspector or board of health, such cow shall be destroyed, the destruction of the cow may be accomplished without first making compensation to the owner or affording him a judicial inquiry. (pp. 334, 335.)

Henriques & Dunn, for the appellant.

W. L. Hughes, for the appellee.

⁸⁹¹ PROVOSTY, J. Ordinance No. 16,204 (C. S.), section 14, provides as follows:

"No cow shall be used in any dairy or dairy farm unless the same shall have undergone the tuberculin test or which is known to be suffering from tuberculosis, splenic fever, anthrax, or any local or general disease which is liable to render the milk from said cows unwholesome, and every person keeping a milch cow for dairy purposes shall permit it to be examined, without cost to the owner, from time to time, as to its freedom from disease, by a veterinarian designated by the health authority, nor shall any cow be brought into and sold within the city of New Orleans for dairy purposes, and no milk therefrom sold unless said cow shall have passed the required inspection by the local health authority and subjected to the tuberculin test. Nothing in this section contained shall be construed as preventing the sale of any milch cow brought to the city for sale, but no milk from such cow shall be sold until said cow shall have passed the required inspection.

"All cows found on examination by the veterinarian designated by the health authority to be free from disease, shall be tagged and registered with said health authority and it shall be unlawful to remove said tag or put it on any other cow, nor shall any cow so tagged be removed from any dairy or dairy farm unless the dairyman or owner notify the health authority of ⁸⁹² said removal and designation, where it shall be again registered and held subject to the regulations herein provided. All cows found to be suffering from disease liable to render the milk from said cow unwholesome shall be at once removed from the herd and isolated, and shall not be again used for milch purposes until cured, or if said disease be incurable or tuberculosis, shall be at once taken to the slaughtering pens and there slaughtered and its carcass destroyed under the supervision of the health authority."

Defendant refused to permit the veterinarian of the board of health to administer the tuberculin test for tuberculosis

to one of his cows for ascertaining whether it was affected with the disease, and was prosecuted and convicted under this ordinance, and has appealed.

His first contention is that the said ordinance is null, because the city council had no authority to pass it. The provision of the city charter under which the ordinance was passed reads as follows:

"The council shall have the power to maintain its [the city's] cleanliness and health, and to this end

"(c) To regulate the location of, and inspection and cleansing of, dairies, stables, cattle-yards, landings and pens, slaughter-houses, soap, glue, tallow and leather factories, depositories for hides, and all places of business likely to be or become detrimental to health, and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease, and to maintain a good sanitary condition in the streets, public places and buildings, and on all private premises. The common council shall provide for the frequent inspection of all premises by persons to be designated, either by the common council or by the board of health in the city. They shall also prescribe what water supply shall be provided by the owners of private premises, and that all premises, yards, streets and alleys shall be kept in a cleanly condition; shall provide for the punishment of any violation of such ordinances or regulation, by fine or imprisonment, or both; and all such fines, when recovered, shall be paid over to the board of health to assist in its maintenance.

"(e) To prevent the sale of adulterated or decayed food, and punish the same; to punish the sale of adulterated drinks."

We think that, for the purposes specified in the ordinance, the plenary police power has been delegated by this statute to the city council.

⁸⁹³ Defendant's next objection is that the ordinance authorizes the taking of property without due process of law, in that no compensation is required to be made to the owner of the cows which are to be destroyed as being affected with tuberculosis.

This same question was carefully considered by the supreme court of Wisconsin in the case of *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39, where the right under the police power to destroy without compensation to the owner dairy cows found to be affected with tuberculosis was sustained, the court saying: "It is fairly established, by ad-

judications too numerous to mention, that a state may, in the proper exercise of its police power, authorize the destruction of such property as has become a public nuisance, or has an unlawful existence, or is obnoxious to the public health, public morals, or public safety, without compensation, notwithstanding that prohibition in section 1, article 14, of the amendments to the constitution of the United States: *Bittenhouse v. Johnston*, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346, 2 Inter. Com. Rep. 232; *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 N. E. 878, 7 L. R. A. 134, affirmed in 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385."

Recently, in this court, an ordinance changing dairy limits, the effect of which was to deprive dairymen of their property without compensation, was sustained as a valid exercise of police power: *City of New Orleans v. Murat*, 119 La. 1093, 44 South. 898.

Defendant next contends that, even if the city council has this power, it cannot delegate the exercise of it to the board of health. But it is the invariable custom to delegate such authority to a board or other functionary, and the authority to do so is well recognized: *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. ed. 1018.

Defendant next contends that dairy cows affected with tuberculosis are not so serious a menace to the public health as to render them fit subjects for this extreme exercise of the police power. Here defendant raises a ⁸⁹⁴ question of fact, which can be settled only by the expert evidence in the case; and the evidence is all to the contrary of defendant's present contention.

Defendant next argues that he must be afforded a judicial hearing before his property can be condemned. Here, again, the question is more one of fact than of law. Would it be practical in a large city to institute a judicial inquiry in the case of every diseased cow in every dairy? Impure food, decayed fish, meats and vegetables, are subjected to the doom of the inspector, without appeal. We see no reason why in a large city the same should not be done with dairy cows which by a test recognized to be practically infallible are found to be a serious menace to the public health.

Dr. P. F. Archinard, the distinguished bacteriologist, testifying in the case as an expert, says: "A tuberculous cow is not only liable to produce tuberculosis or tubercular milk,

but it can give tuberculosis to the other cows in the dairy if they come in contact with its excretions. By that I mean its breathing, passages or urine. Any one of these is liable to be contaminated with tubercular germs, and they dry easy, and while they are dry they are not dead. They live for years. After drying they live for an indefinite length of time, for all we know, and the slightest wind blows them about. The milk in the dairy is liable to become infected with the germs."

Judgment affirmed.

Breaux, C. J., concurs.

The Right to Destroy Animals Supposed to be Infected with a contagious disease is discussed in *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983; *Barrett v. City of Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54; *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. Rep. 113.

The Liability of Health Officers for Destroying Property and abating nuisances, on the ground that the public health is menaced thereby, is discussed in the note to *Blue v. Beach*, 80 Am. St. Rep. 214.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

DAWSON v. WESTERN MARYLAND RAILROAD COMPANY.

[107 Md. 70, 68 Atl. 301.]

COVENANTS—Whether Bind Grantee.—Covenants in a deed which is neither signed nor sealed by the grantee do not, by reason of his accepting it, bind him as a covenantor. (p. 339.)

COVENANTS—Whether Run with Land.—When a deed to a canal company provides as part of the consideration and as a condition that the grantee, who neither signs nor seals the deed, shall construct a basin on the land, this stipulation is not a covenant running with the land. (p. 340.)

CANAL COMPANY—Ultra Vires Contract.—A contract by a canal company to construct a basin along the canal on land purchased by it as a part of the consideration is not ultra vires. (p. 341.)

COVENANTS—Enforcement in Equity Against Assigns of Covenantor.—When a deed to a canal company provides as part of the consideration and as a condition that the grantee shall construct a basin on the land, this provision may be enforced in equity by the grantor against the grantee's assigns with notice, notwithstanding it does not constitute a covenant running with the land. (p. 341.)

EASEMENTS—Manner of Conveyance.—A statute requiring deeds to be executed, acknowledged and recorded as therein provided is applicable to grants of or conveyances for easements in land. (p. 345.)

COVENANTS—Enforcement Against Assigns of Grantor.—The assigns of one who grants land to a canal company in consideration and on the condition that the grantee shall erect a basin connected with the canal on the land can compel the assigns of the grantee to restore the basin after it has been filled in. (p. 347.)

Charles D. Wagaman, J. Clarence Lane, Norman B. Scott, Jr., and Forrest W. Brown, for the appellant.

William Kealhofer and Benjamin A. Richmond, for the appellee.

⁸⁴ BOYD, C. J. This is an appeal from a decree sustaining a demurrer and dismissing the bill of complaint filed by the appellants. In 1835 Jonathan Rowland and wife and Kelly Thomas and wife conveyed to the Chesapeake and Ohio Canal Company a tract of land near Hancock, Washington county. The deed recites that, "Whereas the Chesapeake and Ohio Canal is intended to pass through the lands of the said Jonathan Rowland and Kelly Thomas, who have contracted and agreed to sell and convey to the said company such portion or quantity thereof as may be covered, used, occupied or required by the said canal, or any of its necessary works or appendages, and to carry into full effect the said contract and agreement," they were willing to execute the deed. It is then stated that "in consideration of the premises and in consideration also and upon condition that the said Chesapeake and Ohio Canal Company shall within the limits of the land hereinafter conveyed make, ⁸⁵ construct and establish a basin connected with the said canal, and also a roadway and road culvert leading from the turnpike road under the canal to the Potomac river, and also in consideration of the benefit which will result to them the said Jonathan and Kelly, as owners of said land, by cutting the said canal through and erecting the said work upon the said land and also in further consideration of the sum of one dollar," the grantors granted, etc., the tract of land, which is described by metes and bounds.

The circuit court for Washington county authorized Messrs. Hugh L. Bond, Jr., and Benjamin A. Richmond, as special trustees, to make sale of certain properties, rights, etc., of the canal company to the appellee, and under that authority they conveyed to it, by deed dated March 9, 1905, a portion of the land mentioned in the Rowland deed, including a part of the basin which had been constructed by the canal company in pursuance of the provisions in the Rowland deed. "The appellee constructed its railroad over and through the basin, and this bill was filed by the appellants, who claimed by mesne conveyances the Rowland property, adjoining the basin. The bill prays (1) for specific performance; that the railroad company be decreed to restore the basin and maintain the same as it formerly existed, and (2) that it be enjoined from hindering, obstructing and interfering with the uses and benefits of the basin by the complainants, as they were enjoyed by them, and those under whom they claim, from the time of the construction of the basin until the filling in of the same, and for other relief that we need not now mention.

It alleges that the canal company constructed the canal through the land conveyed by the Rowland deed, and for the benefit of the land retained by Rowland constructed a basin, connecting with and opening into the canal, and that Rowland erected upon the land retained by him, and along the basin, a large warehouse and mill about the year 1835, and from that time until the grievances complained of "the said basin was used by the successive owners of said warehouse and mill as an outlet and highway for the shipping and receiving of ⁸⁶ merchandise bought and sold in the business conducted at said warehouse and mill; for the transporting of coal and other fuel used in supplying said mill, and for such other useful and beneficial purposes incident to the business there carried on." It also alleges that the complainants became the owners of the warehouse and mill property by virtue of certain conveyances referred to. It does not show what interest Kelly Thomas had in the property, or what became of his interest, but in 1842 the real estate of Jonathan Rowland was sold by a trustee, including what was described as "Lot No. 1, being the warehouse and ground attached to Jacob Snively, for the sum of eight hundred and seventy-five dollars."

The appellee demurred to the bill and assigned a number of reasons therefor. Without stating them in full, the main grounds relied on are (a) that the Rowland deed did not contain a covenant which runs with the land, or which created an easement in favor of the adjoining land, which passed as an appurtenance thereto unto the appellants, and (b) that the alleged covenant was ultra vires of the canal company. It may be well to first dispose of some questions about which there can be no serious controversy in this state.

1. The acceptance of a deed poll cannot have the effect in this state of binding a grantee as a covenantor. It is said in 8 American and English Encyclopedia of Law, 65, in speaking of the exceptions made in New York and New Jersey to the general rule, that in order that a provision be binding as a covenant, it must be under the seal of the party by whom it is to be performed. "But this exception has been justly criticised as erroneous in principle, and will be found to be unsupported by the authority of any adjudged cases, except those rendered in the states above mentioned which have adopted them. It may safely be stated as the general rule, that mutual covenants cannot arise out of a deed poll." As the canal company neither signed nor sealed this deed, there would seem to be no doubt that under the

authorities in this state there was no covenant by the canal company: 1 Poe, sec. 144; *Stabler v. Cowman*, 7 Gill & J. 284; *Western Maryland R. R. Co. v. Orendorff*, 37 Md. 328; *State v. Humbird*, 54 Md. 327.

⁸⁷ 2. In addition to what we have just said, it is clear there was no covenant running with the land. In *Lynn v. Mt. Savage Iron Co.*, 34 Md. 603, this court adopted the first two resolutions in *Spencer's Case*, 5 Coke, 16, and the principles there announced are still accepted in this state as correct. What is spoken of by the appellants as "a covenant" in the Rowland deed referred to things not in esse, and there is nothing that could be construed either as a covenant with the grantors and their assigns or by the canal company for itself and its assigns. So whatever may be the rights of the appellants, they have no standing in court on the theory that this is a covenant running with the land, and as the *Lynn* case, in our judgment, conclusively disposes of that question, we will not further discuss it.

3. Before passing on what we regard as the most important questions in the case, we will briefly consider the grounds on demurrer which rely on the provision in the deed for a basin being *ultra vires*. It will be conceded that the appellants have no right to some relief included in the prayers of their bill. For example, there is nothing in the deed which can be construed to bind the canal company to furnish the complainants with water for their mill and warehouse, or other improvements they have on their property adjoining the basin, but in passing on this subject, we must be careful not to confound the right to have the basin with the method of using it. We can see no reason why the company could not have bound itself to make a basin along the canal, just as a railroad company can bind itself to erect a depot at a particular place, and there would seem to be no doubt about the latter: See 26 Am. & Eng. Ency. of Law, 500; 10 Am. & Eng. Ency. of Law, 1079; 18 Am. & Eng. Ency. of Law, 567. A basin connected with a canal may be just as necessary and useful for loading and unloading boats as a station or siding is for a railroad. Unless the canal be wider at points where boats are to be loaded and unloaded than it ordinarily is, it might obstruct navigation to so use it. So, although it be conceded that some of the uses of the basin made by the complainants and those under whom they claim ^{ss} cannot be sustained, we are of the opinion that it was not *ultra vires* for the canal company to contract or agree to construct a basin on part of the land acquired by it by

the Rowland deed, as a part of the consideration of the land purchased.

4. Having reached the conclusions above announced, are the complainants entitled to any relief sought by this bill? In passing on that question, we must determine not only whether the railroad company, as assignee of the canal company, could have been held to such responsibility to the grantors as the canal company could have been under the Rowland deed, but also whether the appellants, as present owners of what we will call the warehouse property, are entitled to relief, even if the railroad company would have been liable to the original grantors. We are of the opinion that the first inquiry must be answered in the affirmative, notwithstanding there was no covenant running with the land, on the principle alluded to in *Lynn's case* (34 Md. 603). After saying that the covenants then in question did not run with or adhere to the railroad of the Mt. Savage Iron Company, so as to bind it in the hands of the assignee, the court said: "It is true, if any attempt were made by the assignee of the Mt. Savage Iron Company to use and apply the wharves and other improvements on the land of the complainants, in a manner and to a purpose different from that intended, a court of equity would restrain such improper use and appropriation. In such case, the question would be, not whether the covenant ran with the land, but whether the party should be allowed to use and appropriate the land in a manner wholly at variance with the contract entered into by its assignor, and with notice of which it purchased. That is the principle of the case of *Tulk v. Moxhay*, 2 Phill. 774; but it is not involved in the present application."

In *Newbold v. Peabody Heights Co.*, 70 Md. 493, 17 Atl. 372, 3 L. R. A. 579, Judge Alvey quoted at length from *Tulk v. Moxhay*, 2 Phill. 774. After announcing the principle which is in substance stated in the *Lynn* case, Lord Chancellor Cottenham went on to say: "Of ⁸⁹ course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing

with notice of that equity can stand in a different situation from the party from whom he purchased." Judge Alvey, after quoting from *Tulk v. Moxhay*, added on page 502 of 70 Md.: "The principle thus clearly stated has been applied in a great variety of cases of restrictive covenants and agreements, both in the English and American courts; and they all concur in holding that whoever purchases land upon which a former vendor or lessor has imposed an easement, charge or restriction in the manner of its use, such as would be enforced by a court of equity as against his vendee or lessee, the party purchasing the land with notice will take it subject to such easement, charge or restriction, however created."

Among other cases in this court reflecting more or less upon the question are *Thruston v. Minke*, 32 Md. 487; *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662; *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393; *Summers v. Beeler*, 90 Md. 474, 78 Am. St. Rep. 446, 45 Atl. 19, 48 L. R. A. 54; *Safe Deposit & T. Co. v. Flaherty*, 91 Md. 489, 46 Atl. 1009. In *Thruston v. Minke*, 32 Md. 487, this court quoted with approval from *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715, as follows: "When it appears, by a fair interpretation of the words of the grant, that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted, for the benefit of the other land owned by the grantor, and originally forming, with the land conveyed, one parcel, such right shall be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent ⁹⁰ grantees of the respective parcels of land": See, also, 7 Am. & Eng. Dec. in Eq. 253, 254, where the question is discussed and many cases cited; 8 Am. & Eng. Ency. of Law, 140, and 11 Cyc. 1078, where many cases are cited—amongst others, *DeMattos v. Gibson*, 4 De Gex & J. 276, which has been cited with approval by this court.

Applying these principles to this case, it seems clear that the appellee would not be permitted to purchase the property from the canal company and destroy the use of the basin which that company agreed to make, construct and establish, as a part of the consideration to be paid for the property if it had notice, and the grantors were still the owners of the adjoining property. The Rowland deed shows on its face that the grantors had other land which would be benefited "by cutting the said canal through and creating the said work

upon the said land," and it was made upon condition that the canal company should make the basin within the limits of the land conveyed. The canal company did make the basin, which according to the allegations of the bill was maintained and used by Rowland and those claiming under him for seventy years—until the appellee filled it up. The habendum clause of the Rowland deed shows that it was the intention of the parties that the use of the land conveyed was to continue as therein provided for. If the canal company could deprive their grantors of the right to use the basin, by conveying it to the appellee in 1905, why could it not have done so by a similar transfer the year after it was constructed? The appellee is making use of it "in a matter wholly at variance" with the condition of the deed under which the canal company acquired it.

5. But although we think a court of equity could undoubtedly give relief to the original grantors, under such circumstances as we have stated, it does not follow that these complainants are entitled to relief. As we have already intimated, they cannot require the appellee to restore the basin for some of the purposes set out in the bill. The original grantors did not by the terms of the deed have the right to use the basin ⁹¹ as a source of water supply for the mill and warehouse, and the canal company had no power to make such a contract as that, so far as we are informed by the record. Nor does the deed show any right in the grantors to build any part of their warehouse over the basin, as the advertisement of the trustee's sale of the Rowland property shows had been done. The most they could have claimed would have been the use of the basin for loading and unloading boats for shipment on the canal and such uses as were incident to that work.

But the real difficulty is that the grantors conveyed all their right, title, interest and estate in the parcel of land described, and the basin was constructed within the limits of the land so conveyed. They made no exception to any part of the land described, and did not in terms make any reservation of any part of it. The deed did not even expressly reserve the right to the grantors to use the basin, or make any provision as to where it should be constructed, excepting "within the limits of the land conveyed," although it may be implied they were to have the use of it—not, however, the exclusive use—and that it was intended to be so located as to give the grantors the benefit of it. There is nothing on the face of the deed to require the canal company to con-

struct the basin next to the part of the grantors' property, which they still retained. Perhaps it was then known that the towpath would be on the side of the land toward the river, and that the basin would therefore be on the side nearest to the turnpike, or they may have had some verbal understanding about the location of the basin, but the deed is silent on the subject—beyond what we have stated above. There is no attempted reservation in favor of the assigns of the grantors, and in stating the consideration it is said, "and also in consideration of the benefit which will result to them the said Jonathan and Kelly, as owners of said land, by cutting the said land through and erecting the said work upon the said land."

The granting clause shows clearly that there was no exception contained in it, and there is none in any other part of the deed, excepting one not involved in this case. If there was ⁹² anything attempted, excepting to convey the land subject to a condition subsequent, it was a reservation. In *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669, and *Herbert v. Pue*, 72 Md. 307, 20 Atl. 182, the distinction between a reservation and an exception is pointed out. In both of those cases citations are made from *Sheppard's Touchstone*, page 80, and *Coke on Littleton*, 47a. As said in the latter: "Note a diversity between an exception (which is ever of part of the thing granted, and of a thing in esse), for which exceptis salvo, praeter, and the like, be apt words, and a reservation which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised." In *Sheppard's Touchstone* it is said of a reservation, "it must be to the grantor, and not to a stranger to the deed," but if it was an attempt to reserve an easement there are other difficulties in the way. The deed was made in 1835, and at that time a grant of an interest in land which did not contain words of inheritance only conveyed a life estate to the grantee, unless it appeared "from the terms and provisions of the deed itself, the purpose it was designed to subserve, and the circumstances under which it was executed, that the intention was to convey an absolute estate": *Merritt v. Disney*, 48 Md. 344; *Foos v. Scarf*, 55 Md. 301; *Hofsass v. Mann*, 74 Md. 400, 22 Atl. 65, and other cases that might be cited. There is nothing in this deed which would take it out of the general rule. When a covenant operated by way of reservation, and not by way of exception, words of inheritance were necessary to convey a fee simple title to an easement, if made prior to the statute which changed the common law (1856):

Ashcroft v. Eastern R. R. Co., 126 Mass. 196, 30 Am. Rep. 672; Whitaker v. Brown, 46 Pa. 197; Engel v. Ayer, 85 Me. 448, 27 Atl. 352.

This principle is recognized by this court in *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662, where, after referring to *Thruston v. Minke*, 32 Md. 487, *Whitney v. Union R. Co.*, 11 Gray, 359, 71 Am. Dec. 715, and *Clark v. Martin*, 49 Pa. 289, it was said: "These cases very conclusively settle the law that a grantor may impose a restriction, in the nature of a servitude or easement, upon the land that he sells or leases, for the benefit of the land he ⁹³ still retains; and if that servitude is imposed upon the heirs and assigns of the grantee, and in favor of the heirs and assigns of the grantor, it may be enforced by the assignee of the grantor against the assignee (with notice) of the grantee." The implication is that unless it is so imposed, it cannot be enforced by the assignee.

But there is still another difficulty in the way of the appellants. The theory of the bill as shown by the eighth paragraph is that an easement was created on the lands mentioned and described in said deed for the benefit of the lands retained by the said Rowland; that these complainants, as assigns of the said Rowland, are entitled to the benefits of said easement over the lands of the defendants as assigns, with notice, of the Chesapeake and Ohio Canal Company." It has been settled by a long line of decisions in this state that our statute, requiring deeds conveying an estate of inheritance or freehold, or any declaration or limitation of use, or any estate above seven years, to be executed, acknowledged and recorded as therein provided, is applicable to grants of, or covenants for, easements in land: *Hays v. Richardson*, 1 Gill & J. 366; *Carter v. Harlan*, 6 Md. 20; *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Polk v. Reynolds*, 31 Md. 106; *Rayner v. Nugent*, 60 Md. 515; *Shipley v. Fink*, 102 Md. 219, 62 Atl. 360, 2 L. R. A., N. S., 1002. In *Hays v. Richardson*, 1 Gill & J. 366, the owner of the land had, under his hand and seal, authorized Richardson to open a road through it and to build, keep in repair and use a bridge over a branch in the field, over which the road would pass. The road and bridge were built, and the defendant obstructed the road. In an action on the case for obstructing the way, it was held by our predecessors that there could be no recovery, because it was necessary that a grant of a right of way *de novo* must be acknowledged and recorded according to our acts of registration, and that the attempted grant

amounted only to a revocable license. That was an action at law, but the principle has been announced in equity, as well as at law. In *Partridge v. Church*, 39 Md. 631, lot-holders held certificates for lots in a cemetery, signed by the chairman of the trustees and the register, and this court, ⁹⁴ through Judge Alvey, said: "We think it clear that it (the certificate) conferred no title or estate in the soil; nor could it operate as a grant of an easement, because it was not under seal; nor was it acknowledged and recorded, so as to be effective to convey such an interest: *Hays v. Richardson*, 1 Gill & J. 366. The right to an easement must be founded upon a grant by deed, or upon prescription, for it is a permanent interest in another's land, with a right of enjoyment; whereas a mere license is but an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein." The same principles were announced in *Rayner v. Nugent*, 60 Md. 575, and in the recent case of *Shipley v. Fink*, 102 Md. 219, 62 Atl. 360, 2 L. R. A., N. S., 1002, the case of *Hays v. Richardson*, 1 Gill & J. 366, was again referred to with approval. This court held in *Shipley v. Fink*, 102 Md. 219, 62 Atl. 360, 2 L. R. A., N. S., 1002, that the evidence in that case established a parol license to enjoy an easement in land, that the license was revocable and a conveyance of the land belonging to the licensor to a purchaser, without notice, revoked the license. In this case the most that can be claimed is that by the acceptance of the deed the canal company impliedly contracted that the grantors should have an easement in the basin, but the deed was not signed, sealed or acknowledged by the canal company, and hence did not grant an easement. As the grantors conveyed all their interest in the land, they could only claim the easement under the implied parol agreement of the canal company, or on the theory of the reservation of an easement, and in either case it was necessary to have a deed executed and recorded.

It is true that a court of equity will not allow a licensor to withdraw his consent without making compensation to the licensee when the latter has expended money on the licensor's land, by reason of the license, but that doctrine cannot aid the appellants, even if it could have been applied if Rowland was still the interested party. The question here is whether such rights passed from Rowland, through mesne conveyances to the appellants, as entitle them to the relief sought. We think it clear that they did not under the authorities

cited. So if we consider the ground relied on in the bill, that there was an ⁹⁵ easement in Rowland in the basin, we find that none was granted, and as the canal company neither signed nor sealed the deed, but the grantors undertook to reserve the easement, it was, on the part of the canal company, a mere parol license to enjoy an easement in part of the land which was conveyed to it, and it did not pass to the assigns of Rowland.

Nor can the appellants get the benefit of the principle above stated that a court of equity would give relief to Rowland against a purchaser, with notice, from the canal company. As establishing the basin was a part of the consideration for the deed, a court of equity might protect the vendors and require compensation—in a proper case might require specific performance as the best, if not the only, way to secure what they were entitled to, but these appellants have no right to complain because the grantors were not paid what they were entitled to, if that be assumed.

If the provision in the deed be treated as a condition, it was a condition subsequent, and the property would revert to the heirs of the grantors, and not to the appellants, if the condition be broken. So, however we regard it, we cannot see any ground upon which the appellants are entitled to relief under this bill. If they purchased the property bounding on the basin on the supposition that the purchase carried with it the right to use the basin, it is to be regretted, but we must construe the deed as we find it, and not as it might have been drawn, in order to pass rights in the basin to assignees of Rowland of his adjoining lands. It may be well to add that an examination of the cases which were relied on by the appellants to vest the rights in the assigns of Rowland will show that they were either brought by the original parties, such as Lynn's case, or the deeds or instruments under consideration expressly included the assigns, such as *Tulk v. Moxhay*, 2 Phill. 774, *Whitney v. Union Ry. Co.*, 11 Gray, 359, 71 Am. Dec. 715, *Clark v. Martin*, 49 Pa. 289, *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662, or there were peculiar grounds for equitable jurisdiction in behalf of those not parties to the deeds or other instruments, such as *Newbold v. Peabody Heights Co.*, 170 Md. 493, 17 Atl. 372, 3 L. R. A. 579; *Safe Deposit & T. Co. v. Flaherty*, 91 Md. 489, 46 Atl. 1009. See latter case, on pages 499, 500, as to ⁹⁶ when those not parties to a deed or contract may have the benefit of provisions in it.

It follows from what we have said that the decree must be affirmed.

Decree affirmed, the appellants to pay the costs, above and below.

LIABILITY OF A GRANTEE ON COVENANTS AND CONDITIONS IN THE DEED.

- I. Conflict and Confusion in Decisions.
 - a. In General, 349.
 - b. As to Form of Remedy, 349.
 - c. As to Substantive Law, 350.
- II. Rule of Nonliability of Grantee as a Covenantor.
 - a. General Rule in Case of Deed Poll, 350.
 - b. Rule as Declared by United States Courts, 350.
 - c. Rule as Applied in Massachusetts, 354.
 - d. Rule as Applied in Connecticut, 355.
 - e. Rule as Applied in Pennsylvania, 357.
 - f. Rule that Deed Poll Contains No Mutual Covenants, 358.
- III. Exceptions to Rule of Grantee's Nonliability as Covenantor.
 - a. General Rule that Grantee is Bound as Covenantor, 359.
 - b. In Georgia, 360.
 - c. In Indiana, 361.
 - d. In Iowa, 361.
 - e. In Kansas, 362.
 - f. In Minnesota, 362.
 - g. In New Hampshire, 363.
 - h. In New Jersey, 363.
 - i. In New York, 364.
 - j. In North Carolina, 365.
 - k. In Ohio, 366.
 - l. The Reason for the Exceptions, 366.
 - m. Criticism of Exceptions, 369.
- IV. Effect of Abolition of Distinction Between Sealed and Unsealed Instruments, 369.
- V. Liability of Grantee on Real Covenants.
 - a. In General, 369.
 - b. Covenants Restricting Building or Use of Buildings, 370.
 - c. Covenants in Restraint of Trade or in Use of Property, 370.
 - d. Covenants Against Nuisances, 371.
 - e. Liability of Husband on Wife's Covenants, 371.
 - f. Liability of Wife on Husband's Covenants, 371.
 - g. Liability for Acts of Third Person, 371.
 - h. Liability of Subsequent Grantees, 372.
 - i. Liability of Grantee as Bona Fide Purchaser, 372.
 - j. Liability of Grantee Pro Tanto, 372.
- VI. Liability of Grantee on Personal Covenants.
 - a. In General, 372.
 - b. Liability of Lessee, 373.
 - c. Liability in Equity of Assignee with Notice, 373.
 - d. Liability of Assignee for Covenants Broken While not a Legal Assignee, 373.
- VII. Privity of Estate and Contract, 373.
- VIII. Covenants of Ancestor Relating to Land.
 - a. Whether Bind Heirs, 376.
 - b. Whether Bind Devisees, 376.

IX. Obligation to Perform Covenants.

- a. Excuse of Performance by Inevitable Accident, 377.
- b. Sufficiency of Performance, 378.

X. Remedies, Venue and Jurisdiction.

- a. Form of Remedy, 378.
- b. Jurisdiction and Venue, 379.

I. Conflict and Confusion in Decisions.

a. **In General.**—On the question of the liability of a grantee on covenants in a deed poll, there has been no little conflict in the decisions, due perhaps to the obscurely stated case in Coke on Littleton, 331a, which has caused, to quote from Maule v. Weaver, 7 Pa. 329, “a prodigious misconception of the language of Lord Coke.” This misconception by several of the early digestors and commentators of the common law has been the ground upon which a number of the American courts have based their decisions holding the grantee of a deed poll liable as a covenantor. More than this, several of the states have introduced the doctrine of subrogation into the common law, others that of estoppel, while others have modified the common law by abolishing all distinction between sealed and unsealed instruments, except in cases of corporations, and still other states have abolished the various common-law forms of actions and simplified pleading by reducing all actions to one form.

b. **As to Form of Remedy.**—The liability of a grantee on a deed poll, about which so much confusion has arisen, goes to the form of the remedy rather than to the substantial rights of the party, or the title of the plaintiff to redress. The general principle that an action of covenant can be sustained only where the instrument upon which the action is brought has been actually signed and sealed by the party, or by his authority, is abundantly sustained by authorities herein set forth. There are, however, exceptions, of which actions upon the custom of London, actions against the king's lessee by patent, and against remaindermen, are admitted instances: *Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252.

The importance of the remedial branch of the law on the grantee's liability on a deed poll depends upon the question as to whether or not a covenant contained in the deed is or is not a covenant against him, which will, or will not, consequently be treated as a specialty on which the statute of limitations will run a much longer time than if the deed poll be treated as an implied contract or an assumpsit on the part of the grantee. Further, no one can maintain an action at law on a contract under seal to which he is not a party: *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210. In Indiana, New Jersey and New York and other states, a deed signed by the grantor only is held in the nature of a covenant under seal, and consequently a specialty: *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756, 8 L. R. A. 604; *Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650;

Atlantic Dock Co. v. Leavitt, 54 N. Y. 25, 13 Am. Rep. 556; while in other states it has been held in the nature of an assumpsit or implied contract, arising from the acceptance of the deed by the grantee and consequently not a specialty: *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Foster v. Atwater*, 42 Conn. 244; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Maule v. Weaver*, 7 Pa. 329; *Hocking County Trustees v. Spencer*, 7 Ohio (pt. 2), 149; *Willard v. Wood*, 3 Mackey (D. C.), 538, affirmed in 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210.

c. As to Substantive Law.—While there is much confusion and conflict in the remedial law on the liability of a grantee on a deed poll, the subject is made more difficult by reason of the substantive law involved. This embraces the question whether or not there is a privity between the parties, as well as to whether the covenants contained in the deed run with the land, and further, whether or not the covenants are in gross, i. e., personal, in order to ascertain the liability of a subsequent grantee taking under a deed poll: *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. On this branch of substantive law the appellate court of Illinois said: "What covenant runs with the land, so that one to whom the estate of the covenantor has come may sue upon it, is a subject upon which the books contain as many refined distinctions as upon, probably, any other branch of the law": *Keegan v. O'Callighan*, 35 Ill. App. 142. In other words, to bind the grantee, there must be either privity of estate or of contract between the parties, i. e., between the original grantee and the grantee of the first covenantor: See cases cited, post, VII.

II. Rule of Nonliability of Grantee as Covenantor.

a. General Rule in Case of Deed Poll.—It is a general rule that the acceptance of a deed poll cannot have the effect of binding the grantee as a covenantor: *Hinsdale v. Humphreys*, 15 Conn. 431; *Willard v. Wood*, 4 Mackey (D. C.), 538; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *State v. Humbird*, 54 Md. 327; *Western Maryland R. R. Co. v. Orendorf*, 37 Md. 334; *Stabler v. Cowman*, 7 Gill & J. (Md.) 284; *Dawson v. Western Md. R. R. Co.*, 107 Md. 70, 67 Atl. 301; *Parish v. Whitney*, 3 Gray (69 Mass.), 516; *Fletcher v. McFarlane*, 12 Mass. 43; *Phelps v. Townsend*, 8 Pick. (Mass.) 392, 394; *Guild v. Leonard*, 18 Pick. (Mass.) 511; *Newell v. Hill*, 2 Met. (Mass.) 180; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Braman v. Dowse*, 12 Cush. (Mass.) 227; *Jewett v. Draper*, 6 Allen (Mass.), 434; *McCabe v. Swap*, 14 Allen (Mass.), 188; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Martin v. Drinan*, 128 Mass. 515; *Dickason v. Williams*, 129 Mass. 182, 37 Am. Dec. 316; *Kennedy v. Owen*, 136 Mass. 199; *Trustees v. Spencer*, 7 Ohio (pt. 2), 149; *Maule v. Weaver*, 7 Pa. 329; *Johnson v. Muzzy*, 45 Vt. 420; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210.

b. Rule as Declared by United States Courts.—Mr. Justice Cox, of the supreme court of the District of Columbia, in the case of *Willard*

v. Wood, 4 Mackey (D. C.), 538, exhaustively reviews the common-law liability of grantees under a deed poll and under an indenture and also the decisions of those states in which the common law has been modified. Excerpts from Coke on Littleton and Sheppard's Touchstone are set forth in extenso, and also excerpts from the highest state and federal courts in support of this general rule. This was a case in which a mortgage was executed in New York, and suit brought thereon in the District of Columbia. The decision, after laying down the general rule that whatever relates to the remedy and constitutes part of the procedure, is determined by the *lex fori*, and that whatever touches the substance of the obligation and the rights of the parties in the contract is governed by the *lex loci contractus*, proceeds as follows: "At common law, while there was some controversy as to the right of a third person to sue on a parol promise made to another for his benefit, it was pretty clear that no such right existed as to promises under seal.

"As Sheppard's Touchstone says, page 174: 'Anyone that is party to the deed, to whom the covenant is made, may take advantage of the covenant, but not a stranger; for if A covenant with B to do an act to C, who is no party to the deed, and he doth it not, B, and not C, must sue him upon this breach.' The United States supreme court evidently takes this view in *Hendrick v. Lindsay*, 93 U. S. 149, 23 L. ed. 855, where they say: 'It is argued, as Mansfield's name does not appear in the letters of *Hendrick*, that he could not join in this action. This would be true if the promise were under seal, requiring an action of debt or covenant; but the right of a party to maintain *assumpsit* on a promise, not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country.' And the court cite, for this position, 1 *Parsons on Contracts*, sixth edition, 467, where it is said: 'But where the promise is made under seal, and the action must be debt or covenant, then it must be brought in the name of the party to the instrument; and a third party for whose benefit the promise is made cannot sue upon it.' We cannot but regard it as an innovation upon the common law, to hold that in case of a deed containing mutual covenants, regularly executed by both parties, a third person, a stranger to the instrument, may sue one of the parties on his covenants, though made for his benefit.

"Still, it is no business of ours if the courts of New York choose to so modify the common law in reference to a New York contract, as to create rights which we would not recognize in a similar case arising within our own jurisdiction. But we regard it as a still bolder innovation on the common law to hold, that the acceptance of a deed in fee simple containing words of covenant on the part of the grantee, but which is not and never was, intended to be executed by him, makes it his deed, as if he had signed and sealed it, and creates a specialty obligation on his part. We are not aware that any such result followed the acceptance of a deed at common law, except where a relation of tenure was created between the parties, and then only to a limited extent. Coke on Littleton, 231a, is referred to in support of

the position taken in New York. The case was that where a lease was made to two on certain conditions, and the indenture bound them in a penalty to the performance of the conditions, and one only of the lessees sealed the lease, it was nevertheless held that an action for the penalty ought to be brought against both, and the plea in abatement of nonjoinder was sustained. In fact, Lord Coke was not discussing covenants, but commenting on Littleton's text in relation to estates in condition, in which (section 294) it was shown that whoever enters under a deed is bound by all the conditions in it, whether he executed it or not. The case put by him to illustrate this does go so far as to hold that a tenant bound by conditions is also bound by a penalty securing them, and was liable to action. What the form of action was does not appear. The liability to the penalty was put on the ground that he had agreed to the lease. The action must have been debt because there was no covenant, and that did not necessarily rest upon a specialty, but may have been founded on the assent to the conditions of the lease inferred from the act of entering under it.

"The case is not a clear authority for treating the lease as the deed of the lessee, not executing it even as between landlord and tenant. But the limitations of the law on this subject are further shown in Sheppard's Touchstone, page 176, in which Coke is cited. It is said: 'If a feoffment or lease be made to two, or to a man and his wife, and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, or the wife doth not, or doth not seal during the coverture, and he or she that doth not seal doth, notwithstanding, accept of the estate, and accept the lands conveyed, or demised; in these cases, as touching all inherent covenants, as for payment of rent and the accessories thereof, clauses of distress or re-entry, nomine poenoe, reparations and the like, they are bound by these covenants as much as if they do seal the deed.' And after giving one or two other illustrations, he adds: 'But quære of collateral covenants in the first cases, for therein it seemed the feoffee or lessee is not bound.' In all the cases referred to by him there is the relation of tenure accompanied with a reservation of rent. But this is not authority for holding that in a deed in fee by which a grantor parts with his entire estate, a covenant to pay a gross sum to a stranger, which is essentially collateral, becomes the covenant of the grantee, though not executed by him, so as to sustain the technical action of covenant. Such a position seems to us contrary to common-law principles which are our only guides upon questions of this character. The weight of authority seems to us to be that a deed, whether in form of indenture or deed poll, is only the deed of him who signs and seals it, while it may be the simple contract, at the same time, of him who signs without sealing, or, under some circumstances, of him who neither signs nor seals, but only accepts it. In *Stabler v. Cowman*, 7 Gill & J. (Md.) 284, where an agreement was clearly intended to be signed and sealed by both parties, but one omitted to seal through accident, the court held that he could be sued in *assumpsit*, while the instrument was the deed of the other party.

"The subject has been discussed at some length in other states where common-law principles have not been departed from, and even in cases of leases it has been held that the same rule applies. Without citing from them at length we refer to *Hinsdale v. Humphreys*, 15 Conn. 431; *Johnson v. Muzzy*, 45 Vt. 420, 12 Am. Rep. 214; *Maule v. Weaver*, 7 Pa. 329; *Trustees etc. v. Spencer*, 7 Ohio (pt. 2), 149; *Martin v. Drinan*, 123 Mass. 515. In one of these cases (45 Vt.), the case of *Finley v. Simpson*, 2 Zab. (N. J.) 311, 53 Am. Dec. 252, is spoken of as the only American case holding an opposite view.

"For these reasons, even in states where a right of action by a mortgagee against the grantee of the equity of redemption, in cases like the present, is conceded, it is, nevertheless, held that the action must be assumpsit, as upon a promise implied from the acceptance of the deed containing the covenant to be performed by the grantee: *Locke v. Homer*, 131 Mass. 93, and cases cited.

"Our conclusion, then, is that if the mortgagee, under the rulings in New York, is entitled to claim the mortgage debt directly from the purchaser of the equity of redemption, in a case like the present, still he must assert his claim here in an action of assumpsit, and that our act of limitations is a bar to any action brought more than three years after the cause of action has accrued": *Willard v. Wood*, 4 Mackey (D. C.), 538.

This case went to the supreme court of the United States on writ of error, where the judgment for the defendant was affirmed: *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210. Said Mr. Justice Gray, in rendering the decision of the court: "Much of the argument at the bar was devoted to the question, whether an agreement of the grantee, in a deed signed and sealed by the grantor only, is, as has been held in New Jersey and New York, in the nature of a covenant under seal, and consequently a specialty (*Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650, 652; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124); or, as held in other states, in the nature of an assumpsit or implied contract, arising from the acceptance of the deed, and consequently a simple contract: *Locke v. Homer*, 131 Mass. 93, 102, 41 Am. Rep. 199; *Foster v. Atwater*, 42 Conn. 244; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Maule v. Weaver*, 7 Pa. 329; *Trustees etc. v. Spencer*, 7 Ohio (pt. 2), 149.

"If the agreement of the grantee is considered as in the nature of assumpsit, implied from his acceptance of the deed, still, being made with the grantor only and for his benefit, upon a consideration moving from him alone, there being no privity of contract between the grantee and the mortgagee, and the latter not having known of or assented to the agreement at the time it was made, nor having since done or omitted any act on the faith of it, it follows that, by the law as declared by this court, and prevailing in the District of Columbia, the mortgagee cannot maintain an action at law against the grantee:

Keller v. Ashford, 133 U. S. 610, 620-622, 10 Sup. Ct. Rep. 494, 33 L. ed. 667, 672, and *Second Nat. Bank v. Grand Lodge* 98 U. S. 123, 25 L. ed. 75, there cited. The payments made by the grantee, and accepted by the mortgagee, on account of the mortgage debt, were made pursuant to the grantee's contract with the mortgagor, and did not create, or warrant to be inferred, a new contract between the grantee and the mortgagee": *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210.

c. **Rule as Applied in Massachusetts.**—The supreme court of Massachusetts in the case of *Parish v. Whitney*, 3 Gray (69 Mass.), 516, supports the general rule that a deed poll does not bind the grantee as a covenantor. The case was an action of contract on the covenant against encumbrances, contained in a deed from the defendants to the plaintiffs. The breach assigned in the declaration was that the land described in the deed was not free from encumbrances, but was subject to an obligation for the erection and perpetual maintenance of the whole line of partition fence between said land and the land of one John Putnam, which obligation is contained in another deed of land, including the same premises, made by John Putnam to Russell Tinker, Jr., from whom the defendants derived their title. That deed (a copy of which was annexed to the declaration) contained the following clause, immediately preceding the habendum: "And in further consideration of this grant, the said Russell, Jr., his heirs and assigns, are to erect and perpetually maintain the whole line of partition fence between the above-granted premises and the said John's land, which fence is to be erected during the present year." The defendants demurred to the declaration on the ground that it set forth no cause of action.

The court in a brief decision sustaining the demurrer said: "The question is whether the clause in the deed of Putnam to Tinker creates an encumbrance upon the land. It is quite clear that it is not a reservation out of the estate granted. The whole estate passed by the deed. It is not a condition upon which the estate is to be held, and for breach of which an entry might be made by the grantor. It is not declared to be a condition, nor is any right of entry reserved. It is not a covenant, running with the land, or otherwise. It is but a personal agreement of the grantee, made as part of the consideration of the grant, and evidenced by his acceptance of the deed, which may bind him and his legal representatives, but does not affect the estate: *Plymouth v. Carver*, 16 Pick. 183"; *Parish v. Whitney*, 3 Gray (69 Mass.), 516.

Mr. Justice Gray, in rendering the decision of the supreme court of Massachusetts in the case of *Martin v. Drinan*, 128 Mass. 515, said: "The agreement to repair buildings upon land adjoining the defendant's, being contained in a deed poll to her, and not being under her seal, is not a covenant, and this action is in the nature of assumpsit on the promise implied from the acceptance of the deed: *Maine v. Cumston*, 98 Mass. 317, 320, and cases cited. It would be difficult, if

not impossible, to maintain the action against an assign of the promisor: *Parish v. Whitney*, 3 Gray, 516; *Bronson v. Coffin*, 108 Mass. 175, 186, 11 Am. Rep. 335. And it is quite clear that it cannot be maintained in the name of an assign of the promisee: *Standen v. Christmas*, 10 Q. B. 135"; *Martin v. Drinan*, 128 Mass. 515. In an earlier case the supreme court of Massachusetts said: "It has long been settled that an action lies for rent reserved upon a deed poll. The reason of the principle has a general application; and we are all satisfied that, as a general rule, where land is conveyed by deed poll, and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain assumpsit for the nonperformance of the duties reserved. It was objected that this was an agreement concerning an interest in lands, and that, no memorandum being signed by the party, the case was within the statute of frauds. But where the law raises the promise, it is not within the statute: Stats. 1788, c. 16. The same answer may be made to the objection that it was a promise to pay the debt of another, and not in writing": *Goodwin v. Gilbert*, 9 Mass. 510. To the same effect are the following cases: *Guild v. Leonard*, 18 Pick. 511; *Newell v. Hill*, 2 Met. (Mass.) 180; *Pike v. Brown*, 7 Cush. 133.

d. Rule as Applied in Connecticut.—The supreme court of Connecticut also conclusively establishes the above rule under the common law, in its decision in the case of *Hinsdale v. Humphreys*, 15 Conn. 431. This was an action of covenant broken. The plaintiff by deed poll leased certain premises to one Loomis, his heirs and assigns. Loomis thereafter assigned his interest in the unexpired term to Chester Humphrey, who made a like assignment to Horace Humphrey, the defendant. The plaintiff's declaration alleged the covenant broken, so made by said Loomis, for himself, his heirs and assigns. To this declaration the defendant demurred; and thereupon the case was reserved for the advice of the court. The defendant urged, in support of the demurrer, that the assignee of a lessee under a deed poll cannot be sued in covenant broken. This is clearly the doctrine of the English courts: 1 Chitty's Pleading, 108, 9; Coke on Littleton, 231a. As this is a matter purely technical, relating to the proper form of action, there is no reason why we should depart from the English rule. There is nothing in it so peculiar as to render it inapplicable to the condition, circumstances or institutions of this country. The plaintiff contended that an action of covenant against the assignee for a breach of the covenant, during his possession of the premises under the assignment, is the proper remedy for the lessor, to recover arrears of rent, due by the express provisions of a deed poll.

The supreme court by Mr. Justice Hinman, in rendering its decision on this demurrer, said: "The declaration being demurred to, the only question arising upon the demurrer is, whether covenant will lie against lessee, or assignee of lessee, for rent on a lease sealed only by the lessor—in other words, whether mutual covenants can arise upon

a deed poll? The general rule that covenant will not lie except against him who, by himself, or his duly authorized agent, has sealed and delivered a deed has not been questioned nor could it be. The very definition of a covenant, a contract or agreement under seal, or by deed, implies clearly, that to be binding, as a covenant, the agreement must be sealed by the obligor, or his agent; otherwise, it would not be his deed.

"But it is said there are certain exceptions to the general rule; and that this case falls within one of them. And it is true that several of the elementary writers do lay down the proposition that the covenantee's acceptance of the deed is such an assent to the agreement as will render it binding on him: 4 Cruise's Digest, c. 25, p. 393; Comyn's Digest, tit. "Covenant," A, 1; 1 Sw. Dig. 571. If nothing more is meant by this than the words in their literal interpretation imply, the proposition is not perhaps objectionable; but supposing the writers intend by it that the covenantee's acceptance of the deed is such an assent to the agreement as will render it binding on him as a covenant, it will be found to be unsupported by the authority of any adjudged case, and it is clearly erroneous in principle. The cases usually referred to in support of this doctrine are *Green v. Horne*, 1 Salk. 197, and the case stated in *Coke on Littleton*, 231a. The case in Salk has no application to this case. The only principle decided there was, that a person not named in an indenture cannot have an action on it. And the case stated in *Coke on Littleton* was not an action of covenant, but an action of debt: *Platt on Covenants*, 3, Law Library, pp. 6, 9. Indeed, all the authorities on this subject are very thoroughly examined by Mr. Platt; and he says that no instance can be found of an action of covenant having been sustained by the courts against one claiming under a deed poll.

"The cases cited at the bar, which arose upon patents from the crown, may form an exception to the general rule that mutual covenants cannot arise upon a deed poll. They evidently do form such an exception, unless they stand upon the principle that the king can covenant for both parties; upon which ground they may be reconciled with the other cases, and would thus be correct in principle.

"It is enough for the purposes of this case that covenant will not lie, without attempting to furnish the plaintiff with another remedy. But as the cases which go to show that another action may be brought also show that covenant cannot lie, as covenant and assumpsit, or covenant and case, are not concurrent remedies; it is not perhaps improper to refer to the case of *Goodwin v. Gilbert*, 9 Mass. 510, in which it was held that where certain duties were reserved, to be performed by the grantee of a deed poll, assumpsit may be sustained for the nonperformance of them. And in the case of *Burnett v. Lynch*, 5 Barn. & C. 589, 12 Eng. Com. L. 327, it was held that case lay against the assignee by deed poll, who had taken possession under an assignment from the lessee, for breaches of covenant committed during the time that the assignee was in possession; and Chief Justice Abbott, in giving his opinion, says he thinks assumpsit would also

lie. We therefore advise the superior court that the plaintiff's declaration is insufficient."

e. Rule as Applied in Pennsylvania.—A strong and pointed decision in support of the general rule above stated was rendered by the supreme court of Pennsylvania, on certificate from the *nisi prius*, in the case of *Maule v. Weaver*, 7 Pa. 329: "The only question in this cause was whether covenant would lie. In 1832, Weaver conveyed a larger lot to Maule, reserving ground rent which he assigned to Stille. In May, 1836, a deed, styled in the premises an indenture between Maule of the first and Weaver of the second part, concluding 'in witness whereof the said parties have hereunto interchangeably set their hands and seals, the day and year first above written,' was sealed and signed by Maule alone. That deed recited the prior deed and the assignment of the ground-rent, and conveyed part of the same property to Weaver under and subject to the payment of the whole of the ground-rent, with a covenant by Weaver with Maule to pay the said rent and keep Maule and his assigns, owners of the residue of the land, indemnified therefrom. The action was on this deed. In the same month Weaver conveyed by deed to Wager and others subject to this ground-rent.

"The defendants gave evidence that the purchase was made by Weaver and nine others, and the title was taken by him to be conveyed to Wager in trust to partition the land. In that partition the lot subject to pay the rent was allotted to one Heyberger. None of the parties went into exclusive possession, but Weaver accepted the conveyance for the benefit of all the parties, and they paid the rent for some time.

"The plaintiff proved payment by himself of a certain amount of the rents to Stille, and a demand of Weaver."

The supreme court in rendering its decision by Gibson, C. J., said: "How it came to be thought by the profession at an early day, and to be handed down to the present, that an action of covenant might be maintained against the grantee in a deed poll under any circumstances, or against anyone else who had not sealed it, I cannot imagine. It appeared to us in *Wilson v. Buchman* so evident on principle that it could not, that we ruled the point in a dozen of words, and directed the case not to be reported, as it seemed to contain nothing which could be of use as a precedent; but in that we were mistaken. Though the principle of that case has been recognized as a general one, but subject to exceptions founded on the royal prerogative, or the customs of particular places, it seems to have been thought that in all cases where a grantee takes an estate by a deed poll, he may be compelled to perform the conditions of the grant by an action of covenant instead of an action of debt or assumpsit; and this supposition had its root in the case obscurely stated in *Coke on Littleton*, 331a; but it is clearly shown by Mr. Platt, the only lawyer who has searched the original roll, that there has been a prodigious misconception of the language of Lord Coke, which was predicated, not of an action of

covenant, but of an action of debt. Yet the same misconception existed in the mind of Chief Justice Abbott, in *Burnett v. Lynch*, by which, however, he affirmed the principle to which he supposed the case put by Lord Coke to be an exception. But the singularity of the exception ought to have sent the profession to the Year-books for the original cases to which references were given, and in which they would have found that the action in each of them was not covenant but debt. It ought to have occurred to them that forms of pleading are touchstones of the law, and that the most dexterous pleader would find himself unable to make a successful profert of the deed poll as the act of one who had not sealed it. Mutual covenants may be contained in the same instrument; but each party must seal and deliver his own exactly as if they were contained in several parts of it. Mr. Platt is apprehensive that the contrary has been too long sanctioned by eminent compilers to be now shaken; but it has merely floated in the professional brain without an adjudged case to support it, or anything better than the obiter dictum of a very distinguished chief justice, who took it as he found it set down in the digests and text-books. On the contrary, in *Lock v. Wright*, 1 Strange, 571, it was held that mutual covenants cannot arise out of a deed poll, because it is not the act of both parties, and the grantee on it is liable in an action of debt. Forms of action are founded in technical reason, and it is greatly important that they be kept to the line of technical congruity, else we should fall into a distressing state of uncertainty and confusion.

"But a more plausible argument is, that as the body of the instrument is in the form of an indenture, and contains a recital that it was interchangeably signed and sealed, the seal of the one should be taken for the seal of the other. So, indeed, it would, if the other had signed, or his adoption of the seal were proved by evidence aliunde; for instance, by the oath of one who saw it. Subscribing is intrinsic evidence to authenticate the seal, the signature attached to it being the party's particular mark to individuate it as the one affixed by him; but as signing is not a part of the execution, but only evidence of it, it follows not that the sealing may not be proved by evidence extrinsic to the deed. What evidence of adoption have we here? Nothing but the recital that the parties had signed and sealed, which was not allowed in *Taylor v. Glaser*, 2 Serg. & R. 502, to supply the place of an actual seal. In that case, however, there was no actual seal, and here there is one; but whatever inference of adoption might else be drawn from the recital is overborne by the fact that the grantor wrote his name to authenticate his seal, and the grantee did not. Judgment reversed": *Maule v. Weaver*, 7 Pa. 329.

1. Rule that Deed Poll Contains No Mutual Covenants.—This, in effect, is stating in a different form the general rule that a grantee under a deed poll is not bound as a covenantor. Hence the principles and reasons therefor given under the general rule are equally applicable here: *Hinsdale v. Humphrey*, 15 Conn. 431; *Stabler v. Cow-*

man, 7 Gill & J. (Md.) 284; *Western Maryland R. R. Co. v. Orendorff*, 37 Md. 328; *State v. Humbird*, 54 Md. 327; *Maule v. Weaver*, 7 Pa. 329; *Morgan v. Pike*, 78 Eng. Com. L. (14 Com. B.) 473; *Northampton Gaslight Co. v. Parnell*, 80 Eng. Com. L. (15 Com. B.) 630; *Locke v. Wright*, 1 Strange, 571.

In the case of *Stabler v. Cowman*, 7 Gill & J. (Md.) 284, the court said: "The words, 'In testimony whereof I have hereunto set my hand and seal,' or, 'we have hereunto set our hands and seals,' found in the body of an instrument of writing, are not sufficient to constitute it the deed or specialty of the party named, whose seal is not affixed. On the other hand, it is the deed of the party named who has sealed and delivered it, although there be no such words in the body of the writing. It is the fact that determines the character of the instrument, and not the assertion in the body of it, that it is signed and sealed; which wherever introduced, is done before the signing and sealing. Nor is the absence of the seal aided by the words, 'signed, sealed, etc.,' which are sometimes placed above the signatures of the subscribing witness. . . . If neither had sealed it, it would have been the deed of neither. If the plaintiff alone had signed and sealed it, it would not have been the deed of the defendant. And it is not perceived how the mere signing of it by the defendant can have the effect to make that his seal, opposite to which the plaintiff wrote his own name only, to denote the execution of the instrument on his part, and on his own account; with nothing to show that the seal was placed there, on behalf of the defendant also, to stand as the seal of each, nor that he wrote his name with reference to that seal, as denoting the execution of the instrument by him; or that he authorized the sealing of it for him, by the plaintiff, or anybody else. On the contrary, as each was contracting for himself, it would seem that each acted for himself throughout; and that neither, contracting for himself, acted on behalf of the other, but intended each to execute the paper on his own behalf. And the fact that the defendant signed it himself is evidence of the absence of authority from him to another to act for him." In other words, the court held that the question whether a written contract is a specialty or parol contract of a party to it depends upon the fact whether it is sealed or not by such party, or some person for him and with his authority. The same contract may be the specialty of one and the parol agreement of another party to it: *Stabler v. Cowman*, 7 Gill & J. (Md.) 284.

III. Exceptions to Rule of Grantee's Nonliability as Covenantor.

a. **General Rule that a Grantee is Bound as a Covenantor.**—A grantee is held as a covenantor on a deed poll in *Georgia South. Ry. Co. v. Reeves*, 64 Ga. 493; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756, 8 L. R. A. 604; *Louisville Ry. Co. v. Power*, 119 Ind. 269, 21 N. E. 751; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269; *Lake Erie etc. Ry. Co. v. Griffin*, 107 Ind. 464, 8 N. E. 451; *Bloomfield R. R. Co. v. Grace*, 112

Ind. 128, 13 N. E. 680; Sexauer v. Wilson, 136 Iowa, 357, 113 N. W. 941, 14 L. R. A., N. S., 185; Peden v. Chicago etc. Ry. Co., 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424; Kennedy Bros. v. Iowa State Ins. Co., 119 Iowa, 29, 91 N. W. 831; Sjoblom v. Mark, 103 Minn. 193, 114 N. W. 746, 15 L. R. A., N. S., 1129; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Hagerty v. Lee, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631; Brigham v. H. G. Mulock Co. (N. J.), 70 Atl. 185; Newbery v. Barkalow (N. J.), 71 Atl. 752; McNichol v. Townsend (N. J.), 70 Atl. 965; Finley v. Simpson, 2 Zab. 311, 53 Am. Dec. 252; Huyler v. Atwood, 28 N. J. Eq. 276; Wahl v. Stoy (N. J.), 66 Atl. 176; Wales v. Sherwood, 52 How. Pr. (N. Y.) 413; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Trotter v. Hughes, 2 Kern. (12 N. Y.) 74, 62 Am. Dec. 137; Pardee v. Treat, 82 N. Y. 385; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Burr Admx. v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; King v. Whitely, 10 Paige (N. Y.), 465; Russell v. Pistor, 7 N. Y. (3 Seld.) 171, 57 Am. Dec. 509; Empire Bridge Co. v. Larkin Soap Co., 109 N. Y. Supp. 1062, 59 Misc. Rep. 46; O'Connor v. Bauer, 111 N. Y. Supp. 869, 127 App. Div. 854; Francis v. Zeiring, 112 N. Y. Supp. 647; Maynard v. Moore, 76 N. C. 158; Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672, 23 L. R. A. 396.

b. In Georgia the law is an exception to the common-law liability of a grantee on a deed poll. This exception is given in the case of the Georgia Southern R. R. v. Reeves, 64 Ga. 493. The facts in this case are as follows: "Osborne Reeves conveyed to the Selma, Rome and Dalton Railroad Company, their successors and assigns, the right of way through his land, of sufficient width to build said railroad, as well as all sidetracks and turnouts, not to exceed fifty feet from the center of the main line, together with all the rights and appurtenances thereunto appertaining. The said company was to build the road, pay the said Reeves twenty-five dollars in money; and it was further provided in the said deed of conveyance that a depot and station was to be located and given to him on the land so conveyed, to be permanently located for his benefit and that of his assigns, to be used also for the general purposes of said railroad company. Under that conveyance the company proceeded to enter upon, locate, grade and construct their railroad, but failed and neglected to comply with their contract in building the said depot and establishing a station as was agreed by them until said company became insolvent. Under proper legal direction all its rights, privileges, franchises and property were sold to, and became the property of, and is now owned by, the Georgia Southern Railroad Company, which said company has succeeded to all the rights of the said Selma, Rome and Dalton Railroad Company.

"This company having also failed to locate and build said depot and establish said station, the said Reeves has brought suit against the said company for its failure to comply with the agreement above specified."

The defendant in this case filed a demurrer to the complaint, alleging in substance that there was no privity between it and the Selma, Rome and Dalton Railroad Company. Said the court in this case: "The whole question was whether or not this judgment was error depends upon the construction of the deed and the relative rights of the party thereunder."

The question was further subdivided into two questions: first, whether the deed contained a condition which constituted a covenant, and secondly, if so, is it a covenant running with the land? Here the court defined the covenant as follows: "A covenant is an agreement between two or more persons, by an instrument under seal, to do or not to do some particular thing. It can only be created by a deed, but may be by a deed poll (the party named in the deed) as well as by indenture; but where lands are conveyed by indenture to a person who does not seal the deed, yet if he enters upon the land, and accepts the deed in other matters, he will be bound by the covenants contained in it." In concluding its decision the court said, citing with approval *Cheney v. Rodgers*, 54 Ga. 170, *Jumel v. Jumel*, 7 Paige (N. Y.), 591, *Moore v. Bennett*, 2 Ch. Cas. 246: "It is a well-settled rule that a party is charged with notice of recitals in any deed under which he claims title." The court therefore sustained the demurrer and affirmed the judgment: *Georgia Southern R. R. v. Reeves*, 64 Ga. 493.

c. Under the Law of Indiana the liability of a grantee under a deed poll is diametrically opposed to that of the common law. In that state the acceptance of a deed poll by the grantee makes it the mutual written contract of the parties, and hence the statute of limitations respecting verbal contracts does not apply thereto, and an action of covenant may be maintained against the grantee: *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756, 8 L. R. A. 604. This is a leading case wherein are reviewed numerous authorities. It has been cited with approval in the subsequent cases of *Harlan v. Logansport Nat. Gas Co.*, 133 Ind. 328, 32 N. E. 930; *Thiebaud v. Union Furniture Co.*, 143 Ind. 344, 42 N. E. 741; *Pittsburg etc. R. R. Co. v. Wilson*, 34 Ind. App. 324, 72 N. E. 666.

d. In Iowa.—In a recent case decided by the supreme court of Iowa, *Sexauer v. Wilson*, 136 Iowa, 357, 113 N. W. 941, the court said: "There is a sharp conflict in the decisions, but this court appears to be committed to the doctrine that in accepting a deed poll containing covenants or conditions to be performed by him in consideration of the grant he becomes bound for their performance: *Peden v. Chicago etc. Ry.*, 73 Iowa, 328, 5 Am. St. Rep. 680, 35 N. W. 424; *Kennedy Bros. v. Iowa State Ins. Co.*, 119 Iowa, 29, 91 N. W. 831. And such is the voice of the great weight of authority: *Georgia Southern R. R. Co. v. Reeves*, 64 Ga. 492; *Midland R. R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 758, 8 L. R. A. 604; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Maynard v. Moore*, 76 N. C.

158; *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545, and note, 36 N. E. 672, 23 L. R. A. 396; decisions collected in 11 Cyc. 1045. The doctrine is an ancient one, being laid down in *Sheppard's Touchstone*, page 117, as follows: 'If feoffment or lease be made to two . . . and there are divers covenants in the deed to be performed on the part of the feoffees or lessees, and one of them doth not seal, . . . and he that doth not seal notwithstanding accept of the state, and occupy the land conveyed or demised, in these cases, as touching all inherent covenants, . . . they are bound by these covenants as much as if they do seal the deed.' An English author, after contending for the rule hereinafter mentioned, observes that, as to above stated: 'Perhaps the doctrine has been too long sanctioned to be now reversed. At all events, it is an introduction of our equitable principle into a court of law; the acceptance of a deed being considered equivalent to an actual execution by the lessee': *Platt on Covenants*, 18. Cases to the contrary proceed upon a theory that an action of covenant is of technical nature, and cannot be maintained, except against the person who by himself or some other person in his behalf has executed a deed under seal or under peculiar circumstances has agreed to do a certain thing: *Kennedy v. Owen*, 136 Mass. 199; *Maule v. Weaver*, 7 Pa. 329; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214. Without entering upon a discussion of the merits of the controversy already discussed with much learning in books, we are content to adhere to the equitable rule that acceptance of a deed poll binds the grantee to the performance of covenants contained therein, supported as it is by the better reasoned cases and in effect approved by previous discussions of this court": *Sexauer v. Wilson*, 136 Iowa, 357, 113 N. W. 941.

e. The Law in Kansas is also an exception to the general rule as to the liability of a grantee on a deed. In the case of *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765, it was held that a grantee accepting a deed reciting that there is a mortgage on the premises, "to be paid by" or "assumed by the grantee, is personally liable for the payment of the mortgage." In deciding this case the Kansas court cites for authority the following: *Corbett v. Waterman*, 11 Iowa, 87; *Bowen v. Kurtz*, 37 Iowa, 240; *Ross v. Kennison*, 38 Iowa, 397; *Thorp v. Keokuk Coal Co.*, 48 Iowa, 253; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327.

f. The Supreme Court of Minnesota holds that a grantee is not bound by a covenant not contained in a deed or indenture in the chain of title, unless he has such knowledge or notice thereof as would imply that the condition or person was assumed as a part of the consideration: *Sjoblom v. Mark*, 103 Minn. 193, 114 N. W. 746, 15 L. R. A., N. S., 1129. This was a case in which the owner of land entered into an agreement or contract with an adjoining owner, in consideration of five hundred dollars, not to sell or permit to be sold upon the premises any intoxicating liquors. The contract was re-

corded in the office of the register of deeds. Thereafter the owner delivered a quitclaim deed of the premises (his wife joining) to respondent Elvina Smith, which deed contained no mention of the agreement or contract. The deed was also recorded in the office of the register of deeds. Respondent Smith then leased the premises to Sullivan, who in connection with a hotel ran a saloon on the premises. The foregoing facts were set out on the complaint, and it was alleged that respondents had actual and constructive notice of the contract. Respondent answered, admitting the execution of the contract, but denied any notice whatever of the same at the time of execution of the deed to Mrs. Smith, and alleged that the deed made no mention of the contract and was without any restriction whatever in regard to the use of the premises. The cause was submitted to the trial court upon the pleadings, and the court found that the agreement was executed and recorded as alleged in the complaint, and that respondent Sullivan was operating a saloon as alleged, but did not find that respondents had actual or constructive notice of the contract. Appellants urged that the contract embraces a covenant which runs with the land, but, if not, that it created an easement or equity in the land, and the grantee, Smith, having been a purchaser with constructive notice of the contract, that its provisions may be enforced against him and his assigns. The court in holding that the respondents, the grantee's assigns, lessors and lessees, were not bound, by reason of the fact they had no knowledge or notice, actual or implied, of the covenant, exhaustively treated the legal principles involved in the question of the liability of a grantee in deed of conveyance.

g. In New Hampshire.—In a well-considered case in New Hampshire—*Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633—it was held that acceptance by grantee of deed poll makes stipulations therein on his part binding upon him, if he had legal capacity to contract, so that assumpsit can be maintained against him for nonperformance thereof. And further, that stipulation by grantee in deed poll to maintain fence around granted premises ran with the land, and is enforceable at law in assumpsit against subsequent grantee, who takes with notice thereof, actual or constructive, or, at all events, is enforceable in equity, although it does not run with the land; notwithstanding the coverture of the original grantee might prevent any recovery against her. It will be noted that this case does not aver that the grantee can be held as a covenantor to a deed poll, and to this extent it cannot be said that this case, strictly speaking, is an exception to the common-law rule, but the common-law rule admits that while the grantee cannot be held as a covenantor, yet he may be sued as on assumpsit or on the case or in equity, but not at law, as a covenantor.

h. In New Jersey, the law is well settled that a covenant or stipulation inserted in a deed poll binds the grantee, his heirs and assigns, where the stipulation relates to the premises conveyed.

In such a case an easement may be acquired by the grantor by a clause of reservation. The technical distinction between reservation and exception will be disregarded and the language used so construed as to accentuate the intention of the party. The grantee in a deed and those claiming under him cannot deny the binding authority of a reservation in a deed: *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631. To the same effect are the following cases: *Brigham v. H. G. Mulock Co.* (N. J.), 70 Atl. 185; *Newberry v. Barkalow* (N. J.), 71 Atl. 752; *McNichol v. Townsend* (N. J.), 70 Atl. 965; *Finley v. Simpson*, 2 Zab. 311, 53 Am. Dec. 252; *Huyler v. Atwood*, 28 N. J. Eq. 276.

If a deed inter partes, whereby an estate is conveyed to the grantee, and the estate conveyed is accepted by the grantee, although only signed and sealed by the grantor, it is the deed of both parties, and the grantee is bound by the covenants therein contained on his part, and can be held in an action of covenant for the breach of them: *Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Crowell v. St. Barnabas Hospital*, 27 N. J. Eq. 650; *Hagerty v. Lee*, 54 N. J. L. 580, 25 Atl. 319, 20 L. R. A. 631; *Wahl v. Stoy* (N. J.), 66 Atl. 176 (in which the court held that a wife's name signed to a deed, but not named elsewhere in deed, construed to bind wife); *Golden v. Knapp*, 41 N. J. L. 215; *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 282.

1. In New York there have been many decisions to the effect that the grantee in a deed poll who accepts an estate is bound by the covenant therein to be performed by him, and that for a breach thereof he is liable in an action of covenant: *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124. But the grantee's liability has been modified by the recent case of *Rector etc. of St. Stephen's Church v. Rector etc. of Church of Transfiguration*, 114 N. Y. Supp. 623, where it is held that a restriction in a deed in the form of a covenant by the grantee that the property will not be used for other than church purposes cannot be enforced as a covenant when its enforcement will not benefit the grantor and its violation will not injure him.

The law is well settled under early decisions in New York that the grantee in a deed who accepts benefits thereunder is liable whether he signed or sealed the deed or not. In the case of *Wales v. Sherwood*, 52 How. Pr. (N. Y.) 413, the court stated the facts briefly as follows: "Phillips, the mortgagor, conveyed the premises to the defendant Sherwood, in consideration of thirty-six thousand dollars, of which Sherwood paid cash only eleven thousand two hundred and fifty dollars, and assumed and agreed to pay the mortgage as the remaining portion of the consideration money. The statement in the conveyance which creates this agreement, immediately after the habendum clause, is in these words: 'Which said mortgage, with the interest thereon from November 30, 1872, the party of the second part hereby assumes and agrees to pay, the same forming a part of the considera-

tion money hereby expressed.' The defendant Sherwood accepted the deed and entered into possession of and enjoyed the premises. The language creating the obligation to pay the mortgage is clear and explicit. It is objected on the part of the defendant Sherwood that he is not liable for any deficiency that may arise on the sale of the mortgaged premises, upon the ground that no agreement in writing has been signed by him wherein or whereby he promised or agreed to pay the bond and mortgage in question, and that there is no privity between him and the mortgagee. It is true that the defendant, the grantee, did not sign the deed, nor was it necessary that he should. The acceptance of the deed, and his entering into possession of the premises, was enough to make complete his liability for the payment of the mortgage, and for any deficiency arising on the sale. In *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556, it is distinctly held that the acceptance of the deed and the enjoyment of the estate created estops the grantee from denying his covenants, and from denying that the seal attached is his as well as that of the grantor. The court here cites the case of *Trotter v. Hughes*, 2 Kern. (N. Y.) 74, where Justice Denio says: 'The acceptance of a conveyance containing a statement that the grantee is to pay off an encumbrance limits him as effectually as though the deed had been inter partes, and had been executed by both grantor and grantee': *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213. In a recent case in this court, in this department, at general term, (*Calvo v. Davies*, 15 Hun, 222), it is held, Brady, J., that when a party by deed assumes the payment of a mortgage executed by his grantor, he becomes the principal debtor. The defendant's obligation, created by his agreement, inures to the benefit of the mortgagee, who may enforce the liability . . . assumed by the grantee in the deed 'by virtue of the doctrine of subrogation in equity, by which the creditor is entitled to use the collateral securities which the debtor has obtained to re-enforce the primary obligation. The mortgagee in such case is looked upon as occupying the position of a surety, while the grantee, having undertaken upon a competent consideration to pay the debt, is regarded as the principal debtor': See, also, *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253. Under these repeated and explicit decisions, the liability of the defendant for the deficiency, if any, would seem to be clearly established. There must be judgment for the plaintiff": *Wales v. Sherwood*, 52 How. Pr. (N. Y.) 413. To the same effect are the following cases: *Pardee v. Treat*, 82 N. Y. 385; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *King v. Whitely*, 10 Paige (N. Y.), 465; *Russell v. Pistor*, 7 N. Y. (3 Seld.) 171, 57 Am. Dec. 509; *Empire Bridge Co. v. Larkin Soap Co.*, 59 Misc. Rep. 46, 109 N. Y. Supp. 1062; *O'Connor v. Bauer*, 111 N. Y. Supp. 869, 127 App. Div. 854; *Francis v. Zeiring*, 112 N. Y. Supp. 647.

j. In North Carolina the liability of a grantee under a deed is the same as that in New York. In the case of *Maynard v. Moore*, 76

N. C. 158, it was held that a grantee who accepts a deed poll containing covenants or conditions to be performed by him as the consideration of the same becomes bound for their performance, although he does not execute the deed as a party. The assignee of such grantee is likewise bound.

k. In Ohio.—The same law governs in the state of Ohio. In the case of *Hickey v. Lake Shore etc. Ry. Co.*, 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672, 23 L. R. A. 396, Mr. Justice Dickman, in an able opinion, after reviewing *Spencer's Case*, 5 Coke, 16, 1 Smith's Lead. Cas. Eq. 68, held that: "Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing it, he could be deemed to have entered into an expressed undertaking to do what the deed says he is to do; and said undertaking for obligations imposed upon and assumed by the grantee, if not technically a covenant running with the land, is, nevertheless, an agreement of the grantee, evident by his acceptance of the deed, which might bind him and his personal representative, and, by expressed words, his heirs and assigns."

l. The Reason for the Exceptions to the general rule is given in *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556, where the court in substance said: "I have found no authority holding that the grantee in such a deed, a deed poll, is not bound by the covenants therein mentioned to be performed by him in some form of action. It has, however, been held in some cases that the technical action of covenant could not be maintained against such a grantee, because he had not sealed the deed." Here the court cites a number of the cases supporting the common-law general rule that the grantee is not liable in the action of covenant as a covenantor on a deed poll. To show the grantee's liability, the court proceeds to review the cases of *Rogers v. Eagle Fire Co.*, 9 Wend. 618; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Spaulding v. Hallenbeck*, 35 N. Y. 206; *Greenleaf's Cruise's Digest*, c. 26, tit. 32, sec. 3; *Sheppard's Touchstone*, 177; 2 Hill on Real Property, 325, and note, 364; 3 Washburn on Real Property, 3d ed., 280; *Finlay v. Simpson*, 2 Zab. 311, 53 Am. Dec. 252. After stating that the court find in none of these authorities any discussion of the principle upon which the liability of the grantee upon the covenant in a deed poll is based, the court proceed to give the reason why a liability is found and upon which principle this liability is based.

"It is undoubtedly true," say the court, "that a seal is essential to a covenant, and that an action of covenant can be based only upon an agreement in writing under seal. In the case of a deed poll containing covenants to be performed by the grantee, the grantee who has induced the grantor to give the deed in reliance upon the covenants, and who has accepted the deed and enjoyed the estate granted, is estopped from denying his covenants. He is estopped

from denying that the seal attached to the deed is his as well as that of the grantor, and hence when sued upon his covenants, the proof of the deed and of his acceptance thereof and enjoyment of the estate conclusively establishes that he has covenanted as stated in the deed. The chancellor, in *Torrey v. Bank of Orleans*, 9 Paige (N. Y.), 649, says: 'A recital of a fact in a deed is, as against the grantee in such deed, and all persons claiming under him through that deed, evidence of the fact recited therein, so as to save the necessity of further proof thereof by the grantor or those who claim under him.' The acceptance of the deed operates as an estoppel upon the grantee and those who claim under him, as against the grantor and his assigns or representatives. In *Sinclair v. Jackson*, 8 Cow. 543, Chancellor Jones says: 'A man who admits a fact or deed in general terms, either by reciting it in an instrument executed by him or acting under it, shall not be received to deny its existence.' And such estoppels run with the land into whose hands soever it comes: *Kinney v. Clark*, 2 How. (U. S.) 109, 11 L. ed. 194.

"But from the form of the attestation clause in the deed to Worcester, I think we must hold that he actually sealed the deed. It is as follows: 'In witness whereof the parties hereto of the first part have caused their corporate seal to be hereunto affixed and these presents to be signed by their president, and the said party of the second part hath hereto set his hand and seal the day and year first above written.' Here is an express acknowledgment by the grantee in the deed, which he accepted and under which he took and held the premises granted, that he had sealed the deed. Can he or those who hold under him be now heard to say that he did not seal it? The deed had a seal affixed, and it is well settled that the several persons who execute a sealed instrument may use or adopt the same seal: *Ludlow v. Simond*, 2 Caines Cas. 1, 7, 42, 55, 2 Am. Dec. 291; *Mackay v. Bloodgood*, 9 Johns. 285; *Van Alstyne v. Van Slyck*, 10 Barb. 383.

"Where two persons execute a sealed instrument, and the seal is placed opposite the name of one, it must be shown that the other adopted the same seal, but this may be shown by any competent evidence; and here we have an express acknowledgment of the grantee. It matters not that the grantee did not subscribe the deed with his name. This is not essential to a sealed instrument. All that is essential is that a party should execute it by sealing it as his instrument. The seal makes it his deed or specialty. It is the statute alone that requires a deed for the conveyance of land to be signed as well as sealed by the grantee. In *Coke on Littleton*, 230 b, etc., it is said, if mention be made in the deed 'that the grantor only hath put his seal and not the grantee, then is the indenture only the deed of the grantor. But when mention is made that the grantee hath put his seal to the indenture, etc., then is the indenture as well the deed of the grantee as the deed of the grantor.' The case of *Maule v. Weaver*, 7 Pa. 329, is adverse to these views. In that case the grantor alone signed the deed, and there was but one seal op-

posite to his name. The attestation clause was as follows: 'In witness whereof the said parties have hereunto interchangeably set their hands and seals the day and year first above written. The deed contained covenants to be performed by the grantee, and in an action of covenant it was held that the grantee was not liable because he had not sealed the deed. Chief Justice Gibson, in writing the opinion of the court, says, in substance, that subscribing the deed by the grantee was not essential, and was only important as authenticating the seal; and that when but one of the parties subscribed opposite the only seal, the presumption was that he alone sealed, and that in order to bind the other party by the seal there must be some evidence to overcome this presumption, and to show that he also adopted the seal, and he held that the recital in the deed, that both parties had sealed, was not sufficient to overcome this presumption. I cannot concur in this conclusion. I think the recital in the deed which the grantee takes and holds, and under which he enjoys the estate granted, furnishes the most satisfactory evidence that he has adopted the seal, and I am also of opinion that he is estopped from denying that the recital is true.

"I have thus far discussed this case upon the theory assumed by the counsel for the appellant, that it was necessary for the plaintiff to maintain that Worcester, plaintiff's grantee, was bound by the covenant contained in the deed as a sealed covenant in such a sense that an action at law upon the covenant as such could be maintained against him for any breach thereof. Upon this theory it was a covenant running with the land, and it is not disputed that this action is maintainable. But if I am wrong in all this, I find no authority against the maintenance of this action to restrain the defendants from doing what plaintiff's grantee, under whom they hold, agreed he would not do. All the authorities agree that some form of action, either in assumpsit, case or equity, can be maintained. If the action were against Worcester, I am unable to see any objection to its maintenance. He would be held bound by the agreement contained in the deed which he accepted. The deed would be held to be evidence that he had made the agreement therein contained. And upon the theory that it was not an agreement on his part under seal, he could have been sued for any breach of it in what was formerly called an action of assumpsit or an action on the case; and a court of equity would restrain him from doing what he had agreed not to do. The agreement qualified the estate which he took and attached itself to that estate. He contracted for himself and assigns; and when the defendants took the premises they were charged with notice of this agreement contained in the deed, through which they derive their title. They must be deemed to have assented to it, and are bound by it just as if they had made it with the plaintiff. In *Tallmadge v. East River Bank*, 2 Duer (N. Y.), 615, a very learned court held that a parol agreement, partly executed, not appearing in the deed, made by a grantee not to build out to the street on the land conveyed to him, was so far binding upon those

holding under him that they would be restrained from violating the agreement. And Platt, in his work above cited, seems to concede that a court of equity might enforce against a grantee a covenant contained in a deed poll, although an action of covenant could not be maintained": *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556.

m. Criticism of Exceptions.—The supreme court of Connecticut has criticised the exceptions to the general rule in its decision in the case of *Hinsdale v. Humphrey*, 15 Conn. 431. This criticism will be found on page 27 of this note. The supreme court of Pennsylvania has also criticised the exceptions to the general rule, which criticism will be found in the extract from *Maule v. Weaver*, 7 Pa. 329; ante, p. 357.

IV. Effect of the Abolition of Distinction Between Sealed and Unsealed Instruments.

In many of the states all distinction between sealed and unsealed instruments has been abolished by statute, except in case of corporate seals: *Dyer v. Gill*, 32 Ark. 410; *Ortman v. Dixon*, 13 Cal. 34; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. Rep. 199, 35 N. E. 135; *Williams v. Haines*, 27 Iowa, 251, 1 Am. Rep. 268; *Gibbs v. McGuire*, 70 Miss. 646, 12 South. 829; *Landauer v. Sioux Falls Imp. Co.*, 10 S. D. 205, 72 N. W. 467; *Garrett v. Belmont Land Co.*, 94 Tenn. 459, 29 S. W. 726; *Murray v. Beal*, 23 Utah, 548, 65 Pac. 727. In these states, therefore, the question of the common-law liability of a grantee under a deed poll, or under any other sealed instrument, cannot arise as that of a covenantor. His liability will be in an action of debt, in an action of assumpsit, or on an implied contract.

V. Liability of Grantee on Real Covenants.

a. In General.—A grantee or covenantee, under a covenant running with and restricting the use of land, or imposing burdens upon it, is bound by it, and may be sued for its breach: *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858, 15 L. R. A., N. S., 359; *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556; *Walker v. Kesner*, 86 Ill. App. 244; *Hardy v. Pecot*, 113 La. 350, 36 South. 992; *Commercial Wharf Co. v. Winsor*, 146 Mass. 559, 16 N. E. 560; *Morse v. Aldrich*, 42 Mass. (1 Met.) 544; *Poage v. Wabash etc. R. Co.*, 24 Mo. App. 199; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Bridgewater v. Ocean City R. Co.*, 62 N. J. Eq. 276, 49 Atl. 801, 63 N. J. Eq. 798, 52 Atl. 1130; *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Haywood Homestead Tract Assn. v. Miller*, 26 N. Y. Supp. 1091, 6 Misc. Rep. 254; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Birdsall v. Tieman*, 12 How. Pr. 551; *Astor v. Hoyt*, 5 Wend. (N. Y.) 604; *Van Horne v. Crain*, 1 Paige (N. Y.), 455; *Astor v. Miller*, 2 Paige

(N. Y.), 68; Tillotson v. Boyd, 4 Sand. (N. Y.) 516; Mygatt v. Coe, 42 N. Y. Supp. 734; Hickey v. Lake Shore etc. R. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672, 23 L. R. A. 396; West Virginia etc. R. R. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 686.

In Perkins Mfg. Co. v. Williams, 98 Ga. 388, 25 S. E. 556, the court held that the grantee was not responsible for the acts of the third person to whom the grantee had leased the land under the same conditions that the grantee himself held it. In Walker v. Kesner, 86 Ill. App. 244, the court said in substance: "The tendency of our courts is toward a greater liberality in matters of pleading, in order that substantial justice may be speedily done; but they have not as yet so far departed from the common-law rules of pleadings as to permit a recovery by covenant under the declaration which sets up a breach of implied warranty or a tort: Walker v. Kesner, 86 Ill. App. 244. And in Empire Bridge Co. v. Larkin Soap Co., 109 N. Y. Supp. 1062, 59 Misc. Rep. 46, it is said that, "Where one grants a parcel of land to which there is no access from the highway save one over the lands retained by the grantor, and in the grant covenants that he will provide a right of way to the highway by laying out and dedicating for public use a street or streets to form such right of way, such covenant is enforceable by and against subsequent purchasers from the parties, though the grantor did not expressly covenant except for himself."

A grantee under a deed poll containing covenants running with the land binding himself and heirs, who enters into possession of the estate conveyed is not liable for a breach occurring after he has sold the same to a subsequent grantee: Hickey v. Lake Shore etc. R. R. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672, 23 L. R. A. 396; Poage v. Wabash etc. R. Co., 24 Mo. App. 199; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550.

b. Covenants Restricting Building or the Use of Buildings bind grantees who take with notice of the extent and nature of the restrictions: Wahl v. Stoy (N. J.), 66 Atl. 176; Brigham v. H. G. Mulock Co. (N. J.), 70 Atl. 185; Leaver v. Gorman (N. J.), 67 Atl. 111; Newbery v. Barkalow (N. J.), 71 Atl. 752; McNichol v. Townsend (N. J.), 70 Atl. 965; Francis v. Ziering, 112 N. Y. Supp. 647; Haywood Homestead Tract Assn. v. Miller, 26 N. Y. Supp. 1091, 6 Misc. Rep. 254; O'Connor v. Bauer, 111 N. Y. Supp. 869, 127 App. Div. 854; Clark v. Devoe, 124 N. Y. 124, 21 Am. St. Rep. 652, 26 N. E. 275. See, on this subject the note to Wakefield v. Van Tassell, 95 Am. St. Rep. 215. Equity will restrain the violation of a covenant entered into by grantee, restrictive of the use of lands conveyed, not only against the grantee covenantor, but also against all subsequent purchasers with notice of the covenant, whether it run with the land or not: Leaver v. Gorman (N. J.), 67 Atl. 111; Brigham v. H. G. Mulock Co., 70 Atl. (N. J.) 185.

c. Covenants in Restraint of Trade or in Use of Property.—Every owner of real property has the right to deal with it so as to restrain

its use by his grantees so long as the restriction is made reasonable, with a due regard to public policy, and without creating an unlawful restraint on trade. Conditions and restrictions in a deed inserted with a view to assert this right by forbidding the use of the property for objectionable trades, businesses and purposes, have been often upheld: See the note to *Wakefield v. Van Tassell*, 95 Am. St. Rep. 221. Where a grantee binds himself by a covenant in his deed, limiting the use of the land purchased in a particular manner so as not to interfere with the trade or business of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor, taking title with notice of the restriction; and this, although the assignees of the covenantor are not mentioned or referred to. It is not necessary that the covenant should be one technically running with the land; it is sufficient that the purchaser has notice of it: *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335. For other authorities in support of this proposition, see *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724; *Taylor v. Owen*, 2 Blackf. (Ind.) 301, 20 Am. Dec. 115; *Mayor etc. of City of Baltimore v. Garrett* (Md.), 69 Atl. 429; *Hisey v. Eastminster Presbyterian Church*, 130 Mo. App. 566, 109 S. W. 60; *Leaver v. Gorman* (N. J.), 67 Atl. 111; *Trustees Columbia College v. Thacher*, 87 N. Y. 311, 45 Am. Rep. 365.

d. On Covenants Against Nuisances.—Covenants in a deed against nuisances on the premises create easements for the benefit of other respective land owners; it is unnecessary to insert them in subsequent conveyances to bind subsequent grantees: *Birdsall v. Tieman*, 12 How. Pr. (N. Y.) 551; *Barrow v. Richard*, 8 Paige (N. Y.), 351. Where such covenants have been inserted in a deed by an original owner, a subsequent grantee, or his lessee, whose conveyances contain no such covenants, may be perpetually restrained by injunction from erecting a steam engine on the premises: *Birdsall v. Tieman*, 12 How. Pr. (N. Y.) 551.

e. Liability of a Husband on Wife's Covenants.—Husband is liable on covenants in his wife's deed in which he joins: *Mygatt v. Coe*, 12 App. Div. 245, 42 N. Y. Supp. 734, 20 N. Y. Supp. 748, 44 Hun, 31, 31 N. Y. Supp. 1130, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850, 147 N. Y. 456, 42 N. E. 17, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646.

f. Liability of Wife on Husband's Covenants.—Where a wife joins with her husband in a lease of her lands, with covenants of quiet enjoyment, her heirs and devisees are not answerable after her death for any breach thereof—this for the reason that being a married woman she would not, while living, be bound: *Foster v. Wilcox*, 10 B. I. 443, 14 Am. Rep. 698.

g. Liability for Acts of Third Person.—A grantee is not liable for the acts of a third party: *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556; *Tillotson v. Boyd*, 4 Sand. (N. Y.) 516; *Astor v. Hoyt*,

5 Wend. (N. Y.) 604; *Astor v. Miller*, 2 Paige (N. Y.), 68. In Georgia the court holds that the grantee was not liable for the acts of a third person to whom the grantee had leased the land under the same conditions that the grantee himself held it: *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556. On the same principles the courts of New York hold that the assignee of a lessee, or the grantee of an estate, is not liable for breaches of covenants running with the land, which were committed by those who have preceded him in the enjoyment of the estate: *Tillotson v. Boyd*, 4 Sand. (N. Y.) 516. In the case of *Astor v. Miller*, 2 Paige (N. Y.), 68, the court holds that "A mortgagee of leasehold premises who has never been in possession, or in the receipt of the profits of the estate, is not liable to an action upon the covenants contained in the lease, as the assignee thereof."

h. Liability of Subsequent Grantees.—It is not necessary that a covenant between grantor and grantee should be one technically running with the land to be enforceable against a subsequent grantee, it being sufficient that he has notice of it: *Andrews v. McCoy*, 8 Ala. 920, 42 Am. Dec. 669; *Morse v. Aldrich*, 42 Mass. (1 Met.) 544; *Stevens v. Annex Realty Co.*, 173 Mo. 511, 73 S. W. 505; *Poage v. Wabash St. L. Ry. Co.*, 24 Mo. App. 199; *Russell v. Pistor*, 7 N. Y. (3 Seld.) 171, 57 Am. Dec. 509; *Maurer v. Friedman*, 125 App. Div. 754, 110 N. Y. Supp. 320; *Birdsall v. Tieman*, 12 How. Pr. (N. Y.) 551; *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. (N. Y.) 266; *Bald Eagle Valley Ry. Co. v. Nittany Valley Co.*, 171 Pa. 284, 50 Am. St. Rep. 807, 33 Atl. 239, 37 Week. Not. Cas. 89, 29 L. R. A. 423.

i. Liability of Grantee as Bona Fide Purchaser.—A purchaser of land is presumed to investigate his title, and where any defect or restriction or covenant appears in the recorded chain of title, it is sufficient to charge him with notice: *Daughaday v. Paine*, 6 Minn. (304) 443; *Maurer v. Friedman*, 125 App. Div. 754, 110 N. Y. Supp. 320. It is held in Minnesota that it is *crassa negligentia* for the purchaser to rely solely upon an abstract of title without an examination of the title deeds; neither does the fact that this is the usual custom of the country raise any equity in his favor: *Daughaday v. Paine*, 6 Minn. (304), 443.

j. Liability of Grantee Pro Tanto.—A grantee, as part owner of estate, is liable pro tanto for the breach of the covenants contained in the deed conveying same: *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Astor v. Miller*, 2 Paige (N. Y.), 68.

VI. Liability of Grantee on Personal Covenants.

a. In General.—Only the covenantor or his executors or administrators are bound on a personal covenant: *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *Gould v. Stanton*, 16 Conn. 12; *Kytle v. Kytle*, 128 Ga. 387, 57 S. E. 748; *Wood v. Wood*, 58 Ky. (1 Met.) 512; *Sullivan v. Carberry*, 67 Me. 531; *Pyle v. Gross*, 92 Md. 132, 48 Atl. 713; *Stanton v. Sauk Rapids Co.*, 74 Minn. 286, 77 N. W. 1; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Houston v. Zahm*, 44 Or. 610, 76 Pac. 641, 65 L. R. A. 799. A mere personal covenant, not running with the land

nor binding the alienee, will be enforced against the alienee in equity only where he is chargeable with notice of the contract: *Van Doren v. Robinson*, 16 N. J. Eq. 256. In *Pyle v. Gross*, 92 Md. 132, 48 Atl. 713, the supreme court of Maryland held that a married woman's inchoate right of dower is a mere chose in action, and the fact that she joins with her husband in signing a deed containing a covenant of warranty in order to release her right of dower in the estate conveyed, the property not relating to her separate estate either real or personal, does not make her liable for a breach of the covenant.

b. Liability of a Lessee.—An action of covenant for rent will not lie against a lessee where the lease is a deed poll, signed by the lessor only, although the lessee may have accepted the lease, and occupied and held under it during his full term, without paying the rent reserved; in other words, the lessee is not liable if he has not sealed and signed the lease: *Hinsdale v. Humphrey*, 15 Conn. 431; *Trustees of Hocking County v. Spencer*, 7 Ohio (pt. 2), 149; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214.

c. Liability in Equity of Assignee with Notice.—Although not bound at law on personal covenants, assignees who have taken with notice may be held liable in equity: *Van Doren v. Robinson*, 16 N. J. Eq. 256.

d. Liability of Assignee for Covenants Broken While not a Legal Assignee: *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Armstrong v. Wheeler*, 9 Cow. (N. Y.) 88; *Hurley v. Brown*, 60 N. Y. Supp. 846; *Tillotson v. Boyd*, 4 Sand. (N. Y.) 516; *St. Saviour's Churchward v. Smith*, 3 Burr. 1271.

VII. Privity of Estate and Contract.

To bind a grantee, there must be either privity of estate or of contract between the parties—i. e., between the original grantee and the grantee of the first covenantee: *Allen v. Greene*, 19 Ala. 34; *St. Louis etc. Ry. Co. v. O'Baugh*, 49 Ark. 418, 5 S. W. 711; *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531; *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; *Waycross Air Line Co. v. Southern Pine Co.*, 115 Ga. 7, 41 S. E. 271; *Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283; *Dalton v. Taliaferro*, 101 Ill. App. 592; *Keegan v. O'Callaghan*, 35 Ill. App. 142; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. 72; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Barkley v. Steers*, 47 La. Ann. 951, 17 South. 438; *Smith v. Kelley*, 56 Me. 64; *Pyle v. Gross*, 92 Md. 132, 48 Atl. 713; *Dawson v. Western Maryland R. R. Co.*, 107 Md. 70, 68 Atl. 301; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Bickford v. Page*, 2 Mass. 455; *Mason v. Kellogg*, 38 Mich. 132; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Miller v. Noonan*, 83 Mo. 343, affirming 12 Mo. App. 370; *Wheeler v. Schad*, 7 Nev. 204; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. 810; *Trustees Columbia College v. Lynch*, 70 N. Y. 440, 26 Am.

Rep. 615; Trustees Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Van Rensselaer v. Read, 26 N. Y. 558; Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Mygatt v. Coe, 152 N. Y. 457, 57 Am. St. Rep. 521, 46 N. E. 949; Newburg Petroleum Co. v. Weare, 44 Ohio, 604, 9 N. E. 845; Manderbach v. Bethany Orphans' Home, 109 Pa. 231, 2 Atl. 422; Town of Middletown v. Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191; Burtners v. Keran, 24 Gratt. (Va.) 42; Wallace v. Pereles, 109 Wis. 316, 83 Am. St. Rep. 898, 85 N. W. 371, 53 L. R. A. 644.

"A grantee of the covenant stands, in the lifetime of the covenantee, in the same position, as to suing upon the covenant, that his heir or devisee does after his death. But there is one rule that is of universal application. It is not sufficient that a covenant is concerning the land; there must be a privity of estate between the covenanting parties: Webb v. Russell, 3 Durn. & E. 393"; Keegan v. O'Callaghan, 35 Ill. App. 142. "A person cannot invoke a breach of warranty between his own vendor and the person who has sold to him, unless there be privity between himself and that vendor in respect to the subject matter of the call in warranty. In the absence of privity, his own contract measures his rights of warranty": Barkley v. Steers, 47 La. Ann. 951, 17 South. 438.

The court of appeals in New York in an able and exhaustive decision says: "There are three manner of privities, viz.: (1) Privity in case of estate only; (2) Privity in respect to contract only; (3) Privity in respect to estate and contract together: 2 Sugden on Vendors, 714; 4 Cruise's Digest, 376, Greenleaf's ed., 458. The term 'privity in estate' denotes mutual and successive relationship to the same rights of property: Stacy v. Thrasher, 6 How. (U. S.) 44-59, 12 L. ed. 337; Greenleaf on Evidence, secs. 189, 523; Bigelow on Estoppel, 6th ed., 347"; Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646. But in Rhode Island the court holds that "privity between the grantor and the grantee of an estate in fee simple being abolished by the statute of quia emptores, no covenant running with the land can exist between them": Town of Middletown v. Newport Hospital, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191; Hopkins v. Lane, 9 Yerg. (17 Tenn.) 79; Morton v. Thompson, 69 Vt. 432, 38 Atl. 88. In order that a subsequent grantee be held liable on a covenant, the covenant must be one running with the land—i. e., its performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties: Atlanta Consol. St. Ry. Co. v. Jackson, 108 Ga. 634, 34 S. E. 184. But in New Hampshire it is held that if the grantee had actual or constructive notice of the covenant, he is liable in assumpsit, or, at all events, in equity: Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633. The decision in this case also exhaustively states the law of privity as to a grantee's liability in the following words: "It has been asserted that covenants or agreements made by owners of land will not run with the land as a burden, unless there is between the covenantor and

covenantee a privity of estate, arising upon the relation of tenure between them. Assuming that the statute of *quia emptores* is in force in this state, it is clear that no relation of tenure existed between Johnston and Apphia Martin, the original grantor and grantee; and if the doctrine just referred to is correct, it would follow that the agreement entered into between them would not run with the land. But we are not disposed to adopt the doctrine. It is inconsistent with the rule that certain covenants for title, entered into on a conveyance in fee, will run with the land. There is no more privity of estate, in the sense of tenure, to support covenants which are a benefit to the land owner than there is to support those which are a burden to him. The suggestion that the running of certain covenants for title with the land is an exception may be met by the reply of Sir Edward Sugden (just quoted) to a similar suggestion upon another topic. The doctrine that privity of estate, in the sense of privity arising upon tenure, is necessary to make the burden of a covenant run with the land, is also entirely at variance with the rule that if the owner of an estate for life conveys his whole estate, reserving an annual rent, which the grantee covenants to pay, the grantor may maintain covenant for rent against an assignee of the grantee. *McMurphy v. Minot*, 4 N. H. 251, is exactly that case. It is there said by Richardson, C. J., page 254: 'Rent may be reserved upon a grant of a man's whole estate, in which case there can be no reversion.' See other cases cited in *Delafield v. Parish*, 25 N. Y. 9. Considering the question on principle, it seems to us that in a case like the present, there is such a connection between the parties that the agreement should run with the land, although no relation of tenure exists.

"The older authorities on the question of covenants running with the land are examined at length in the notes to *Spencer's Case*, *Smith's Lead. Cas.*, 5th Am. ed., 119, 183; and it is not proposed to comment on them here. Mr. Hare, one of the American editors, seems to conclude that the law should be substantially as we have laid it down (see pages 182, 183); but we do not understand him to assert that this conclusion is supported by the weight of authority. There are, however, some comparatively recent authorities, not referred to in Mr. Hare's note, which tend to support the view now taken. One of the most important of these is the much considered case of *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. There an annual rent had been reserved by a deed by indenture conveying the fee, the grantee covenanting for himself, his heirs, executors, and assigns, to pay said rent. It was held that this covenant ran with the land, and was binding upon an assignee, independently of tenure or reversion. *Denio, J.*, said (page 91): 'But there is a certain privity between the grantor and grantee of the land. It is not the privity arising upon tenure, for there is no fiction of realty annexed. It is, however, the same sort of privity which enables the grantee of a purchaser to maintain an action upon the covenants of title given to his vendor; and it is, moreover, a privity of the same nature with that which obtains between the grantor and grantee of terms for life and for years. It

is notorious that the grantee of a term is liable upon covenants which are in their nature capable of running with the land, such as covenants to pay rent, to repair, and the like, which his grantor made with the owner of the reversion. In this case there is, it is true, a reversion, and that may be indispensable to enable the covenantee to assign the obligation made to him; but it is not easy to see how, upon any kind of reasoning, the presence or absence of a reversion can affect the relations between the party primarily chargeable upon the covenants and another to whom he conveys the land charged with the performance of these covenants. It is obvious that the fiction of a feudal tenure has nothing to do with the case": *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633, 636.

If the covenant is personal, on the death of the obligee, it goes to his administrators, and he alone is entitled to sue on it. The converse of this is that on a personal covenant the grantee's administrator or other personal representative is alone liable and not the grantee's heirs: *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531.

"It is necessary for the creation and existence of a real covenant that there should be a privity of estate between the grantor and grantee; and such covenants are usually contained in the deed of conveyance itself": *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531.

VIII. Covenants of Ancestor Relating to Land.

a. Whether Bind Heirs.—At common law the heir was not answerable for the covenants of his ancestor unless expressly named, but this condition was remedied by the passage of an act of parliament. The various states, by statutory enactment, have made heirs liable for a breach of their ancestors' covenant, to the extent of the assets received: *Maynard v. Polhemus*, 74 Cal. 141, 15 Pac. 451; *McDonald v. McElroy*, 60 Cal. 484; *Holder's Heirs v. Mount's Heirs*, 25 Ky. (2 J. J. Marsh.) 187; *Lawrence's Heirs v. Hayden*, 7 Ky. (4 Bibb) 229; *Walker v. Fort*, 3 La. 535; *Morse v. Aldrich*, 42 Mass. (1 Met.) 544; *Webber v. Webber*, 6 Me. 127; *State v. Burness*, 129 Mo. App. 474, 107 S. W. 1094; *Barlow v. Delaney*, 86 Mo. 583; *Metcalf v. Larned*, 40 Mo. 572; *Fowler v. Kent*, 71 N. H. 388, 52 Atl. 554; *Hall v. Martin*, 46 N. H. 337; *Hutchinson v. Stiles*, 3 N. H. 404; *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. (8 Vroom) 282; *Roosevelt v. Fulton's Heirs*, 7 Cow. (N. Y.) 71; *Hill v. Ressegien*, 17 Barb. (N. Y.) 162; *Carter v. Long*, 114 N. C. 187, 19 S. E. 632; *Farber v. Blubaker Coal Co.*, 216 Pa. 209, 65 Atl. 551; *Woods v. Ely*, 7 S. D. 471, 64 N. W. 531; *Young v. Moore* (Tex. Civ. App.), 110 S. W. 548; *Auld v. Alexander*, 6 Rand. (Va.) 98; *Dickinson v. Hoomes' Admr.*, 8 Gratt. (Va.) 353; *Fields v. Squires*, Fed. Cas. No. 4776, Deady, 366.

b. Whether Bind Devisee.—A devisee under the common law was not bound by his testator's covenants (*Platt on Covenants*, 452), though by statute in some of the states he is bound to the same extent as an heir—i. e., to the assets (real estate) received: *McClure v. Dee*, 115 Iowa, 546, 91 Am. St. Rep. 181, 88 N. W. 1093; *Thompson v. Shoeman*, 1 Bibb (Ky.), 401; *Rohrbaugh v. Hamblin*, 57 Kan. 393, 57

Am. St. Rep. 334, 46 Pac. 705. On this subject the supreme court of New Hampshire said in the case of *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633: "Upon principle, we should say that a subsequent grantee, purchasing with the notice which registry gives of such a stipulation, impliedly enters into the same engagement as the first vendee, and is liable in assumpsit for nonperformance of the stipulation. We think that the first grantee in a deed poll like the present stands on the same footing with a devisee taking property under a devise imposing a burden in favor of a third party. In *Pike v. Brown*, 7 Cush. 133, 135, Shaw, C. J., expressly asserts that a devise 'stands on the same footing with a deed poll.' In *Veazey v. Whitehouse*, 10 N. H. 409, it was held that assumpsit could be maintained against the grantee of a devisee for nonperformance of the duties imposed by the devise": *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633, 636. But where a wife joins with her husband in a lease of her lands, with covenants of quiet enjoyment, her heirs and devisees are not answerable after her death for any breach thereof—this for the reason that being a married woman she would not, while living, be bound: *Foster v. Wilcox*, 10 R. I. 433, 14 Am. Rep. 698.

IX. Obligation to Perform Covenants.

a. Excuse of a Performance by Inevitable Accident.—To excuse the performance of an express covenant, it must be shown that it is prohibited by law, or that its performance has become impossible by the intervention of causes which human agency could not prevent: *Morrow v. Campbell*, 7 Port. (Ala.) 41, 31 Am. Dec. 794; *Singleton v. Carroll*, 6 J. J. Marsh. (Ky.) 527, 22 Am. Dec. 95; *Morse v. Aldrich*, 42 Mass. (1 Met.) 544; *Bohleke v. Buchanan*, 94 Mo. App. 320, 68 S. W. 92; *Green v. Kelly*, 20 N. J. L. 544; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Warner v. Hitchins*, 5 Barb. (N. Y.) 666; *Warfield v. Watkins*, 30 Barb. (N. Y.) 395; *Kemp v. Knickerbocker Ice Co.*, 51 How. Pr. (N. Y.) 31; *Cobb v. Harmon*, 23 N. Y. 148—in this case the court laid down the following principle: "It is a settled rule of law that where a party by his own contract absolutely engages to do an act, or creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident or other contingency not foreseen by or within the control of the party, unless its performance is rendered impossible by the act of God, or of the law, or of the obligee; but where the law creates a duty or charge and the party is disabled from performing it without default in himself and has no remedy over, then the law will excuse him": *People v. Bartlett*, 3 Hill (N. Y.), 571; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Delaware etc. R. R. Co. v. Bowns*, 58 N. Y. 573; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333, 29 Barb. 491; *New York etc. R. R. Co. v. Standard Oil Co.*, 87 N. Y. 486; *Myers v. Drake*, 10 Watts, 110; *Miller v. Phillips*, 31 Pa. 218; *Huntingdon etc. R. R. Co. v. McGovern*, 29 Pa. (5 Casey) 78—in this case the Pennsylvania court held that where one party is the cause why the covenant cannot be performed by the

other, performance is excused. To the same effect is *Lovering v. Buck Mountain Coal Co.*, 54 Pa. 291. The law on this subject as briefly stated in effect by the New York court in *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142, as follows: "Where a party is prevented by the act of God from discharging a duty created by the law, he is excused; but where he engages unconditionally by express contract to do an act, performance is not excused by inevitable accident, or other unforeseen contingencies not within his control." This doctrine as laid down in the New York court is supported by numerous cases cited in the text and in a note to the said volume in the said edition thereof by Mr. Francis Kernan.

b. Sufficiency of Performance.—A substantial compliance with a covenant by the grantee satisfies the covenant in the eyes of the law: *Avery v. New York Central etc. R. R. Co.*, 121 N. Y. 31, 24 N. E. 20; *Hoard v. Garner*, 10 N. Y. (6 Seld.) 261; *Stuyvesant v. Mayor etc.*, 11 Paige (N. Y.), 414.

X. Remedies, Venue and Jurisdiction.

a. Form of Remedy.—A deed poll made to and accepted by a grantee affects the mode of declaring only, and not the extent of his liability: *Hinsdale v. Humphrey*, 15 Conn. 431; *Willard v. Wood*, 4 Mackey (D. C.), 538; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 24 N. E. 756, 8 L. R. A. 604; *Dawson v. Western Maryland R. R. Co.*, 107 Md. 70, 68 Atl. 301; *State v. Humbird*, 54 Md. 327; *West. Maryland R. R. Co. v. Orendorff*, 37 Md. 334; *Stabler v. Cowman*, 7 Gill & J. (Md.) 284; *Parish v. Whitney*, 3 Gray (69 Mass.), 516; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Martin v. Drinan*, 128 Mass. 515; *Dickason v. Williams*, 129 Mass. 182, 37 Am. Rep. 316; *Fletcher v. McFarlane*, 12 Mass. 43; *Phelps v. Townsend*, 8 Pick. (Mass.) 392, 394; *Guild v. Leonard*, 18 Pick. (Mass.) 511; *Newell v. Hill*, 2 Met. (Mass.) 180; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Braman v. Dowse*, 12 Cush. (Mass.) 227; *Jewett v. Draper*, 6 Allen (Mass.), 434; *McCabe v. Swap*, 14 Allen (Mass.), 188; *Kennedy v. Owen*, 136 Mass. 199; *Goodwin v. Gilbert*, 9 Mass. 510; *Maine v. Cumston*, 98 Mass. 317; *Trustees v. Spencer*, 7 Ohio (pt. 2), 149; *Maule v. Weaver*, 7 Pa. 329; *Johnson v. Muzzy*, 45 Vt. 420; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210.

A grantee under a deed poll conveying an estate and containing covenants to be performed by him, although he accepts the deed and enters into possession of the estate, could not be sued under the common law, nor can he be sued in the District of Columbia, nor in those states in which the principles of common-law pleading and practice predominate, in an action of covenant: *Foster v. Atwater*, 42 Conn. 244; *Hinsdale v. Humphrey*, 15 Conn. 431; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Martin v. Drinan*, 128 Mass. 515; *Hocking County Trustees v. Spencer*, 7 Ohio (pt. 2), 149; *Maule v. Weaver*, 7 Pa. 329; *Johnson v. Muzzy*, 45 Vt. 419; *Willard v. Wood*, 4 Mackey (D. C.), 538; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 831, 34 L. ed. 210. To the same effect are the numerous cases cited post, p. 350.

The only remedy against a grantee for a breach of covenants contained in a deed poll conveying an estate, into the possession of which he enters under the deed, is by an action of assumpsit or implied contract arising from his acceptance of the deed: *Foster v. Atwater*, 42 Conn. 244; *Hinsdale v. Humphrey*, 15 Conn. 431; *Locke v. Homer*, 131 Mass. 93; *Martin v. Drinan*, 128 Mass. 515; *Hocking v. County Trustees v. Spencer*, 7 Ohio (pt. 2), 149; *Maule v. Weaver*, 7 Pa. 329; *Johnson v. Muzzy*, 45 Vt. 419; *Willard v. Wood*, 4 Mackey, 4 (D. C.), 538; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. Rep. 931, 34 L. ed. 210.

b. Jurisdiction and Venue.—When the action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory, and may be sued as a transitory action; but when it is founded on privity of estate, the action is then local, and must be sued in the county where the land lies: *Lienow v. Ellis*, 6 Mass. 331; an action of covenant, founded upon privity of estate in land, is local, and must be brought in the place where the land lies: *White v. Sanborn*, 6 N. H. 220. To the same effect as the above cases is a Pennsylvania case in which the court holds that assumpsit lies in Pennsylvania for the use and occupation of land in New Jersey, the court holding the action is founded on privity of contract, not on privity of estate. Others hold to the same effect that an action for rent by the lessor against the lessee is transitory, so is covenant by the assignee of the reversion, under the statute of 32 Henry VIII, chapter 34; but debt by an assignee of the reversion is local: *Henwood v. Cheeseman*, 3 Serg. & R. 500; *Dalton v. Taliaferro*, 101 Ill. App. 592.

SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY v. REYNOLDS.

[107 Md. 107, 68 Atl. 281.]

FIRE INSURANCE—Unfair Conduct in Receiving Proof of Loss.—Where an insured sends proof of loss to the company, stating that he will correct it if insufficient, but the company makes no reply to this nor to two subsequent letters, and several weeks later its agent writes that the proofs are so carelessly made that he has not felt called upon to enlighten the insured, and in reply to a subsequent demand the agent states that he neither denies nor admits liability, and refers the insured to his policy for information, the conduct of the company is unfair, and amounts to a denial of liability and a waiver of a provision in the policy that losses shall not be payable until the expiration of sixty days after receipt of proof of loss. (pp. 381, 382.)

S. Johnson Poe and Edgar Allan Poe, for the appellant.

John C. Rose and John L. G. Lee, for the appellees.

107 BURKE, J. Frank M. Reynolds sued the appellant, a corporation, in the superior court of Baltimore City on a policy of insurance, and from a judgment rendered against it in that suit it has appealed. The suit was instituted on the eleventh day of May, 1906, and the declaration is precisely similar to the one filed in the preceding case of the Continental Ins. Co. v. Reynolds, 107 Md. 96, 68 Atl. 277, except as to the date on which the **108** policy is alleged to have been issued. Certain legal questions, arising under the "iron safe clause" of the policy, were presented under the defendant's third and fourth prayers which were refused, but under an agreement incorporated in the record these questions are not to be considered in this case.

The questions raised upon the record for our determination are: First, was the suit properly brought under the act of 1886, chapter 184, known as the speedy judgment act of Baltimore City? Secondly, was the suit prematurely brought? In the preceding case we held that a suit on a fire insurance policy could be brought under that act.

This appellant, as the evidence shows, did not act fairly and frankly with the policy-holder, and its conduct is utterly irreconcilable with the recognition of its responsibility under the policy. The record shows that the first proofs of loss were mailed to John J. Babcock, the general agent for the defendant company, on March 12, 1906, accompanied by a letter from Mr. Lee in which he said: "We have made this proof of loss up as near as we could to conform to your rules. If it is insufficient please advise us and we will endeavor to correct the same." To this no answer was received, and on the 15th of March, Mr. Lee again wrote asking for a reply. On the 16th of March he wrote directly to the company at Springfield, Illinois, and said that he had sent to Mr. Babcock, the company's agent at Philadelphia, on the 10th inst., the proof of loss; there was an error in the date mentioned, for while the letter inclosing the proof of loss was dated March 10th, it was not actually mailed until the 12th. In his letter to the company Mr. Lee said: "You have never seen fit to acknowledge the receipt of any of my letters, though your agents here, McVomas and Kroh, admitted to me that you received the proof of loss. I went to Philadelphia on the 21st inst., to see you about this loss, but missed you, and they said you were here in Baltimore examining this loss, as you called up your agent Record at Bel Air." No response was made to this letter, and on the 30th of March,

Mr. Lee again wrote Babcock saying: "Please let me have answer to ¹⁰⁹ my recent communications in regard to the loss of Frank M. Reynolds at Level, Md. We have tried to comply with your rules in making proof of loss, and would like to have our money."

The first response which Mr. Lee received from Babcock was the letter of April 5th, twenty-four days after the first letter was written to him. In this letter Mr. Babcock wrote to Mr. Lee saying: "The very careless manner in which you made out the first paper sent in which you claim full amount of the policy, while your statement in the same papers showed you to be in error, and also your asking for an immediate payment of the face of the policy when the same under the plain conditions of said policy would not be due until sixty days after satisfactory proofs were received at the Home Office of the Company, indicated such negligence or carelessness that as a business proposition, I did not feel called upon to enlighten you for the benefit of your claim against the company which you seem so very desirous to have me do."

On the 16th of April Mr. Lee wrote to Mr. Babcock, saying that if he did not hear from him to the contrary by Friday, the 20th inst., he would take his action as a refusal to pay, and would bring suit. Mr. Babcock answered his letter on the 19th of April in this way: "Replying to yours of the 16th inst., I have to say that I assume no control or custody of your conjectures, or construction of my actions, but if you assume to construe them as you state in your letter you will do—such construction will be without regard for the statement or the facts, otherwise you could not assume what you claim to. My statement was very plain and clear, that I neither admitted nor denied liability, and for that reason would not ask Mr. Reynolds to perform any act for the company whatever." Mr. Lee wrote two subsequent letters to Mr. Babcock, one on the 25th and one on the 27th of April. In the letter of the 25th he complained that he could get no satisfactory answers to his letters, and in one of the 27th he wrote: "That common honesty requires you to state your position, and not delay the matter longer." In reply to this Mr. Babcock ¹¹⁰ wrote: "Your policy is the contract by which we are both to be governed, and I again refer you to the same for information."

The court will not permit the company to thus trifle with its policy-holders. These letters of the company's agent evince a total lack of appreciation of the duty owed by the company to the plaintiff, and tend strongly to show that the company

had decided not to pay the loss unless it was compelled to do so. Upon the evidence contained in the record, and under the principles stated in the case of *Continental Ins. Co. v. Reynolds*, 107 Md. 96, the first and second prayers of the defendant were properly refused. It follows that the judgment must be affirmed.

Judgment affirmed, with costs above and below.

It is the Duty of an Insurance Company, on the receipt of proofs of a loss, to promptly point out defects therein, if any, to afford the insured all reasonable facilities for ascertaining what they are so that he may be able to remedy them; otherwise the company may waive its right to object to the proofs as furnished: Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. Rep. 598; Gould v. Dwelling-house Ins. Co., 134 Pa. 570, 19 Am. St. Rep. 717; Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. 73, 21 Am. St. Rep. 904. And an insurance company may waive proofs of loss by denying its liability: Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 117 Am. St. Rep. 382; Security Mutual Ins. Co. v. Woodson, 79 Ark. 266, 116 Am. St. Rep. 75; Aetna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 112 Am. St. Rep. 232.

MAYOR AND COUNCIL OF HAGERSTOWN v. BALTIMORE AND OHIO RAILROAD COMPANY.

[107 Md. 178, 68 Atl. 490.]

MUNICIPAL CORPORATION—Power to Declare Nuisance.—A municipality has no power to declare anything a nuisance which is not such by statute or at common law. (p. 386.)

MUNICIPAL CORPORATION—Stockyard as Nuisance.—A stockyard situated in a town is not a nuisance per se. (p. 386.)

MUNICIPAL CORPORATION—Regulation of Domestic Animals.—A municipal ordinance making it unlawful for any person, without obtaining a permit, to herd or keep domestic animals, temporarily or permanently, within the city limits, at any point within two hundred and fifty feet of two or more residences, unless the animals are kept in an inclosed structure, is unconstitutional. (p. 387.)

MUNICIPAL CORPORATION—Permit to Keep Animals.—An ordinance which invests the mayor and council with arbitrary power to grant or withhold a permit to keep domestic animals within the city limits is unreasonable and void. (p. 388.)

Alexander Neill, Jr., and William J. Witzenbacher, for the appellant.

J. Clarence Lane, Wm. Ainsworth Parker and Henry H. Keedy, Jr., for the appellee.

¹⁸³ BRISCOE, J. The questions for decision in this case arise upon an appeal from a decree of the circuit court for

Washington county overruling a demurrer to a bill in equity. The principal question involved turns upon the validity of an ordinance passed by the mayor and council of Hagerstown, on the second day of May, 1907. The ordinance is as follows:

"An Ordinance entitled, an ordinance, to provide regulations for the herding, keeping, and confining of domesticated animals, within the corporate limits of Hagerstown.

"Section 1. Be it enacted and ordained by the Mayor and Council of Hagerstown, that it shall be unlawful for any person or persons, corporation or corporations, without a permit therefor first had and obtained from the Mayor and Council to herd, keep or confine, temporarily, transiently, habitually or permanently within a distance of two hundred and fifty (250) feet from two or more residences, which shall be situated ¹⁸⁴ within the corporate limits of Hagerstown, and upon a public street thereof, any horses, mules, donkeys, cattle, cows, steers, bulls, sheep, hog, goats or other domesticated animals whatsoever, whether the same are awaiting transportation or otherwise, unless such horses, mules, donkeys, cattle, cows, steers, bulls, sheep, hogs, goats or other domesticated animals shall be herded, kept or confined in an enclosed structure or building that shall be covered throughout by a substantial roof and enclosed on all sides by a tight wall containing apertures only for such doors and windows as shall be necessary to secure access and ventilation to such enclosed structure or building, and in no event shall any such doors and windows open or look upon any public street of said Hagerstown."

The validity of this ordinance is attacked upon several grounds: 1. Because it is unfair, partial and unreasonable; 2. It places unreasonable, arbitrary and oppressive power in the hands of mayor and council; 3. It prohibits the appellee company from doing what it is authorized and required to do, both as a common carrier and by statute; 4. It was not enacted as required by the charter of Hagerstown.

The facts of the case, briefly stated, are these: On the 25th of May, 1907, a warrant was issued by one of the police justices of Hagerstown charging upon oath that on the tenth day of May, 1907, the appellee corporation did without a permit first had and obtained herd, keep, and confine within a distance of two hundred and fifty feet from two or more residences situate on Summit avenue, a public street within the corporate limits of Hagerstown, a certain large number of cattle, cows, steers, and hogs, then and there, not being herded, kept and confined in an inclosed structure or build-

ing as provided by ordinance regulating the herding, keeping, and confining of domesticated animals, and contrary to the provisions of the ordinance passed on the second day of May, 1907.

The appellee company was arrested under the warrant and on 3d of June, 1907, filed in the circuit court for Washington county the bill of complaint contained in the record. A preliminary injunction was thereupon granted by the court below restraining all further prosecution of the suit under the 185 ordinance, and from an order of court overruling a demurrer interposed on the part of the defendant this appeal has been taken.

The bill of complaint charges that the plaintiff is a corporation duly incorporated under the laws of the state of Maryland, is engaged in intrastate and interstate commerce, and is common carrier of passengers, freight and livestock; that among the lines of railroads operated by it is the Washington County Railroad Company, extending from Hagerstown, Maryland, to Weverton, Maryland, where it connects with the main line of the appellee road. That the Washington County Railroad Company is a corporation duly incorporated by an act of the General Assembly of Maryland, passed at the January session, 1864, chapter 334, and that under its charter, it is required to furnish accommodation for the transportation of passengers and property offered for transportation, at the place of starting and at the usual stopping places for receiving passengers and freight. That the appellee company is in possession and control of the property of the last-named railroad company, including its terminals and stockyards, at Hagerstown, and operates the same for and on account of the Washington County Railroad Company under the terms and provisions of its charter, and subject to the duties and obligations imposed upon and granted to it by the act of 1864.

The bill further charges that the appellee, as a common carrier of livestock, and by the express provisions of the act of 1864, is required to provide proper and suitable stockpens and facilities for loading and unloading, and caring for horses, cattle and other livestock delivered to it in the course of its business at its regular stations. That in pursuance of law they have erected, entirely on land owned by it, convenient to its station and place of starting in Hagerstown, proper accommodations to receive for shipment livestock offered for transportation, to wit, an inclosure into which the livestock are driven. The inclosure is connected by an elevated footway, raised at such an angle as will offer safe ascent and

descent to or from the cars, and over which the livestock are driven for ¹⁸⁶ the purpose of loading for transportation or unloading them at the point of consignment. That without such inclosure and footway it would be unable to perform the duties required of it by law, as a common carrier, to those offering livestock for transportation or to those receiving livestock for transportation, or to those receiving livestock consigned to them, and would render itself liable to actions for damages.

It further avers that the inclosures are kept clean and free from any accumulation of offensive odors or dirt, and that its use is in accordance with its chartered rights and in compliance with its legal duty. That it is impossible for the plaintiff and the Washington County Railroad Company to locate their stockyards at a convenient place near to their station and convenient to the place of starting as required by its charters, without having the same within the prohibited distance from two or more residences situate within the corporate limits of Hagerstown and upon a public street thereof, and that it is impracticable to keep and maintain the stockyards for the uses stated in compliance with the requirements of the ordinance.

The bill also alleges that the appellee did, on the day charged, receive in due course of its business, as a common carrier, certain livestock delivered to it for transportation and shipment from its station in Hagerstown to points on its line outside, and kept the same for a reasonable time until the same could be loaded into its cars, shipped and transported, but that in so doing it was in the proper discharge of its rights and duties as a common carrier of livestock, and that it was done in the mode and manner above stated, and in accordance with the law imposed by its charter and as a common carrier.

The bill of complaint admits the charge in the warrant, but avers that the ordinance is illegal, void and of no effect, because the same is partial and unreasonable, is in restraint of trade, in violation of the interstate commerce act, in violation of the state constitution and the fourteenth amendment of the constitution of the United States, that it was not enacted and passed as required by the charter of Hagerstown, ¹⁸⁷ and that it is invalid and contrary to law, because it confers upon the mayor and council unreasonable and arbitrary power, under which unfair, unjust and hurtful discriminations may be practiced in its enforcement, in that companies engaged as a common carrier in the transportation of live-

stock may be put to a disadvantage in the conduct of the public business in favor of others engaged in the same business.

It will be thus seen upon the facts alleged by the bill, and admitted by the demurrer to be true, that the principal controversy here relates to the validity of the ordinance in question.

It is clear that the power of the mayor and city council of Hagerstown to pass the ordinance must depend upon the authority conferred by the legislature, either by express grant or by a fair and reasonable intendment. It will be found amongst the powers conferred by its charter are:

1. The mayor and council shall have the power to pass all ordinances necessary for the good government of the town.

2. "To prevent, remove and abate all nuisances or obstructions in or upon the streets, lanes, highways, alleys, drains or watercourses, or in or upon any lot adjacent thereto, and to provide for imposing a fine on any persons causing or creating such nuisance or obstruction."

3. "And for the preservation of the cleanliness, health, peace and good order of the community."

4. "And for the protection of the lives and property of the citizens."

5. "And to suppress, abate and discontinue, or cause to be suppressed, abated and discontinued, all nuisances within the corporate and sanitary limits of the town, they may pass all ordinances or by-laws from time to time necessary."

6. "To regulate and control all offensive trades, manufactures and traffic of offensive fertilizers or other commodities within the town limits."

The principal question, then, is whether or not the ordinance in question is a valid exercise of the powers thus conferred.

¹⁸⁸ It is well settled that a municipality has no power to declare a thing a nuisance which is not such at common law or has not been declared to be such by statutes: *Frostburg v. Wineland*, 98 Md. 239, 56 Atl. 811, 64 L. R. A. 627; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 484.

A stockyard situated in a town is not a nuisance per se, yet this ordinance makes unlawful that which it is necessary for the plaintiff to do in the performance of its duties, as a common carrier, and which confessedly under the demurrer is not a nuisance.

In *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, it is said that whatever power can be properly exercised by municipal authority over the rights and property of the citizen must be

derived from the legislature of the state. It must be by express grant or by fair and reasonable intendment; for otherwise the trades and business of the people would be at the mercy, and be made dependent upon the caprice, of those who might exercise municipal power, instead of being governed and regulated by the general law of the land. While the legislature has granted to the mayor and council of Hagerstown ample power to pass ordinances necessary for the good government of the town, to prevent, remove and abate nuisances, to regulate and control offensive trades, etc., yet it has not authorized the exercise of an unlimited control over the trades and business occupations of its people, by the passage of an ordinance similar to the one in question.

Besides this, it will be observed that the ordinance does not establish or prescribe any general rules by which the mayor and council are to be controlled or guided in granting or withholding the permission to herd, keep or confine the animals mentioned therein. It provides that the herding, keeping and confining, temporarily, transiently, habitually or permanently, of domesticated animals within the corporate limits of Hagerstown, as prescribed therein, shall be unlawful without a permit from the mayor and council. In other words, notwithstanding the business the appellee may be engaged in is a lawful one, and in accordance with its chartered rights, it may be destroyed or taken from it and given to its ¹⁸⁹ competitors, at the mercy or partisan action of the municipality. While the courts, federal and state, have been exceedingly liberal in the construction of ordinances passed for the good government, protection of the health, peace and good order of municipalities, yet they have always held that if an ordinance was capable of being administered partially or unreasonably, it was invalid. In *Re Christensen*, 43 Fed. 243, it is said: "The fact that it permits arbitrary discriminations and abuses in its execution, depending upon no conditions or qualifications whatever, other than the unregulated arbitrary will of certain designated persons, is the touchstone by which its validity is to be tested." In *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155, 51 N. E. 758, 42 L. R. A. 696, the supreme court of Illinois, in a well-considered case, says: "The ordinance, in so far as it invests the board of trustees with the discretion here indicated, is unreasonable. It prohibits that which is in itself and as a general thing lawful, and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated

by permanent local provisions operating generally and impartially. The ordinance is not general in its operation. It does not affect alike all citizens who use traffic vehicles. It is only persons driving traffic vehicles upon the boulevards without the permission of the board of trustees who are subjected to the penalties of the ordinance. The ordinance in no way regulates or controls the discretion vested thereby in the board. It prescribes no conditions upon which the special permission of the board is to be granted. Thus, the board is clothed with the rights to grant the privilege to some and to deny it to others. Ordinances which thus invest a city council or board of trustees with a discretion which is purely arbitrary and which may be exercised in the interest of a favorite few are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured."

The ordinance in the case at bar, we think, places unreasonable, ¹⁹⁰ arbitrary and oppressive power in the hands of the mayor and council, and we are compelled to pronounce it invalid and void. In the case of *Mayor etc. v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, this court held that where an ordinance laid down no rules by which its impartial execution could be secured, or partiality and oppression prevented, it would be declared invalid. The conclusion reached by us in this case is sustained by the weight of authority in the federal courts and the decisions of this and other states: *Mayor etc. v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Bostock v. Sams*, 95 Md. 400, 93 Am. St. Rep. 394, 52 Atl. 665, 59 L. R. A. 282; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220; *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. Rep. 461, 35 L. ed. 73; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620.

The cases of *Commissioners of Easton v. Covey*, 74 Md. 262, 22 Atl. 266, *Fisher v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 673, 48 L. ed. 1018, and other cases relied upon by the appellant, are unlike this. And in holding this ordinance void and invalid for the reasons stated, "we contravene no decisions in our own state, and impose no unnecessary restraints upon the action of municipal bodies" within proper and constitutional limitations. There are other questions raised on the record in this case, but as we hold the ordinance here in question to be invalid and contrary to law, it will be unnecessary for us to discuss them. For the reasons

given, the decree of the circuit court for Washington county will be affirmed.

Decree affirmed, with costs in this court and in the court below.

The Power of a Municipality to Declare What is a Nuisance is the subject of a note to *Miller v. Town of Syracuse*, 120 Am. St. Rep. 372.

The Validity of Municipal Ordinances vesting arbitrary discretion in the city council, or some board or officer, is discussed in the note to *City Council of Montgomery v. West*, 123 Am. St. Rep. 36.

Ordinances Regulating and Prohibiting the keeping of livestock and stables are ordinarily upheld as a proper exercise of the police power: *Miller v. Town of Syracuse*, 168 Ind. 230, 120 Am. St. Rep. 366; *City of St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614; *State v. Hord*, 122 N. C. 1092, 65 Am. St. Rep. 743.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY v. LYSHER.

[107 Md. 237, 68 Atl. 619.]

PUBLIC STREET—Injury to Blind Man by Falling into Hole.—

Where a blind man walking along a street with which he is familiar and feeling his way with a cane falls into an unguarded hole dug by a telephone company, the question of his contributory negligence and of the negligence of the company is for the jury. (p. 391.)

George Dobbin Penniman, for the appellant.

Arthur P. Shanklin and Alexander Harcastle, Jr., for the appellee.

²³⁸ BRISCOE, J. The plaintiff is a blind man living at No. 1622 North Bradford street, Baltimore City. He was employed at the Maryland ²³⁹ School for the Blind as a broom-sewer in one of its workshops. He was injured on the twentieth day of January, 1906, while walking on the west side of Bradford street between Federal and Lanvale streets, by falling into a hole, which had been dug in the sidewalk, and left open and unguarded by the defendant corporation.

The declaration states that the defendant is a corporation owning and operating a telephone service in the city of Baltimore and state of Maryland. That on or about the twentieth day of January, 1906, the defendant, by its servants and agents, dug in the sidewalk on the west side of Bradford street, between Federal and Lanvale streets, a deep hole, and

left the same open and unguarded, and the plaintiff while walking on Bradford street in the ordinary pursuance of his business fell into the hole dug by the defendant, its servants and agents, and left unprotected and unguarded by them, and by reason of the negligence of the defendant and its servants and agents in charge of the digging of the hole was grievously injured, and the plaintiff used due care but the defendant did not use due care.

The principal question before us is the ruling of the court upon the prayers, and this will require an examination of the evidence set out in the record.

The plaintiff was the chief witness, and testified that he lived with his brother in law at 1622 North Bradford street; that he had been blind for twenty-one years and was employed in the workshop at the Maryland School for the Blind; that he had been connected with the school for twelve years, and he had been employed in the broom-shop of the school for four years; that in going from his home on Bradford street to the School for the Blind, which is on the north side of North avenue between Calvert street and Guilford avenue, he walked south on the west side of Bradford street to Federal street and east on the north side of Federal street to the northeast corner of Milton avenue and Federal street, where he boarded a car and rode to Guilford and North avenues. He then left the car and walked across the pavement, following the inner ²⁴⁰ curb of the pavement to the steps of the workshop, and that he had been going over the same ground for four years. That he moved along the street by passing his cane over the street in front of him, feeling along with his cane, following the curbstone as much as he could. He further testified that he was hurt on Saturday, January 20, 1906. That he went to work that morning and left the shop at five minutes of 12; that at the time he fell he was following the curbstone with his cane in the same way he always did. He fell in the hole as he was walking on the pavement with his stick in his right hand, in the same way he always used it. He was running it along the edge of the curb as he always did and he stepped into the hole. There was nothing around the hole to warn him there was an obstruction. That he was severely hurt about hip, arm and back. There was further testimony to the effect that the hole in which the plaintiff fell had been dug by the agents of the defendant corporation along the footway or pavement of the street for the purpose of planting a telephone pole,

and the hole was open and unprotected at the time of the accident.

The defendant's prayer, offered at the close of the plaintiff's case, to the effect that the uncontradicted evidence on the part of the plaintiff shows that he failed to use his stick to determine the condition of the pavement in front of him, and thereby walked in a hole which he could have discovered by the exercise of proper care on his part, and was thereby injured, was properly rejected. This proposition upon the evidence was clearly a question for the jury.

At the conclusion of the evidence the plaintiff offered two prayers, both of which were granted, and the defendant offered twelve, of which the fifth, sixth, ninth and twelfth were granted and all the others were rejected.

The plaintiff's first and second prayers were properly granted, and have frequently been sustained by this court in damage cases, where the case is submitted to the jury and need not be discussed here.

The court committed no error in overruling the special exceptions ²⁴¹ to these prayers. There was evidence to sustain the propositions asserted by them, if believed by the jury.

It is plainly apparent, we think, that if the rejected prayers of the defendant had been granted by the court below, it would have been a manifest invasion of the province of the jury in determining the question of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff. These were both questions for the consideration of the jury under the facts of the case, and were fully and fairly submitted to the jury under the plaintiff's and defendant's granted prayers. The vital question in the case was whether the plaintiff, a blind man, exercised due care in passing along the sidewalk on the west side of Bradford street on the day of the accident. By the defendant's fifth prayer the question of due care was directly submitted to the jury, to the effect that if the jury believed the accident would not have happened if the plaintiff had used proper care on his part, then the verdict of the jury must be for the defendant.

By its ninth prayer the jury were further told that if they believe that both the plaintiff and defendant were negligent, then their verdict must be for the defendant, as the plaintiff could not recover if his negligence contributed to the accident.

The standard of care sought to be fixed in such cases by the defendant's rejected prayers is not "the ordinary care" sanctioned by the adjudicated cases: *Fennemen v. Holden*, 75 Md. 1, 22 Atl. 1049.

In *Sleeper v. Sandown*, 52 N. H. 244, where a blind man, in the daytime, walked off the side of an unobstructed bridge sixteen feet in width, which was defective for want of a rail, and suffered an injury, it was held that the court could not say, as a matter of law, that his fault contributed to the accident; but it was for the jury, after considering his familiarity with the road, his ability arising from the increased acuteness, fidelity and power of his other senses or otherwise, and all the circumstances of the case, to say whether he was guilty of carelessness in attempting to pass the bridge without a guide.

²⁴² In *Smith v. Wildes*, 143 Mass. 556, 10 N. E. 446, a somewhat similar case, in a suit against the keeper of a shop for personal injuries occasioned to the plaintiff, a blind man, while walking unattended along a street in a city, by falling into a hole in the sidewalk of a street, it was held that the questions of due care on the part of the plaintiff and negligence on the part of the defendant were for the jury, under the facts of the case: *Harris v. Uebelhoer*, 75 N. Y. 169; *Stewart v. Ripon*, 38 Wis. 584; *City of Franklin v. Harter*, 127 Ind. 446, 26 N. E. 882.

For the reasons stated, it follows there was no error of which the appellant is entitled to complain in the rulings of the court upon the prayers, and as the case was properly submitted to the jury, the judgment will be affirmed.

Judgment affirmed, with costs.

The Law Requires Persons Who are Blind or Deaf to exercise a somewhat greater degree of care for their own safety than it requires of other persons not so afflicted, in order to relieve them of a charge of contributory negligence: Karl v. Juniata County, 206 Pa. 633, 56 Atl. 78; Thompson v. Salt Lake Rapid Transit Co., 16 Utah, 281, 67 Am. St. Rep. 621. But clearly it is not negligence, as a matter of law, for a blind man to go upon a street with which he is acquainted, and he has a right to rely, at least to some extent, on the supposition that holes and pitfalls in the street will not be left unguarded: Smith v. Wildes, 143 Mass. 556, 10 N. E. 446; Franklin v. Harter, 127 Ind. 446, 26 N. E. 882. In Florida Cent. etc. R. R. Co. v. Williams, 37 Fla. 406, 20 South. 558, it is said that the blind have as much right to frequent railroad depots, public crossings, and other places of danger as any other of the general public; but that when they do so, due care dictates that they must provide themselves with such surroundings while there as are reasonably necessary to avoid upon their part all known dangers that encompass the place.

SAXTON v. KRUMM.

[107 Md. 393, 68 Atl. 1056.]

WILLS—What Amounts to Undue Influence.—The influence which vitiates a will must be exerted upon the testator to such a degree as to amount to force or coercion, or by importunities which he could not resist, so that the motive was tantamount to force or fear. (p. 394.)

WILLS—Unnatural Disposition of Property.—Neither an illicit relation between the testator and his beneficiary, nor an unjust and unnatural disposition of his property, is sufficient per se to warrant a conclusion of undue influence. They are circumstances properly to be considered by the jury in connection with evidence of undue influence, but are not in themselves evidence either of fraud or undue influence. (p. 396.)

WILLS.—Where a Testator Gives All His Property to His Mistress, and makes no provision for his relatives, including an aged and dependent sister, this raises no presumption of undue influence, and the will must be given effect in the absence of any other vitiating circumstances. (pp. 398, 399.)

A. C. Strite, Charles D. Wagaman, Wm. F. Shay and Ferdinand Williams, for the appellant.

Alex. Armstrong, Jr., Norman B. Scott, Jr., J. Clarence Lane and A. A. Doub, for the appellee.

398 BURKE, J. A paper-writing dated the fourteenth day of January, 1899, purporting to be the last will and testament of Christian F. Young, was offered for probate in the orphans' court of Washington county. By this paper the testator gave and bequeathed to Mrs. Lewis Krumm his house and lot situated in Watsontown, Pennsylvania, and all his money in banks, and all notes and bonds, and all valuables in his name and in his possession, if she survived him. On the petition and caveat of the appellant, who is a sister of the testator, three issues were sent to the circuit court for Washington county for trial. The first issue related to the execution and attestation of the will; and the second and third issues related to fraud and undue influence exercised and practiced upon the testator in the making of the will. The case was removed to the circuit court for Allegany county. The trial in that court resulted in a verdict for the defendant upon each of the issues.

This record brings up for review certain rulings of the lower court made during the trial. There are three exceptions in the record. Two relate to rulings upon questions of evidence and one to the action of the court upon the prayers. At the close of the plaintiff's case the court granted

three prayers, by which the jury were instructed to find their verdict for the defendant upon each issue.

The main and practically the only question in the case ³⁹⁹ arises under the second prayer granted by the court. By this instruction the jury were told that the plaintiff had offered no legally sufficient evidence to show that the will in question was procured by undue influence. The testator undoubtedly had the right to dispose of his property in any manner he deemed proper, consistent with the policy of the law, and it is no valid objection to the will that he gave his property to a stranger in blood; provided he was mentally competent to execute a valid deed or contract, and was free from undue influence at the time. There is not the slightest evidence that Christian F. Young was not fully competent to make the will in question. The issues of fraud and undue influence assume his testamentary capacity. It is not pretended, nor is there a particle of evidence in the record to show, that the will was procured by fraud, but it was earnestly contended that the record contains sufficient evidence to have justified the jury in finding that the will was procured by undue influence. Upon this issue the burden was upon the plaintiff and she was obliged to offer evidence tending to show that the will was the product of an influence exerted upon the testator to such a degree as to amount to force, or coercion, or by importunities which he could not resist, so that the motive was tantamount to force or fear. This is the established law in this state, and has been applied in numerous adjudged cases in this court: *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Layman v. Conrey*, 60 Md. 286; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Zimmerman v. Bitner*, 79 Md. 115, 28 Atl. 820. In *Somers v. McCready*, 96 Md. 437, 53 Atl. 1117, where the question now before us was under consideration, the court, speaking through the late Judge Jones, said: "From what appears to be the rule of law by which we are to be guided in the inquiry as to the sufficiency of evidence to support a charge of undue influence in the procuring of a will, it is not sufficient to condemn and avoid the will to find that there was influence which affected the testator's disposition of his property; but it must be, to vitiate his act, such influence as, at the time he was making such disposition, dominated his will, ⁴⁰⁰ took away his free agency, and prevented the exercise of judgment and choice by him. There may have been advice, suggestion or importunity going to affect his purpose and act in the dis-

position he chooses to make; yet if he had testamentary capacity, and was free and unconstrained in his volition at the time of making his will, the influence that may have inspired it or any of its provisions will not be that influence which the law denounces as undue. The inquiry to be made in any given case goes to the effect of the influence in bringing about the testamentary act, and how the effect was produced; and includes, first, the exercise of the influence; second, the opportunity for it to be exerted; and third, its actual exercise or operation to the extent and in such a way as to make the act in question the product of the influence uncontrolled by, and irrespective of, any volition on the part of the testator."

When the evidence contained in this record is tested by this well-established rule, is it legally sufficient to support the issue of undue influence? The testator died at Hagerstown, Maryland, in December, 1904. His wife had died in 1897. His only heirs at law were two sisters, one of whom is the appellant, and some nephews and nieces, children of two deceased sisters. Mrs. Saxton, the appellee, is a widowed sister of the testator, and was about sixty-three years of age at the time of his death, and is dependent upon others for her support. When the testator was a boy she had taken care of him. Shortly after the death of his wife in 1897 he made a will by which, after giving some small legacies to a number of his relatives, he devised and bequeathed one-third of the remainder of his estate to the appellant, stating at the time that she had taken him into her home when he was a boy and had been a mother to him. He had contributed small sums of money for her support, always spoke kindly of her, and appeared to be attached to her, and this apparently affectionate relation continued down to the time of his death. There is evidence in the record to the effect that at Christmas, 1899, the testator told the appellant that she would have his property in case he died before her.

401 The will in controversy was written by the testator in Hagerstown, and was attested by two reputable and credible witnesses, both of whom were dead at the time of the trial, but whose signatures were proved. The caveatee, Mrs. Krumm, was not in Maryland when the will was made, and there is no evidence whatever in the record of any acts of undue influence exerted over him at that time, or at any other time. There is no evidence of suggestion, advice or importunity on her part as to the disposition of his property. It is not shown that she ever discussed that matter with him, and there is nothing whatever to show the circumstances under

which the will was made. The testator had known Mrs. Krumm in Watsontown before he moved to Maryland, and prior to the death of his wife had been on friendly terms with her. There is evidence tending to show that after Mrs. Young's death, the testator had committed acts of adultery with the appellee in Watsontown, Pennsylvania, in 1897, and in Hagerstown in 1901. They corresponded frequently, and some of the letters of the appellee contained allusions of an impure and vulgar nature. But no reference is found in any of them to his business affairs.

The position of the appellant is that it was competent for the jury, as matter of law, to infer the will was procured by undue influence from the testator's illicit relation with the legatee, and from the unnatural disposition of the property, which disposition is contrary to his previously expressed purpose. To this proposition, which was earnestly pressed upon us by the very able arguments of the appellant's counsel, we cannot assent. There appears to be a general concurrence in the authorities that neither an illicit relation nor an unjust and unnatural disposition of the property is sufficient per se to warrant a conclusion of undue influence. They are circumstances properly to be considered by the jury in connection with evidence of undue influence, but they are not in themselves evidence either of fraud or undue influence. Where there is evidence of external acts of fraud, or undue influence, and especially where there is evidence that the capacity of the ⁴⁰² testator was impaired, the circumstances here relied on would be of great weight, as is evidenced from the cases of *Grove v. Spiker*, 77 Md. 300, and *Hiss v. Weik*, 78 Md. 439, 28 Atl. 400. In *Layman v. Conrey*, 60 Md. 286, and in *Dalrymple v. Gamble*, 68 Md. 523, 13 Atl. 156, the principle here stated is fully recognized and applied. In the latter case the court said: "A good deal was said in argument as to the relations which existed between the testator and this legatee, but assuming them to be as reprehensible and as immoral as they have been pictured, still such immoral conduct, of which they were both equally guilty, did not deprive him of the power of making a will in her favor, nor her of the right to receive whatever property that will gave her."

It would be a great inconsistency and absurdity to accord to a testator the power to dispose of his estate in any way he may think proper, consistent with the settled principles of the law, and at the same time say that this will may be annulled if it appears that its disposition is unjust or inequitable or

unaccountable. The effect of such a principle would be the practical denial of the free right of testamentary power in a very large class of cases.

The appellant places her main reliance upon the cases of *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, and *Reichenbach v. Ruddach*, 127 Pa. 564, 18 Atl. 432. It is to be noted that these cases are not in harmony with the general current of authority upon the question we are considering. In 29 American and English Encyclopedia of Law, 131, the rule as to the weight to be given to the fact of illicit relations shown to have existed between the testator and the legatee is thus stated: "While undue influence is more readily imputed where the beneficiary under a will is a mistress of the testator than where she is his wife, and while such illegitimate relation is a circumstance proper for the jury to consider, particularly where there is evidence that the testator's capacity is impaired, still there is generally held to be no presumption of undue influence arising from such relation merely, though there is authority that the mere existence of the unlawful relation justifies a verdict against the validity of ⁴⁰³ the will." The author states that this is the prevailing rule in at least eleven states of the Union.

The exception to the general rule is to be found in the two Pennsylvania cases cited by the appellant. It is true that in *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620, where it was shown that the testator was living in open adultery with a woman to whose children he devised the bulk of his estate, and where it was shown that the testator was suffering from a cancerous disease and an impaired mind, and where numerous acts of undue influence were shown to have been exercised upon him by the woman with whom he was living as his mistress, the court held that the facts of the adulterous relation taken in connection with the devise to the daughters of the adulteress was "evidence of an undue influence exerted by her over the testator and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will."

But in *Wainwright's Appeal*, 89 Pa. 220, the court declined to follow this broad rule. In *Wainwright's* case the court, speaking through Chief Justice Sharswood, said: "In an issue of *devisavit vel non* on the allegation of undue influence by the mother of an illegitimate child, the legatee in the will, the unlawful cohabitation of the mother with the testator is not of itself sufficient evidence from which the jury could infer undue influence: *Rudy v. Ulrich*, 69 Pa.

177, 8 Am. Rep. 238. It is true that if there are other facts, unlawful cohabitation may be a circumstance of weight." In Johnson's Appeal, 159 Pa. 630, 28 Atl. 448, the evidence tended to show the testator devised nearly one-half of his estate to a woman with whom he had unlawful relations at the time he executed the will. The court said: "The contention of the appellants necessarily rests upon the proposition that the existence of an unlawful relation between the testator and Mrs. Russel is sufficient alone to raise a question of undue influence, and to carry the question to the jury. That such is not the law was expressly decided by this court in Rudy v. Ulrich, 69 Pa. 177, 8 Am. Rep. 238, Main v. Rider, 84 Pa. 217, and Wainwright's Appeal, 89 Pa. 220. In the former of these cases Dean v. Negley, 41 ⁴⁰⁴ Pa. 312, 80 Am. Dec. 620, was distinguished as resting upon the peculiarity of its own facts."

In Smith v. Henline, 174 Ill. 184, 51 N. E. 227, it is said: "The existence of an illicit relation between the deceased testator and his mistress will not give rise to a presumption of undue influence as a matter of law, but undue influence is more readily inferred in the case of a will made in favor of a mistress than in the case of a will in the favor of a wife. The existence of the relation is a circumstance to be considered by the jury along with the other facts in the case. . . . The jury have a right to consider the fact of the unlawful relation where there is proof, as there is in the case at bar, tending to show restraint and interference, impaired mental capacity, loss of will power, and sickness or disease at the time of the making of the will."

The jury could not have lawfully concluded that the will was procured by undue influence from the mere fact that he gave all his property to the appellee, with whom the evidence shows he had been guilty of adultery. He had a legal right to give her his property. He had full capacity to make a will; he was many miles distant from the appellee when he made it; it was made more than five years before his death, and he made no change in it, although he had ample opportunity to do so, and the fact he did not change it is evidence that he was satisfied with its provisions. The disposition of his property is unnatural, and it is much to be regretted that no provision was made for this aged and dependent sister; but the court cannot aid her without unsettling the fixed principles of law. The testator undoubtedly had an unlawful attachment to this appellee, and resorted to deceit and

duplicity to obtain the possession of the will which he had made in 1897 in order that he might destroy it.

We have examined the record carefully, and the most we are able to say is that the will is the product of the improper affection entertained by the testator for Mrs. Krumm. But this is not undue influence sufficient to avoid the will, as that term is understood in the law. The language of the court in ⁴⁰⁵ *Sunderland v. Hood*, 84 Mo. 293, may well be applied to this case: "Many wills are made which ought not to have been made. Testators are always under some improper influence when the proper objects of their bounty are in no way provided for in their wills. A father who disinherits a worthy and needy son or daughter has a right, but must be prompted by some improper influence to do so. He may have formed an attachment for strangers stronger than that for his children, which should not exist, but the law does not prevent him from gratifying his whims or caprice in the testamentary disposition of his property."

There are two exceptions to testimony taken by the appellant. These exceptions are not referred to in the brief of the appellant's counsel, and were practically abandoned in this court. The testimony of Edward E. Hutzell was properly stricken out, as it had not the remotest bearing upon the issues. The witnesses to the will being dead, and the appellee having complied with the requirements of section 346, article 93 of the Code, there was no error in the ruling on the first exception, and the evidence objected to was properly admitted.

Finding no error in any of the rulings, they will be affirmed.

Rulings affirmed and cause remanded.

A Will is not Invalid Because It may Appear Unwise, Unjust or Unnatural in its provisions, for the law does not make the right of testamentary disposition dependent upon its judicious exercise. Nevertheless, the injustice or unnaturalness of a will is a circumstance which may be considered with other evidence tending to show, on the part of the testator, an unbalanced mind or a mind susceptible to or swayed by undue influence: 1 *Ross on Probate Law and Practice*, 64; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808; *In re Kaufman*, 117 Cal. 288, 59 Am. St. Rep. 179; *Berberet v. Berberet*, 131 Mo. 399, 52 Am. St. Rep. 634; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Crandall's Appeal*, 63 Conn. 365, 38 Am. St. Rep. 375.

Undue Influence to Invalidate a Will must amount to such a degree of restraint or coercion as destroys the free agency of the testator at the time of his execution of the will: *Dowie v. Sutton*, 227 Ill. 183, 118 Am. St. Rep. 266; *Compher v. Browning*, 219 Ill. 429, 109 Am. St. Rep. 346; *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 391.

Where a Testator Makes a Will in Favor of His Mistress, to the exclusion of his children or other relatives, this alone seems insufficient to

raise a presumption that the will was the result of an undue influence exerted by her: *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44; *Estate of Ruffino*, 116 Cal. 304, 48 Pac. 127; *Middleton's Case*, 68 N. J. Eq. 584; *McClure v. McClure*, 86 Tenn. 173.

SEABROOK v. GRIMES.

[107 Md. 410, 68 Atl. 883.]

WILLS—*Life Estate in Perishable or Consumable Property*.—A bequest for life of property which is consumed in use, such as a newspaper plant, together with the subscription list and goodwill of the business, vests title absolutely in the life tenant. (pp. 403, 404.)

TRADEMARK.—*The Name of a Newspaper* is in the nature of a trademark, and passes by an assignment in connection with the business in which it is used; but apart from the article or business to which it is affixed, it confers no right of ownership. (p. 404.)

TRUST—*Extension by Implication*.—The scope of duration of a trust will not be extended by mere implication beyond the plain and reasonable construction of the language employed in creating it. (p. 405.)

D. N. Henning, for the appellants.

E. Oliver Grimes, Jr., and Edward O. Weant, for the appellees.

⁴¹¹ PEARCE, J. The bill of complaint in this case was filed in the circuit court for Carroll county by the appellants, administrators de bonis non cum testamento annexo of Samuel B. Grammer and Samuel J. Conly, against E. Oliver Grimes, Jr., executor of Emily J. Rippard, deceased, John H. Mitten, and E. Oliver Grimes, Jr., and Wm. L. Seabrook, receivers, to enforce an alleged trust in favor of said Samuel B. Grammer created by the last will and testament of William H. Grammer, deceased, the father of said Samuel B. Grammer.

⁴¹² William H. Grammer died in 1862, leaving a last will and testament, executed in 1861, and duly admitted to probate, the material provisions of which are as follows:

"I give, devise and bequeath to my present wife, Emily Jane, all my property and estate real, personal, and mixed, for and during the term of her natural life, and, in trust during her life as aforesaid, for the support, education, and maintenance of my son, Samuel B. Grammer, begotten of the body of my deceased wife, Julia A., until he shall attain the age of twenty-one years.

"After the death of my wife, I will, devise, and bequeathe, all the estate above devised to my wife during her life, to my son, Samuel B. Grammer, and his heirs forever.

"I hereby constitute and appoint my wife, Emily Jane Grammer, to be sole executrix of this, my last will and testament, with full power and authority to do all things necessary to carry into effect the objects and trusts herein mentioned or intended."

Emily Jane Grammer, after the testator's death, married James Rippard, and died in 1905, having in 1903 sold to John H. Mitten a half interest in the newspaper then published by her in Westminster, Maryland, called the "American Sentinel," together with the plant and material used in publishing the same, it being the same newspaper and some portion of the same plant, owned and published by said William H. Grammer at Westminster at the time of his death, and which was included in the property disposed of by his will.

Emily J. Rippard left a last will and testament duly probated, and appointed E. Oliver Grimes executor thereof, as is alleged in the bill of complaint, but there is no copy of said will in the record, or any allegation in the bill of the disposition made by it of her property.

Samuel B. Grammer died in 1880 leaving a last will and testament, by which he devised and bequeathed all his estate, real and personal, to his aunt, Louisa C. Conly, and constituted her his executrix. This will was duly admitted to probate, but Louisa C. Conly renounced as executrix, and letters of ⁴¹³ administration de bonis non cum testamento annexo were subsequently granted to Wm. L. Seabrook and David N. Henning on said estate, and Louisa C. Conly has assigned and conveyed to Samuel J. Conly all her interest in the property devised and bequeathed to her by the will of Samuel B. Grammer.

The bill of complaint alleges that the "American Sentinel" was purchased by William H. Grammer in 1850, and was conducted by him with such skill and ability as to become very profitable and of great value, and that it became, and has since continued to be, the organ of the Republican party in Carroll county, and still is the only Republican political newspaper published in said county; that under the provisions of the will of said William H. Grammer, the said newspaper, plant and material, goodwill, and subscription lists, vested in the said Emily Jane Grammer "in trust for the said Samuel B. Grammer during his lifetime, and at her

death passed to the said Samuel B. Grammer and his heirs"; "that under the will of the said Samuel B. Grammer all his interest and estate became vested in his legatee, Louisa C. Conly."

"That under the deed of Louisa C. Conly, the said property became vested in her grantee, Samuel J. Conly, from the time of its execution."

"That the legal title of all said property is vested in Wm. L. Seabrook and David N. Henning, administrators de bonis non cum testamento annexo of Samuel B. Grammer, to be administered in due course of law."

The bill also alleges that upon the death of Emily J. Rippard, the said Wm. L. Seabrook, then sole administrator cum testamento annexo of Samuel B. Grammer, laid claim "to said 'American Sentinel,' newspaper, plant, and all the property and rights incident thereto, for the benefit of the heirs and claimants under the will of Samuel B. Grammer," and that thereupon E. Oliver Grimes, Jr., executor of Emily J. Rippard, and John H. Mitten, filed a bill against Wm. L. Seabrook, then sole administrator cum testamento annexo of Samuel B. Grammer, alleging the conflicting claims of title to said newspaper and plant, and procured a decree appointing the said E. Oliver Grimes, Jr., and ⁴¹⁴ the said Wm. L. Seabrook receivers, with power and authority to take charge of and conduct said newspaper and plant until the determination of the title thereto, which is still undetermined. The bill also alleges that the said Emily J. Grammer from time to time used and applied a portion of the income and profits derived from the publication of said newspaper "to the maintaining of said newspaper and plant, and replenishing of material incident and necessary thereto as occasion arose, as she was required to do by the trust reposed in her by the last will and testament of said Wm. H. Grammer," but never did execute the trust reposed in her of educating and maintaining said Samuel B. Grammer during his minority, or for any period thereof, but, on the contrary, required him from his earliest childhood to support himself and contribute to her support by his labor in the office of said newspaper, and that there has never been an accounting in respect to said trust by said Emily J. Rippard.

The bill then prays: 1. That the receivers state an account of their receipts and disbursements; 2. That said receivers be ordered to deliver possession of the property held by them as receivers to the said administrators of Samuel B. Grammer; 3. That the executor of Emily J. Rippard state an ac-

count of the income derived by her from said newspaper and the disposition thereof; 4. That the conveyance of one-half interest in said newspaper to John H. Mitten be declared fraudulent and void.

The defendants, the executors of Emily J. Rippard, the receivers and John H. Mitten each demurred separately to the whole bill—first, generally; second, because the court had already assumed jurisdiction over the same subject matter in the receiver suit; and third for other good causes. It will thus be seen that the bill does not seek to enforce the alleged trust as to any property other than this newspaper and plant, and that the title to that alone is here in controversy.

The primary and fundamental matter for determination, therefore, is the character and quality of the estate taken by ⁴¹⁵ Mrs. Rippard in this newspaper plant and business, and the nature and extent of the trust declared by the will in favor of Samuel B. Grammer in so far as it affected said newspaper plant and business.

It has long been held that a specific bequest of articles of personal property which are consumed in their use vests in their legatee absolutely, though given for life: Preston on Legacies, 95; Randall v. Russell, 3 Mer. 194.

In that case Sir William Grant said: "A gift for life, if specific, of things quae ipso usu consumuntur is a gift of the property, and there cannot be a limitation over after a life estate in such articles"; and in 2 Williams on Executors, page 707, seventh American edition, the same is said to be the law, citing Randall v. Russell, 3 Mer. 194, and Porter v. Tournay, 3 Ves. 314.

In Evans v. Iglehart, 6 Gill & J. 171, this court said: "It is conceded in all the authorities which touch upon the subject that where an article of personalty of such a nature that its use is its consumption is specifically given to a legatee for life with remainder over, the legatee for life takes the absolute property in the thing bequeathed." In that case however, the bequest for life was of the residue of the testator's estate, and the court held that notwithstanding a distinction made, or intimated, in the cases referred to, as to a general bequest or a bequest of the residue, "the same principle that would vest the absolute property of a specific bequest of consumable articles in the legatee for life, would vest a like estate in a similar legatee in things consumable, part of a general residue," and supported that conclusion by clear and cogent reasoning. This case was followed and approved in

Wootten v. Burch, 2 Md. Ch. 190, Budd v. Williams, 26 Md. 265, and many other cases, and is the settled law of this state.

That the property here in controversy is of a character whose use is its consumption, we think becomes manifest, upon consideration. Machinery, and especially the delicate and complicated forms which are used in the arts and manufactures, soon become obsolete, and may properly, therefore, be classed as perishable. In none of the departments of ⁴¹⁶ industry is this more observable than in the business of printing. Modern improvements in this class of machinery succeed each other so rapidly that the costly press of to-day may lose half its salable and usable value to-morrow. It has been nearly fifty years since the death of Wm. H. Grammer, and forty-three years intervened between his death and that of Mrs. Rippard. It is not conceivable that the press, type and material necessary to the operation of the business and in use by him at the time of his death could have continued to be serviceable for nearly half a century. Most of it must, of necessity, have long since worn out, and must have been replaced by Mrs. Rippard to enable her to continue the profitable publication of a paper recognized, as the bill alleges, as the organ of a great political party in a prosperous and progressive community. The bill alleges that she applied a portion of the income and profits of the paper to the maintaining and replenishing of the plant. If she had not done so, the press, type and engine (if there was an engine at that time), or other means of operating the press, would long since have been consigned to the scrap pile, as it would have been if she had never used it, and had left it to perish from nonuse. She could not have been compelled to use it in order to preserve it, nor could she have been required to replenish it, or add modern improvements for the benefit of the remainderman. This machinery, logically and legally, must be classified with farming implements and such articles of domestic and household furniture as are worn out and consumed by constant usage, and comes within the proper scope of the principle applied in *Evans v. Iglehart*, 6 Gill & J. 171.

The name of a newspaper is in the nature of a trademark, and passes by an assignment in connection with the business in which it is used; but apart from the article or business to which it is affixed, it confers no right of ownership, and unless the specific plant, or property by means of which this paper was published, is held to pass under this will to these plaintiffs, they can have no property right in its name, as an element of value in this case: *Witthaus v. Braun*, 44 Md.

⁴¹⁷ 303, 22 Am. Rep. 44; Wilmer v. Thomas, 74 Md. 485, 22 Atl. 403, 13 L. R. A. 380. "As a mere abstract right having no reference to any particular property, it is conceded it cannot exist": Dixon Crucible Co. v. Gugenheim, 2 Brewst. 339.

Mrs. Rippard, during her ownership, doubtless could have restrained a stranger from using the name of her paper in a competitive business at the same place, but this would be so, only because the right of property in the business was united with the right of property in the name. Nor do the subscription lists and goodwill of the paper constitute any element of value in this case. These were held in Seighman v. Marshall, 17 Md. 550, not to be assets, because "of inappreciable value, and of too uncertain and contingent a nature to be the subject of appraisement or estimation."

No better illustration of the good sense and soundness of that rule could be adduced than the present contention that the subscription lists and advertising patronage of forty-three years ago should be considered in this case. Unless, therefore, the absolute legal title which Mrs. Rippard must, under the decision in Evans v. Iglehart, 6 Gill & J. 171, be held to have taken in this property was held upon some trust for the benefit of Samuel B. Grammer, which is now capable of enforcement, and requires an accounting by her executor, these plaintiffs are not entitled to the relief prayed.

Now, as to the trust. There can be no trust if there is no intention to create one, and therefore, if upon all the circumstances of the given case the court is of opinion that the settler did not mean to create a trust, the court will not impute a trust where none in fact was contemplated: 1 Lewin on Trusts, side p. 83. It is also true, however, that any expression manifesting an intention that the donee is not to have the beneficial enjoyment of the whole or some part of the gift will be binding on the conscience of the trustee: Hill on Trustees, side p. 65.

But again, no trust can be raised where there is uncertainty, as where the objects intended to be benefited are imperfectly described, or the amount of the property to which ⁴¹⁸ the trust should attach is not sufficiently described: 1 Lewin on Trusts, side p. 132.

It necessarily results from these established principles that where a trust is declared, its scope or duration will not be extended by mere implication beyond the plain and reasonable construction of the language employed in creating the trust.

"In all cases the fiduciary words must be imperative on the donee": Hill on Trustees, 66. And this applies as well to the scope and duration of the trust as to its creation.

The contention of the appellants in this case is, that the whole estate was held in trust by Mrs. Rippard not only for the maintenance and education of Samuel B. Grammer during his minority, and during the residue of her own life for her own use, but in trust also for Samuel B. Grammer and his heirs or representatives after her death.

But we cannot so read this will, and in our opinion the only trust impressed upon this property was for the maintenance and education of Samuel B. Grammer until he became twenty-one. The clause which declares the trust is expressly limited to the purpose of maintenance and education, and to the period of his minority, and it is preceded by an unrestricted bequest to the wife for her own life. Whatever estate she took in law under that bequest, she took subject to a trust which by its express terms was to cease when the son reached twenty-one, and which in fact terminated more than thirty years ago. The will did not, either in terms or by any just implication, devote the whole income of the estate during his minority to his maintenance and education. The testator's wife was in law, and presumably in fact, as dear an object of his bounty as his son, and we think it is clear that his intention was that his wife should take the whole estate for her life, charged with the maintenance and education of the son during his minority, and that upon her death the whole estate should go to the son. But this last purpose of the testator is frustrated by the inflexible rule of law established in *Evans v. Iglehart*, 6 Gill & J. 171, and which, under all the cases, cannot be contravened ⁴¹⁹ or set aside in order to effectuate what the court, but for that rule, would give effect to. It must be observed that this will did not definitely fix and determine any amount to be applied to his maintenance or education, nor the character of education he was to receive. This was left to the discretion of the wife. The bill alleges that he was brought up in this printing office, but does not allege that he did not attend school or that he received no education. He was maintained, and through his employment in the office of the paper he received at least some sort of education, such as presumably qualified him for that trade.

If, during the continuance of that trust, the trustee did not provide proper maintenance or education, a court of equity, upon proper application through a next friend of the infant,

could and would have determined what was proper maintenance and education, having regard to the means at the disposal of the trustee, and would have enforced due execution of the trust. It is perhaps possible after reaching his majority that he might have maintained an action for neglect of duty upon proper proof thereof. But if such right ever existed, it has long since been barred by laches, if not by limitations.

We have carefully examined the cases cited in the appellant's brief and relied upon to sustain his contention that the trust embraced the whole estate in remainder, viz., *Chase v. Stockett*, 72 Md. 235, 19 Atl. 761, *McClernan v. McClernan*, 73 Md. 283, 20 Atl. 908, and *Roberts v. Roberts*, 102 Md. 131, 111 Am. St. Rep. 344, 62 Atl. 161, 1 L. R. A., N. S., 782, but without going into any discussion of these cases we cannot find in them any warrant for extending this trust beyond what we have indicated.

In the view that we have taken of this case, the question of multifariousness, and the omission to file exhibits named in the bill before issuing process, become unimportant, and this opinion will not be extended by any consideration of those questions.

Decree affirmed, with costs to the appellees above and below.

If an Estate for Life with Remainder Over is Given in Property Consumed in Use, it is the duty of the executor to sell the property, and to pay over the interest to the tenant for life; but if the executor consents to the legacy, and the property remains in the hands of the life tenant, and an increase takes place while in the possession of the tenant for life, it belongs to him, and the remainderman is only entitled to what remains of the original stock: *Saunders v. Haughton*, 8 Ired. Eq. 217, 57 Am. Dec. 581.

Where There is a General Bequest of a Residue for Life, with remainder over, including articles consumed in using and those not so consumed, the whole should be converted into money and invested, and only the interest paid to the legatee for life: *Covenhoven v. Shuler*, 2 Paige Ch. 122, 21 Am. Dec. 73.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

PILON v. VIGER.

[198 Mass. 118, 84 N. E. 310.]

EVIDENCE, Conclusiveness of the Court's Refusal to Admit.—
If letters are offered in evidence, and there is a conflict of evidence as to whether the party whom it is claimed wrote them did so or not, and the judge refused to admit them, it must be presumed he found they were not written by such party, and this finding will not be reversed by the appellate court. (p. 409.)

H. W. Ogden, for the defendant.

M. B. Warner and U. G. Church, for the plaintiff.

118 HAMMOND, J. This was an action to recover damages for breach of promise of marriage. The defendant denied the engagement and affirmed that if there ever was an engagement he was released therefrom by the conduct of the plaintiff. During the trial the defendant produced and offered in evidence three anonymous letters which he contended had been written by the plaintiff; and in response to a question propounded to him by the judge at the plaintiff's request, said that he offered them, first, on the question of damages, and, second, on the credibility ¹¹⁹ of the plaintiff. The letters are before us, and it is difficult to see their materiality upon either of these questions.

But we do not find it necessary to decide that question, because even if they do have a remote bearing there appears to be no error in their exclusion. Upon the offering of the letters there was a preliminary question before the court, and that was whether the plaintiff wrote them. Upon that question the evidence was conflicting, the plaintiff denying that she ever wrote them or authorized them to be written, or that she knew anything about them; while, on the other hand, a handwriting expert testified that she did write them.

Upon this preliminary question the evidence warranted a finding either way. The judge having rejected the letters, it is to be assumed that his finding upon this preliminary question was that the plaintiff did not write them; and that finding we cannot disturb. Upon such a finding the court properly excluded the letters. The rules of law applicable to such a situation have been so fully discussed in the recent cases of *Commonwealth v. Reagan*, 175 Mass. 335, 78 Am. St. Rep. 496, 56 N. E. 577, and *Commonwealth v. Tucker*, 189 Mass. 457, 76 N. E. 127, 7 L. R. A., N. S., 1056, that we need only to refer to those cases and the authorities therein respectively cited.

Exceptions overruled.

The Sufficiency of the Preliminary Proofs to justify the admission of such documentary evidence as a photograph is a question committed to the discretion of the trial judge, and will not be reviewed on appeal unless there has been an abuse of such discretion: See note to *State v. Matheson*, 114 Am. St. Rep. 441.

AMERICAN CIRCULAR LOOM COMPANY v. WILSON.

[198 Mass. 182, 84 N. E. 133.]

EQUITY PRACTICE—Additional Findings.—It is the right and duty of the judge to make such additional or different findings of fact, without hearing further evidence, as follow as inferences from the facts reported by the master. (p. 424.)

EQUITY PRACTICE.—The formal confirmation of the report of a master, though the more regular practice, is not indispensable where the action of the court amounts to a practical confirmation. (p. 424.)

JURISDICTION—State and National Courts—Patent Rights.—A state court has jurisdiction to try and determine a suit in equity to establish an equitable title to letters patent issued by the United States. (p. 424.)

LETTERS PATENT—Employer's Right to an Invention of His Employé.—The superintendent of a manufacturing department, charged with the duty of looking after machinery and making improvements therein, who makes an invention, his employer furnishing the money necessary to pay the expenses of procuring a patent, does not thereby lose his right to the invention so as to entitle his employer to an assignment of the letters patent, where such employer has had the benefit of the invention through the use of machines made under the patent and contributing largely to the success of his business. (p. 425.)

LETTERS PATENT, Employer's Right or License to Use.—When one in the employ of another in a certain line of work devises an improved method or instrument for doing that work, and uses the

property of his employers and the services of their employés to develop and put into practicable form such invention, and explicitly assents to the use by his employers of such invention, he thereby gives some kind of license, or, at least, a shop right to any patent which may be issued to him as the result of his invention and of the use of his employers' property and employés thus given to him, but his employers are not from these facts entitled to a perpetual and exclusive right under the patent. (p. 428.)

EMPLOYÉ in Manufacturing Plant, Duty of to His Employer.

One who is both a director and an employé of a manufacturing corporation owes it the duty to be vigilant in acquiring information as to all experiments made in its factory relating to machinery, and to communicate to the board of directors, or, at least, to the managing director, all material information he may obtain in regard to contemplated improvements or inventions, to enable his employer to act intelligently and promptly upon the subject of acquiring title to any new inventions or patents relating to its machinery, and is legally bound not to act in antagonism to the interests of the corporation. (p. 430.)

CORPORATION, MANUFACTURING, Employé and Director of, When may not Acquire a Patent for His Own Use.—A director and trusted employé of a manufacturing corporation, knowing that it is able to purchase any invention or improved machinery for use in its business, and that its interests would be promoted by such acquisition, violates his duty by secretly purchasing any such invention or improvement, either for the purpose of afterward selling it at an advance price or of using it to the injury of his employer, and such employing corporation may, by proper proceedings in equity, secure to itself the benefit of any purchase made by such employé. (p. 430.)

EMPLOYER AND EMPLOYÉ, Duty of the Former to Act Promptly When Informed that the Latter has Purchased Patent Rights to Which the Employer may Become Entitled.—If an employé, becoming aware of an invention susceptible of being applied to the machinery and in the business of his employer, takes an assignment of the patents for his own use, and the employer permits the employé to pay off an indebtedness existing in favor of the employer for moneys advanced to the inventor while perfecting his invention and also to make additional payments to the inventor, and then remains silent for more than two and a half years, this is an election to permit the employé to retain for his own use the rights acquired by an assignment to him of the letters patent, and precludes the employer from maintaining any suit to compel such rights to be assigned to it or used for its benefit. (pp. 431, 432.)

EMPLOYER AND EMPLOYÉ, Right of the Former to an Assignment of Patent Rights Acquired by the Latter.—If a trusted employé of a manufacturing corporation knows of experiments being made and inventions perfected relating to machinery of the class used in the business of the employer in the charge of such employé, and acquires by assignment letters patent to such invention without first giving his employer an opportunity to do so, the latter may treat the assignment as taken in trust for his benefit, and may compel the transfer upon reimbursing his employé for the respective amounts paid by him. (pp. 432, 433.)

LETTERS PATENT, Equitable Assignment of Right to by One Corporation to Another.—If letters patent to an invention are acquired under such circumstances that a corporation has a right to insist that the acquisition shall be treated as a trust for its benefit, and it turns over all its assets to another corporation, which takes charge

of its business affairs, and a formal assignment is made of such assets, including letters patent, inventions and choses in action, the assignee corporation is entitled to have the inventions so acquired held in trust for its benefit, and to a decree requiring an assignment to it. (p. 433.)

EQUITY PRACTICE—Discretion Respecting Recommitting the Master's Report.—It is within the discretion of the trial judge to determine whether he will recommit the master's report as requested at different times by each party. (p. 434.)

INJUNCTION PENDENTE LITE, Discretion of the Court Respecting.—It is in the discretion of the judge whether he will issue, continue or dissolve an injunction pendente lite, and what terms, if any, he will impose on either party, and whether he will require a bond to be given as a condition to such issuing. (p. 434.)

INJUNCTION, Assessment of Damages for Wrongfully Issuing It, When may be Refused.—Where no bond was required or given to authorize the issuing of an injunction, the court issuing may, on its dissolution, refuse to make any assessment of the damages suffered from such issuing. (p. 434.)

EQUITY PRACTICE—Amount to be Paid for an Assignment When Should not be Left Open.—When a court finds that the plaintiff should pay the defendant certain expenditures made by him as a condition of the assignment by him to the plaintiff of letters patent, the amount so to be paid should not be left in blank in the final decree, to be determined on a further application to the court, but the question of such amounts should be settled by the final decree. (p. 435.)

EQUITY PRACTICE—Requirement of an Assignment, When Should not be Absolute.—Where a decree establishes the complainant's rights to the assignment of letters patent on the repayment of disbursements made by the defendant, and where the plaintiff has an option not to make such payment unless he wishes to enforce his right to such assignment, the decree should not require the defendant absolutely to make the assignment, and should be to the effect that the defendant assign upon the repayment of the sums found to be due. (p. 435.)

Suit seeking to establish in the plaintiff corporation an alleged equitable title to seven letters patent issued by the United States and one pending application for a patent. On the filing of the bill, an ad interim injunction was ordered, and after a hearing, on motion, a further order was made that the injunction be continued pendente lite. A master's report was filed on December 31, 1906, and a motion made on January 16, 1907, by the plaintiff to recommit the case to the master for a supplemental report was denied as to certain specified matters, and granted as to others, providing the master "could make such report upon the evidence already introduced at the hearings before him." The plaintiff appealed from so much of the order as partially denied its motion.

On January 6, 1907, the supplemental report was filed, to which the plaintiff interposed eighty-seven and the defend-

ant four exceptions. These were heard before the trial judge, who, on March 15, 1907, made a memorandum and order on the exceptions and also an order for a final decree. This order directed a decree for the tubing machines and the three loom patents, and for the plaintiff as to the remaining three patents and the application for a patent.

The plaintiff, on March 18, 1907, appealed from the order contained in the memorandum, and on April 3d following, the defendants moved that the injunction be dissolved as to the patents regarding which a decree had been ordered in their favor. The defendants also moved that the damages which they had sustained by reason of the injunction be assessed. The motions were denied, and the defendant James S. Wilson appealed.

May 4, 1907, an interlocutory decree was entered overruling some of the plaintiff's exceptions to the master's report and sustaining others, and this decree was, as to the defendants' exceptions, as follows: "The defendants' exceptions are all overruled. They are four in number, and relate almost wholly to the rulings of the master upon matters of law. The court will state its own rulings upon matters of law so far as necessary to dispose of the case in the order for final decree." The defendants appealed from this latter decree.

May 25, 1907, a motion was made by the defendants that the report be recommitted to the master to find upon certain specified matters respecting which, according to the affidavit of their counsel, the inferences contained in the judge's memorandum for a decree drawn from the facts reported by the master were at variance with the evidence introduced before him. Counsel for the plaintiff filed an affidavit stating that the findings for which the defendants requested a recommittal of the report were either wholly immaterial or sufficiently covered by matters appearing in the master's report, or were directly contrary to the findings made by him and the evidence upon which the findings were made, and that many of the matters concerning which further findings were requested involved pure questions of law and inferences of fact on matters clearly inferable from facts appearing in the master's report. This motion having been denied, September 3, 1907, the defendants appealed. On the last-named date, the court denied a motion again interposed that the plaintiff be required to give a bond to pay damages sustained by reason of the injunction, and also denied an application to assess such damages, and from this action of the court the defendants also appealed.

The master's findings respecting the employment of the defendant Wilson upon which the complainant relied were as follows: "In 1892 the plaintiff was engaged in a small way in producing flexible tubing at a small shop or factory at West Hanover, Massachusetts. Both its output and financial resources were very small. The defendant at this time was the owner of a factory building in Chelsea, Massachusetts, and a resident of that city. He was then about thirty-one years of age and temporarily out of employment. He had had a varied business experience, having been a traveling salesman, a shipping clerk, and assistant superintendent of a paper mill and factory, and had for some time run a stock farm. He was a man of energy and executive ability and of good character, and the matter of renting his factory in Chelsea to the plaintiff and entering its employ came up. At a directors' meeting held in 1892, the following vote was passed: 'Voted, that the treasurer be authorized to make a contract with J. S. Wilson of Chelsea, Massachusetts, for the rent of his factory at Chelsea, Massachusetts, at a rent of one thousand dollars per year, with the privilege of four years at the same rate, also for his services for one year at eighteen hundred dollars to be paid at the rate of one hundred dollars per month and six hundred dollars at the end of the year.' No written contract was executed, but a verbal agreement in the matter was entered into, following sundry conversations between the defendant and the officers of the plaintiff company. The verbal agreement as regards the employment was in substance for the services of the defendant at the salary above named, and defendant entered plaintiff's employ in June, 1892, in accordance with said agreement, and rented his factory to the plaintiff in accordance with the terms of said vote.

"The first important contested question which arises is as to the terms of this verbal contract of employment. What did the parties understand by the 'services' of Wilson? The plaintiff contends that defendant was hired, in part at least, as an inventor or mechanical expert to improve the slow and inefficient methods then in use in making flexible tubing, and in general to have full charge and control of the mechanical and producing end of the business, subject, however, to one Brooks, who was then and until his death in July, 1899, the general manager of the company; that the defendant, either by express agreement or necessary implication, bound himself to transfer to the plaintiff patents to all inventions which he might either make or acquire while in the employ of the

plaintiff, or at any rate to transfer to the plaintiff all rights under such patents except in so far as he, the defendant, might be able to utilize such patents in lines of business not conflicting or competing with the plaintiff's business. The defendant denies that there was any such agreement or understanding, express or implied, as regards inventions of his own or others, or patents on the same, which he might in any way acquire. The burden of proof is on the plaintiff to establish such an agreement to transfer patents or rights thereunder, and, so far as any express contract or agreement is concerned, it has failed entirely to sustain the burden. This leaves, therefore, to be considered what contract or agreement, if any, the law would imply in the matters in dispute on the facts found. . . .

"I find that the defendant was employed as a superintendent of the manufacturing department of the plaintiff's business under and subject to the directions of Brooks, the general manager of the corporation in June, 1892, and for some seven years thereafter. His employment involved the directing of the employés in the manufacturing department, and, in general, the running of the manufacturing end of the business for the best interests of the plaintiff, but under and subject to Brooks down to the time of his death. Such employment would naturally require, if a superintendent was competent, and I find did require in this case, though not formally stated in the hiring, the looking after the machinery, making improvements on the same, if within his power, and generally the improvement of the plant as regards increasing the output, raising the quality and diminishing the expense. And from July, 1899, the date of Brooks' death, the defendant had full charge and control of the manufacturing and producing end of the business, subject to one Clark, who succeeded Brooks as general manager, and subject also to the board of directors. The evidence shows and I find that the board of directors and Clark gave the defendant practically a free hand in his department. He became an employé of the plaintiff company in a position important at the time and which steadily became more important. He was legally bound to serve it faithfully and to the best of his ability. On April 5, 1898, he was elected a director of the plaintiff company, and remained a director from that time down to a few weeks before the bringing of the present suit, to wit, to August 18, 1904, when he failed of re-election at an adjourned annual meeting of the stockholders. With the selling and financial end of the business, except incidentally

as a member of the board of directors, the defendant had no active duties. As regards making purchases, he had no direct or specific authority, and with one or two exceptions made none of any size. So far as the evidence shows, what purchases he did make were at all times approved or ratified by the plaintiff. He was, of course, aware of the prosperity of the plaintiff company and was a sharer therein. His own salary was increased from time to time, as were also other salaries, until it reached five thousand dollars per annum. And, as the business of the plaintiff company increased, his responsibilities also increased. From the time he was elected a director he also knew that the company was financially able and likely in all probability, if it knew of the opportunity, to purchase patents or patent rights which might be useful in improving the quality of its goods, or its processes of manufacture, or cheapening such processes, or in any way aiding to preserve its almost complete monopoly. Especially did the defendant know of this disposition on the part of the plaintiff company after August, 1901."

With respect to the tubing-machine invention, the master's finding was: "The application for the patent describes the invention as that of the defendant, and the patent itself was issued to him. . . . The expenses involved in procuring the patent, to wit, the patent solicitors and patent office fees, were paid by the plaintiff. The product turned out by the machine is the same product which is covered by the Herrick patent [a patent covering the then product of the plaintiff]. The first machine constructed which embodied the invention was paid for by the plaintiff and is the plaintiff's machine. This is true of a large number of other machines embodying the same inventions, and subsequently built from time to time to meet the growth of the plaintiff's business. Each of the machines built was in use much of the time from the date of its completion and installing in the factory before referred to down to August 18, 1904, when defendant left the employ of the plaintiff company, and, I am informed by counsel, all these machines are still there and in use or ready to use."

The findings and rulings of the judge as set forth in his memorandum for a decree were substantially as follows: "This patent was issued in 1895 to the defendant, the inventor. At that time Wilson was superintendent in charge of the manufacturing department of the plaintiff's business, receiving a salary as superintendent, and having a duty of making improvements in the plaintiff's machinery. There

was no express agreement between the parties in regard to the ownership of inventions which Wilson might make or of patents which he might obtain upon them. . . . In the absence of express agreement between the parties the law will not imply an agreement requiring Wilson to convey or assign to the plaintiff any interest in his own invention, or in the patent obtained upon it. Upon the facts found by the master, there was no breach of confidence or other violation of duty by Wilson to his employer in relation to his own invention and patent, and therefore no ground upon which to raise a constructive trust in favor of the plaintiff.

"The plaintiff contends that at least an exclusive license should be implied in its favor, on the ground (among other grounds) that the plaintiff had a substantial monopoly in the business of making and selling such flexible tubing, and the defendant owed a duty to protect that monopoly. The court declines to imply a right to an exclusive license. The plaintiff, in order to protect its monopoly, might have insisted upon making an express agreement with Wilson in regard to any patents he might obtain upon inventions made by him. Not having done so, it is entitled only to such rights as can justly be implied from the relation of the parties, and the surrounding material facts. The court rules that upon the facts of this case no license can be raised by implication against Wilson, except a license to use the existing machines actually constructed under the patent while he was in the employment of the plaintiff. If it is attempted to extend the implied license beyond such existing machines, there is no definite principle by which to limit its scope and extent, and it is therefore safer and more just to leave the parties where they have left themselves.

"The master reports that an agreement was made before him upon the subject of shop rights or implied licenses in machines, by which the whole matter was left open, and not to be passed upon in this suit. There is reason to fear that there has been some misunderstanding in regard to the scope of the agreement made before the master. Counsel for the plaintiff understood the expression 'shop rights or implied licenses' to mean merely rights in existing machines, and contend that the agreement left them free to argue that the plaintiff had an equitable right to compel the defendant Wilson to execute a license permitting the plaintiff to construct and use additional machines under the patent, to any extent to which the law would imply a license. It is not clear to the court, after comparing the various passages in

which the master used the expression 'shop rights or implied licenses,' that he used it in the narrow sense in which it was understood by counsel for the plaintiff. In view of the possible misunderstanding upon this point, the court would not feel at liberty to imply a license applicable to any but existing machines constructed during the employment of Wilson, without sending the case back to the master for a further report upon the whole question of licenses. It is unnecessary to take this action, however, for the reason that the court is of the opinion, and rules as matter of law, that upon the facts found the plaintiff has no rights in the tubing-machine patent except the right to use machines constructed under it while the defendant James S. Wilson was in its employment. This right rests upon estoppel in pais. As to the tubing-machine patent, the bill is ordered to be dismissed."

The findings of the master as to the three loom patents were in substance as follows: "Very late in 1900 one Brown began work experimenting, having in mind to invent a circular loom of an improved pattern, primarily intended to weave the cylindrical cotton covering for flexible metallic tubing. Brown was an inventor and machinist. He had a shop of his own, and before this time had frequently built machines and given expert service to the plaintiff company. He had never been in the employ of the plaintiff company on wages or salary, but had done his special work as an independent contractor. There was no evidence that Brown was asked by anyone to turn his inventive ability in this direction. He apparently did it of his own accord. And he finally succeeded in inventing such improved loom, and the invention is embodied in the circular loom patent and the two ancillary patents, the shuttle patent and the bobbin-holder patent, covering two separate mechanical devices in the improved loom. These loom patents are of great value, not only in the plaintiff's business, but in other lines.

"About January, 1901, the defendant, and very shortly afterward Clark, the treasurer of the plaintiff corporation and a director therein, learned that Brown was making experiments and endeavoring to perfect an improved circular loom. Each separately interviewed Brown and advanced him money, the defendant making advances before the invention had been perfected, and Clark making his advances subsequently, to enable Brown to build the first machine. The defendant's advances were made because he anticipated purchasing the invention, or an interest therein, and Clark's in

the expectation of getting some control thereof, if the machine to be constructed should prove a success. Clark testified, and I find, that his efforts toward obtaining this invention and the patents which might be procured thereon were made in behalf of the plaintiff corporation, and by himself as its representative. Defendant did not disclose to the officers of the plaintiff company that he knew of the invention of the loom and of Brown's work in that direction, nor did he disclose that he was furnishing money to Brown to assist him in the matter, and they ascertained these facts in another way. Clark concealed his negotiations from defendant for a time and actively tried to prevent defendant from learning what he, Clark, was trying to do. . . .

"Something of a quarrel took place between Clark and the defendant, but the final outcome was that in February, 1902, after the loom patent had been issued, and after the applications for the shuttle patent and the bobbin-holder patent had been filed, Clark abandoned his attempt to get from Brown these inventions for the plaintiff company, turned his contract with Brown over to the defendant, and left the defendant to deal with Brown as he might see fit. Defendant agreed to repay, and did repay, Clark the moneys which Clark had on the plaintiff company's account advanced Brown, and, without further opposition on the part of the plaintiff or Clark, completed the trade with Brown, took assignments from him of the inventions and the rights thereunder, and personally paid him about eight thousand dollars. . . . At the time the plaintiff company, as above stated, was through Clark desirous of purchasing these inventions, and the patents thereon. It was financially amply able to do so, and it was greatly to the financial interest of the plaintiff company to acquire them.

"It did not appear that Clark's knowledge of the whole situation and the dealings between the defendant and Brown were absolutely complete, but I see no reason to believe that Clark's information on the subject was not reasonably complete. Except that he was not informed, and did not ascertain until some two years later, what amount Wilson claimed to be the purchase price. I do not find that defendant actually concealed or misrepresented anything to Clark in the matter, unless certain statements of the defendant to Clark are to be considered as material misstatements of fact.

"The defendant, at the time he was thus dealing with Brown, was superintendent, and in charge of the mechanical and producing end of the plaintiff's business, as hereinbefore

fully found, and subject, of course, to the general manager. He was, and for nearly three years had been, a director of the plaintiff company. He was legally bound from his position to use all reasonable efforts to serve the plaintiff's interests, and, in view of his position and his office as director, I rule he was legally bound not to act in antagonism to the interests of the plaintiff corporation, and I find his purchase of these patents was directly antagonistic to its interests, and I rule was in violation of his duty to it, inasmuch as defendant made no attempt to protect the interests of the plaintiff company in this connection. The situation was very different from the situation as regards the tubing machine, both because the tubing machine was his own invention, and because at the time that patent was obtained he was not a director. I find, however, that there was no direct contract between plaintiff and defendant covering the subject of inventions which defendant might acquire. Apparently such a contingency was not thought of when defendant entered plaintiff's employ.

"Considering the question of law on all the facts heretofore found and herein recited, I rule on the facts found that defendant was not justified in himself purchasing these three loom patents against the plaintiff's interest and desire, unless in so doing he should take proper steps to secure to the plaintiff company full rights to use the inventions in its business. So far as other and noncompeting use was concerned, I see no reason why he did not have the right to obtain them for himself if the interests of his company were protected.

"But the directors of the company knew through Clark sometime prior to the closing of the defendant's trade with Brown, as well as at the time thereof, February, 1902, in part what defendant was doing, and beyond question knew generally that the defendant was paying considerable money to Brown for these inventions, or some interest in the same, and for building new looms, and also knew he was repaying Clark the moneys Clark had advanced on plaintiff's account as heretofore stated, knew that the looms which were built under the patents and were set up and used in the plaintiff's factory by the plaintiff were not paid for by the plaintiff, but were the defendant's own property. Knowing this the plaintiff company made no demand on the defendant, made no offer to reimburse him in whole or in part, and brought no action against him to assert the rights which it claims in this bill until August, 1904, a period of almost two years and eight months from the granting of the principal

patent. I rule, as matter of law, that this long lapse of time operates as a bar to the plaintiff company now enforcing the rights which it formerly had to relief in the matter of these patents. . . . The long delay was unreasonable. To permit the plaintiff to make its election after such delay would be to allow it to wait for time to determine the value of the inventions, and then, if defendant's bargain with Brown turned out a good one, to take the advantage of it in large part away from the defendant, and, if it proved a bad bargain, to leave it on his hands."

As to two other patents, known as the Blackler patent and the Thibodeau patent, the master found the assignments of them were procured under circumstances similar to those appertaining to the loom machine patents, except that there was no circumstance showing any acquiescence on the part of the plaintiff in the defendant's acts.

The master also found that the defendant Wilson procured from the inventor the assignment of the pipe-cleaning machine patent and the application for a patent upon the pipe-bending machine while he was president of a corporation called the Boston Electroduct Company, under circumstances importing breaches of trust on his part toward that company such as appertained toward the plaintiff with regard to the Blackler and Thibodeau patents; that the electroduct company was organized by the defendants and Clark and Brooks, all of whom were then directors of the plaintiff, and that a majority of the stock of the corporation so formed finally came under the control of the plaintiff, which thereupon carried on its business as co-ordinate to its own, but without terminating the corporate existence of the electroduct company; that an oral assignment before the suit was begun was made to the plaintiff of the assets of the electroduct company, and after the commencement of the suit a formal written assignment was made to the plaintiff. The master, being of the opinion that the equitable rights of the electroduct company against the defendant were not transferable by assignment, excluded all evidence of such assignment, "saving the rights of the plaintiff in the matter."

December 9, 1904, the electroduct company petitioned to be admitted as a party plaintiff, but on January 16, 1905, the petition was denied, the order of denial stating that it was made because the defendant averred that he did not put or rest his defense on the ground that the electroduct company had any right or title in or to the patents, or any of them, or to the application therefor. February 24, 1905,

plaintiff amended its bill by leave of the court, setting forth in detail the facts in regard to the electroduct company and the assignment of its assets to the complainant.

The trial judge, with regard to the loom patents, the Blackler and Thibodeau patents, the pipe-cleaning machine patent, and the application for a patent upon the pipe-bending machine, found and ruled as follows: "As to the patents acquired by Wilson by purchase: Wilson held a position of great importance to the plaintiff's business, as superintendent of its manufacturing department. The court finds as a fact that it was a confidential position. He had, as the master finds, 'practically a free hand in his department.' By virtue of his employment he had the best means of obtaining knowledge in respect to the plaintiff's machines. By reason of the situation in which he was placed, he owed his employer the duty to be vigilant in acquiring information as to all experiments made in the plaintiff's factory relating to machinery, and to communicate to the board of directors, or at least to the managing director, all material information he might obtain in regard to contemplated improvements, in order to enable his employer to act intelligently and promptly upon the subject of acquiring title to any new inventions or patents relating to its machinery. The duty of Wilson may be described as the duty of fidelity—an implied condition in his contract of employment. The court rules that if the defendant Wilson withheld information from the plaintiff which it was his duty to communicate, such withholding of information was a breach of confidence and a violation of his duty of fidelity to the plaintiff; and if by reason of such breach of confidence he prevented the plaintiff from acquiring title to the patents in question or any of them, equity will follow the title to such patents into his hands and charge it with a constructive trust in favor of the plaintiff. There is a real distinction between the case of the patent obtained by Wilson for his own invention and those patents which he acquired by assignment from others. In the former case there was no breach of confidence. In the latter case he was bound to make full disclosure to his master before acquiring for himself.

"In applying this ruling it seems to the court that upon the facts found by the master the three loom patents stand upon a different ground from the others. As to these inventions, Wilson had negotiations with Clark, the managing director of the plaintiff corporation, and Clark left the defendant to deal with Brown, the inventor, as he saw fit.

Wilson was at that time a director and paid employé of the plaintiff. It was competent for the board of directors to divide and apportion the duties of management of the affairs of the corporation among themselves, for convenience and efficiency in management. Wilson, as director, was not charged with any duty in respect to the purchase of inventions or patents. As employé—that is, superintendent in charge of the mechanical department of its business—it was competent for the plaintiff by its board of directors to make such contract with him for his services as they saw fit, and to release him from obligations of his existing contract. Upon the facts found by the master the court rules that in dealing with Clark in reference to the loom inventions Wilson could properly assume that Clark was acting for and in behalf of the corporation, and that any arrangement he might make with Clark would be in effect an arrangement between the corporation and himself. The facts then known to Clark were sufficient to put him fully on his guard against Wilson as a competitor for the loom inventions. Two other directors, who owned a majority of the stock of the corporation, knew substantially the facts which Clark knew, and the court rules that the arrangement between Clark and Wilson in respect to the loom patents was the agreement of the corporation, and binding upon it until set aside by a bill by minority stockholders or by some other legal proceeding. The effect of the arrangement between Clark and Wilson was to leave Wilson free, as between himself and the corporation, to purchase the loom patents for himself. As to these three patents the bill is ordered to be dismissed.

“The remaining patents can be disposed of together. The court finds that Wilson failed to perform his duty to the plaintiff in respect to each one of the four patents above named, that he failed to disclose information which it was his duty to disclose, and that such failure was a violation of the confidence reposed in him by his employer. The two patents relating to electroduct stand, in respect to this duty of Wilson, upon the same ground as the Blackler patent and the Thibodeau patent, notwithstanding the somewhat peculiar business relations between the plaintiff and the Boston Electroduct Company, shown in the report of the master. Wilson’s employer, the plaintiff, was obtaining profits from the sale of electroduct under contract, and had an interest in all improvements in machinery used for making electroduct, and a right to compete with any person for the purchase of such improvements or of any patent protecting them.

The master finds that the plaintiff would have purchased the Blackler patent if it had been given the opportunity to do so. The court finds as a fact, from other facts stated in the master's report, and in addition to facts stated by him, that the plaintiff would have purchased the Thibodeau patent and the pipe-bending machine patent and the pipe-cleaning machine patent if the defendant Wilson had performed his duty of fidelity to his employer. The court finds as a fact that his failure to perform that duty prevented the plaintiff from acquiring title to each of those four patents, and rules that Emma M. Wilson holds the legal title to the Blackler patent, the Thibodeau patent, the pipe-bending and pipe-cleaning machine patents, charged with a constructive trust in favor of the plaintiff. The remedy in damages is not adequate, and, by reason of the breach of confidence, equity imposes a trust. The defendant James S. Wilson was a director of the plaintiff corporation from April 5, 1898, but the court deems it unnecessary to rule upon the difficult question of the duties of an unpaid director, not charged with any specific duties as such director, and raises the constructive trust wholly out of his violation of his contract of employment, under which he was paid for his services.

"The plaintiff is entitled to an assignment of each of the four patents named, but upon condition of repaying to the present holder of the title the amount expended by Wilson to obtain title, with interest."

A. M. Lyman and C. F. Perkins, for the plaintiff.

S. L. Whipple and A. Lincoln, for the defendants.

¹⁹⁹ SHELTON, J. It is admitted that the defendant Emma M. Wilson received her assignments without giving any valuable consideration, and that her rights are no greater than those of her husband, the other defendant. The only questions accordingly to be considered are those which arise in determining the rights of the plaintiff against James S. Wilson, who will hereafter ²⁰⁰ be called the defendant. Certain facts have been found by a master to whom the case was referred by the superior court, and are set out in his report and supplementary report and in statements made by him in reference to two hundred and fifty suggestions and requests for findings of fact and rulings of law made to the master by the parties; and some additional findings of fact were made by the judge who heard the arguments of counsel upon the exceptions to the master's report and upon the

merits. These findings are stated in the elaborate order for a final decree made by that judge, and were made as inferences upon the facts reported by the master. The right and duty of the judge to make such additional or different findings of fact, without hearing further evidence, by way of inference from the facts reported by the master, cannot be contested: *Kennedy v. Welch*, 196 Mass. 592, 83 N. E. 11; *Young v. Winkley*, 191 Mass. 570, 78 N. E. 377; *Crane v. Brooks*, 189 Mass. 228, 75 N. E. 710; *Bacon v. Abbott*, 137 Mass. 397. This was done in *Moore v. Rawson*, 185 Mass. 264, 70 N. E. 64. And see the cases collected in 16 Cyc. 458. Nor is it material that the master's report does not appear to have been formally confirmed, though undoubtedly that would have been the regular procedure. It was accepted and acted upon by the judge with certain additions and corrections, the material for which was found in the report itself. This was a practical confirmation of the report, as varied by the findings and rulings made by the judge, especially when followed by the final refusal to recommit the report to the master. This view is confirmed by the fact that both the interlocutory decree as to the exceptions and the final decree afterward entered contain a recital that it was made "upon a master's report and exceptions of the parties thereto and the master's supplementary report": *White v. Hampton*, 10 Iowa, 238; *Johnson v. Meyer*, 54 Ark. 437, 16 S. W. 121. And the defendant very properly has not contended that this court has not jurisdiction to pass upon the case presented here. It is plain that the contentions made are not by their nature for the exclusive cognizance of the federal courts: *Binney v. Annan*, 107 Mass. 94, 9 Am. Rep. 10; *Desper v. Continental Water Meter Co.*, 137 Mass. 252; *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837; *Wade v. Lawder*, 165 U. S. 624, 17 Sup. Ct. Rep. 425, 41 L. ed. 851. We proceed to consider the merits of the case.

201 1. The plaintiff has not established its right to require an assignment of the tubing-machine patent, the letters patent numbered 543,587, and dated July 30, 1895, upon a machine for making tubing. This was the invention of the defendant himself, made while he was employed by the plaintiff as the superintendent of its manufacturing department. The machine was designed to turn out the same product, a flexible covering and protection for electric wires, which the plaintiff was already producing under the Herrick patent, so called, for the use of which the plaintiff held an exclusive license; and it was a material improvement upon the pre-

vious mode of obtaining that product. One of the defendant's duties under his employment was to look after the plaintiff's machinery and to make improvements therein. The expenses of procuring the patent were paid by the plaintiff. Many machines embodying the invention and built under the patent have been constructed under the direction and supervision of the defendant at the expense of the plaintiff, and have been used by it in its business with his knowledge and consent; and the success of its business has largely depended upon its use of these machines. But these circumstances and the other facts which have been found do not show that the plaintiff is entitled to the property right in the invention itself and in the letters patent which secure that right. The invention and the patent thereon belong to the inventor, to whom the patent has been issued, unless he has made either an assignment of his right or a valid and enforceable agreement for such an assignment, even though it was his duty to use his skill and inventive ability to further the interests of his employer by devising improvements generally in the appliances and machinery used in the employer's business. This was assumed in *Burton v. Burton Stock Car Co.*, 171 Mass. 437, 50 N. E. 1029, and in *Hope-dale Machine Co. v. Entwistle*, 133 Mass. 443. It is the settled doctrine of the federal courts: *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. Rep. 886, 37 L. ed. 749; *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct. Rep. 193, 30 L. ed. 169; *Sendelbach v. Gillette*, 22 App. Cas. (D. C.) 168; *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A., N. S., 1172; *Barber v. National Carbon Co.*, 129 Fed. 370, 64 C. C. A. 40, 5 L. R. A., N. S., 1154; *Whiting v. Graves*, Fed. Cas. No. 17,577; *Barry v. Crane Brothers Mfg. Co.*, 22 Fed. 396. It was said by Gray, J., in *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. Rep. 886, 37 L. ed. 749: "A ²⁰² manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect." And Gray, C. J., in an elaborate opinion in *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A., N. S., 1172, decided in 1905, after a careful examination of the previous decisions, says: "We have been referred to no case, nor have we been able to discover one in which, apart from express

contract or agreement, and upon the mere general relation of employer and employé and of the facts and circumstances attending it, the employer has been vested with the entire property right in the invention and patent monopoly of the employé, or with anything other than a shop right or irrevocable license to use the patented invention. Such a right in the employer, the employé may be estopped to deny, by the fact of his employment and his conduct in relation to the use of his inventions by his employer, and to that extent and no further have the cases gone." The same principle has been maintained in other states: *Eustis Mfg. Co. v. Eustis*, 51 N. J. Eq. 565, 27 Atl. 439; *Fuller & Johnson Mfg. Co. v. Bartlett*, 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747; *Joliet Mfg. Co. v. Dice*, 105 Ill. 649. It has been enforced between partners: *Belcher v. Whittemore*, 134 Mass. 330; *Burr v. De la Vergne*, 102 N. Y. 415, 7 N. E. 366; *Slemmer's Appeal*, 58 Pa. 155, 98 Am. Dec. 248. How far the rule will be held to be applicable where it appears that by the express terms of the hiring the employé was to exercise his inventive faculties with reference to the specific inventions in question for the sole benefit of his employer, we need not now consider, for that question does not arise in this case: See *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. Rep. 322, 40 L. ed. 480; *Solomons v. United States*, 137 U. S. 342, 11 Sup. Ct. Rep. 88, 34 L. ed. 667; *Hapgood v. Hewitt*, 11 Biss. 184, 11 Fed. 422; *Annin v. Wren*, 44 Hun, 352; *Connelly Mfg. Co. v. Wattles*, 49 N. J. Eq. 92, 23 Atl. 123. Cases in which there was an express agreement that the invention should become the property of the employer stand, of course, upon a different footing; but even such agreements have been construed somewhat strictly against the employer: *Hildreth v. Duff*, 143 Fed. 139; *Bonsack Machine Co. v. Hulse*, 57 Fed. 519, and 65 ²⁰³ Fed. 864, 13 C. C. A. 180; *Wright v. Vocalion Organ Co.*, 148 Fed. 209; *Joliet Mfg. Co. v. Dice*, 105 Ill. 649. There was in this case no express agreement for an assignment of the patent, or that the invention should become the property of the plaintiff; and the facts do not authorize the inference that the parties had any understanding to that effect. The defendant was not employed to give partial form to an invention or conception which was the property of his employer, as in *Gallagher v. Hastings*, 21 App. D. C. 88. Nor was there as to this invention, under the circumstances shown, any breach of confidence on the part of the defendant, or any violation of the duty which

he owed to the plaintiff such as to enable the latter to hold him as a constructive trustee for its benefit.

It follows from what has been said that the plaintiff's thirty-third, thirty-fourth, sixty-sixth, seventieth, seventy-first and eightieth exceptions to the master's report were all properly overruled. So far as they were material to the case, they could not have been sustained. Nor does it sufficiently appear that the master ought to have been required to report the evidence applicable to any of them. The plaintiff's rights seem to have been fully protected. We cannot find that the evidence referred to in the eightieth and eighty-first exceptions bore at all upon what we deem the vital issues in the case. What was said by this court in *Long v. Athol*, 196 Mass. 497, 82 N. E. 665, 17 L. R. A., N. S., 96, as to exceptions to the admission of evidence by a master is peculiarly applicable here. The plaintiff's eighty-first exception also must be overruled.

But the plaintiff contends also that it is at least entitled to an exclusive and irrevocable license under this patent to use the machine protected by it until the expiration of the patent. This contention rests largely upon the language of *Brown, J.*, in *Solomons v. United States*, 137 U. S. 342, 11 Sup. Ct. Rep. 88, 34 L. ed. 667: "When one is in the employ of another in a certain line of work, and devises an improved method of instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment ²⁰⁴ and the benefits resulting from the use of the property and the assistance of the coemployés of his employer, as to have given to such employer an irrevocable license to use such invention." That some kind of license, or at least of a shop right, under this and some others of the patents in controversy has in effect been given by the defendant to the plaintiff would seem to be manifest: See, besides the case already cited, *Keyes v. Eureka Min. Co.*, 158 U. S. 150, 15 Sup. Ct. Rep. 772, 39 L. ed. 929; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. Rep. 78, 37 L. ed. 1049; *McClurg v. Kingsland*, 1 How. 202, 11 L. ed. 102; *Boston v. Allen*, 91 Fed. 248, 33 C. C. A. 485; *Withington-Cooley Mfg. Co. v. Kinney*, 68 Fed. 500, 15 C. C. A. 531; *American Tube Works v. Bridgewater Iron Co.*, 26 Fed. 334. It does not, however, fully appear

whether any or all of the rights that have been given by the defendant to the plaintiff were given with or without agreement for compensation therefor, or whether the circumstances would or would not warrant a finding that any compensation was to be paid by the plaintiff to the defendant: *Burton v. Burton Stock Car Co.*, 171 Mass. 437, 50 N. E. 1029; *Kleb v. Wallach*, 6 App. Div. (N. Y.) 583, 39 N. Y. Supp. 654; *Deane v. Hodge*, 35 Minn. 146, 59 Am. Rep. 321, 27 N. W. 917. We cannot say that this claim was not to some extent open to the defendant upon his answer. The master has not found the facts bearing upon this question, acting in accordance with what he understood to be the desire and agreement of both parties. There was evidently a misunderstanding between the plaintiff's counsel and the master as to the questions of implied licenses or shop rights and royalties; but we do not consider that this misunderstanding can in any way have prejudiced the rights of either party upon any other question than the existence and extent of shop rights in the plaintiff and the defendant's right to have royalties therefor. The rights of both parties will be sufficiently protected if any decree in this suit shall be made without prejudice to either party upon these questions. There is nothing here which need deter us from considering and determining the plaintiff's claim that it is entitled to a perpetual and exclusive license from the defendant.

This question is not wholly free from difficulty. But it must be observed that most of the cases already cited, in which it was held that the property right to the invention and patent did not become vested in the employer under circumstances like those ²⁰⁵ before us, would lose their real force if they were to be construed as recognizing in the inventor merely a bare legal title, with the exclusive beneficial interest in his employer; and, however nicely an assignment might be distinguished from a license, it would still remain true that a perpetual and exclusive license for the use of a patented machine or process without the payment of any royalty would leave absolutely no beneficial interest in any one but the licensee. Indeed, such a state of facts might be fatal to the rights secured by a valid and valuable patent, since the owner of the patent might have no motive to bring any action against infringers to protect the rights which he would be very likely to grudge to his involuntary licensee, and the mere licensee would have no right to bring such actions: *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. Rep. 334, 34 L. ed. 923. If, however, such a license could

be treated in law or equity as being equivalent to an assignment, as it would be in fact, we have already seen that the plaintiff is not entitled to it. Except the case of *Eustis Mfg. Co. v. Eustis*, 51 N. J. Eq. 565, 27 Atl. 439, which, as to the point of exclusiveness and so far as it goes beyond the agreement of the parties, is not in accordance with the great weight of precedent, we are not aware of any authority for making such an implied license exclusive, even if it could be said that it extended to the general right of using the patented machines, and was not limited to the particular machines which were set up in the plaintiff's shop with the consent of the defendant. Nor ought we, by ordering such a license, to foreclose the defendant's right to a royalty, which has not been passed upon and which we have not the means of determining. We are of opinion that the plaintiff is not entitled to any perpetual and exclusive license under this patent. As to any less extensive right, the parties must be left in the situation in which they have chosen to place themselves by their conduct; and we need not consider whether or not there is, as contended by the defendant, any distinction between the implied license or shop right given where the mere right to sell a product is protected and where the right to use a machine or method of manufacture is concerned: See *Gill v. United States*, 160 U. S. 426, 16 Sup. Ct. Rep. 322, 40 L. ed. 480; *Keyes v. Eureka Min. Co.*, 158 U. S. 150, 15 Sup. Ct. Rep. 772, 39 L. ed. 929; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. Rep. 78, 37 L. ed. 1049; *Barber v. National Carbon Co.*, 129 Fed. 370, 5 L. R. A., N. S., 1154, 64 C. C. A. 40; *Boston v. Allen*, 91 Fed. 248, 33 C. C. A. 485; *Withington-Cooley* ²⁰⁶ *Mfg. Co. v. Kinney*, 68 Fed. 500, 15 C. C. A. 531; *Wade v. Metcalf*, 16 Fed. 130.

The bill, so far as it relates to the tubing-machine patent, must be dismissed.

2. The circular loom patent, so called, being letters patent No. 690,355, dated December 31, 1901, came to the defendant by assignment from one Brown, its inventor. The defendant was at this time one of the directors of the plaintiff company, as well as the superintendent of its manufacturing department. He occupied a confidential position: *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450. The duties of his employment gave him the best means of acquiring knowledge in respect to the plaintiff's machines and of any improvements that might be devised therein. Both as director and as hired servant in a position of trust and confidence, he owed to the plaintiff, in the well-chosen language of the judge of

the superior court, "the duty to be vigilant in acquiring information as to all experiments made in the plaintiff's factory relating to machinery, and to communicate to the board of directors, or at least to the managing director, all material information he might obtain in regard to contemplated improvements, in order to enable his employer to act intelligently and promptly upon the subject of acquiring title to any new inventions or patents relating to its machinery." He was legally bound not to act in antagonism to the interests of the plaintiff. If there was property which was necessary for the business of the plaintiff, and which he knew that the plaintiff desired to acquire, and intended and was able to purchase and pay for, in order to protect and develop its business interests, it would be a violation of his duty for him secretly to purchase that property, either for the purpose of afterward selling it to the plaintiff at an advanced price and thus taking advantage of its necessities, or of using such property otherwise to the injury of the plaintiff; and the plaintiff could, by proper proceedings in equity, secure to itself the benefit of his purchase. This principle has been applied and enforced in many instances and in a great variety of cases: *Trice v. Comstock*, 121 Fed. 620, 61 L. R. A. 176, 57 C. C. A. 646; *Church v. Sterling*, 16 Conn. 388; *Blake v. Buffalo Creek R. R.*, 56 N. Y. 485; *Seacoast R. R. v. Wood*, 65 N. J. Eq. 530, 56 Atl. 337; *Trenton Banking Co. v. McKelway*, 8 N. J. Eq. 84; *Galbraith v. Elder*, 8 Watts, 81; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; ²⁰⁷ *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242; *Hardenbergh v. Bacon*, 33 Cal. 356. It has been recently affirmed by this court: *Old Dominion Copper Min. Co. v. Bigelow*, 188 Mass. 315, 108 Am. St. Rep. 479, 74 N. E. 653; *Parker v. Nickerson*, 112 Mass. 195. It was applied to a case involving the ownership of patent rights in *Averell v. Barber*, 24 App. Div. (N. Y.) 53, 49 N. Y. Supp. 123. Nor can the duty of the defendant to communicate to the plaintiff all the information that he might acquire relative to the protection and development of its interests and business, especially of that part thereof which was under his personal charge, be denied or restricted: *Farnam v. Brooks*, 9 Pick. 212; *Edmondstone v. Hartshorn*, 19 N. Y. 9; *Clark v. Bank of Wheeling*, 17 Pa. 322; *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568; *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570. We are not impressed by the defendant's argument that, because he was not bound to communicate and turn over to the plaintiff, in the absence of any agreement therefor, all his own inventions, therefore

he owes no obligation to the plaintiff with reference to other inventions which might come to his knowledge. We are of opinion that the superior court rightly ruled that "there is a real distinction between the case of the patent obtained by Wilson for his own invention and those patents which he acquired by assignments from others. In the former case there was no breach of confidence. In the latter case he was bound to make full disclosure to his master before acquiring for himself." Where, accordingly, there are no other facts found to exist, we cannot doubt that equity will, on the application of the plaintiff, subject the title to such patents as are practically necessary to the prosecution of the plaintiff's business and were obtained from others by the defendant in violation of his duty to the plaintiff, to a constructive trust in the plaintiff's favor.

This right of the plaintiff, however, was not an absolute one. The assignments to the defendant were good, except against the plaintiff. The defendant's title was merely voidable. It was at the option of the plaintiff to take the benefit of his assignments or not, as it might elect. And we are of opinion that what took place between the defendant and Clark, the plaintiff's managing director, who was acting for the plaintiff in that behalf, was in legal effect an election on the part of the plaintiff to allow the defendant to take and hold the circular loom patent upon the defendant's repaying the money which Clark, in behalf of ²⁰⁸ the plaintiff, had advanced to Brown upon this account. The defendant made such repayment, paid also to Brown a large sum of money, amounting to seven thousand five hundred dollars, for the patent alone, and took an assignment of this patent; and nothing further was done by the plaintiff by way of objection to this conduct of the defendant for more than two and a half years. Upon the facts found by the master and the superior court, the plaintiff was charged with full knowledge of the facts; and it cannot now avoid the effect of the election which it then made: *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Bassett v. Brown*, 105 Mass. 551. The plaintiff did not merely make an erroneous choice of a remedy which did not exist, as in *Doucette v. Baldwin*, 194 Mass. 131, 80 N. E. 444, and *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691. It elected to take a return of its money, and allow the defendant to purchase the patent instead of making the purchase itself. This was not a case of laches merely, but also of an election fairly made to waive an existing right within the meaning of the language of the court in *Lindsay Petro-*

leum Co. v. Hurd, L. R. 5 P. C. 221, 239. And although the facts are not the same as to the patents for the bobbin-holder, No. 694,128, and the shuttle, No. 702,281, dated respectively February 25 and June 10, 1902, yet, in view of the master's finding that these were merely ancillary and subsidiary inventions to that of the circular loom, and were designed to be used only in connection with that, and of the fact that we find nothing in the specifications of the patents themselves to lead us to a different conclusion, we are of opinion that they should now go with that patent. The plaintiff's consent that the defendant might purchase and retain the principal invention should be extended so as to cover also the incidental and subsidiary inventions. This is only a special application of the underlying principle of *Orcutt v. McDonald*, 27 App. D. C. 228, and *Gedge v. Cromwell*, 19 App. D. C. 192.

It follows that the rulings of the superior court sustaining the plaintiff's fifth and ninth exceptions to the master's report, and overruling the third, eighth, fifty-ninth and sixtieth exceptions was correct; and that the bill cannot be maintained as to the patents just mentioned.

3. The Blackler patent, No. 751,777, dated February 9, 1904, upon a flexible tubing or conduit of new and improved design, ²⁰⁹ and the Thibodeau patent, No. 794,433, dated July 11, 1905, upon a machine for making tubing, issued since the bringing of the bill upon one of the applications named therein, need not be particularly considered. For the reasons which have been stated in reference to the circular loom patent, the plaintiff may treat the assignments of these patents obtained by the defendant as really taken in trust for its benefit, and may have them transferred to itself upon reimbursing to the defendant the respective amounts paid by him therefor. The plaintiff's eleventh exception to the master's report must be sustained, and its tenth, sixty-first and eighty-sixth exceptions must be overruled. There was no error in the rulings made by the superior court as to these matters.

4. The remaining patent, that numbered 686,921, and the application for a patent upon a pipe-cleaning machine, differ from the other patents which were acquired by the defendant by purchase and assignment from their inventors only in the fact that the equitable right to these was originally in the Boston Electroduct Company, another corporation, which, though in a sense organized and for a time maintained in the mere interest of the plaintiff, and as a sub-

subsidiary company to it, had yet an independent existence, and of which the defendant was himself the president. It was found to be the Boston Electroduct Company and not the plaintiff which originally had at its election the right to the remedy here sought to be enforced against the defendant. But under the circumstances here existing we do not regard this fact as material, for two reasons.

In the first place, the record shows that at a comparatively early period of the litigation, while hearings were going on before the master, the electroduct company asked leave to join in the suit as a party plaintiff. The defendant opposed this request, and declared that he did not put or rest his defense on the ground that that company had any right or title to the patents or any of them or the applications therefor. Upon this declaration, the request of the electroduct company was denied by the judge. In the second place, it also appeared that, the business of the electroduct company having been unsuccessful and its resources having been exhausted, the plaintiff, as a kind of unofficial liquidator, in the fall of 1898, took possession of ²¹⁰ all its assets, paid or compromised its debts, and itself virtually took charge of all that company's affairs. The corporate existence of that company was continued; but there was no meeting of its stockholders or directors after the plaintiff took possession of its assets, until November 9, 1904. The inventions in question were made by Brown in and after 1899. The plaintiff paid him for his work, charging this, however, upon its books to the electroduct company. At an adjournment of the above-mentioned stockholders' meeting, on November 15, 1904, it was voted that the company assign all its assets to the plaintiff, and that the officers of the company should execute all necessary papers for that purpose; and on February 1, 1905, a formal assignment of all the property and assets of that company, including "interests in letters patent, . . . inventions, . . . and choses in action," was made to the plaintiff. Copies of this vote and of the assignment are annexed to the master's report. We do not doubt that this claim of the electroduct company was assignable, or that it passed by the assignment: *Jenkins v. Eliot*, 192 Mass. 474, 78 N. E. 431; *Andrews v. Tuttle-Smith Co.*, 191 Mass. 461, 78 N. E. 99; *Currier v. Howard*, 14 Gray, 511. Moreover, independently of the defendant's verbal stipulation and of the facts which we have stated, the plaintiff had at the very time of the making of these inventions an interest in their intended product,

and was obtaining a profit from the sale of that product; and it was found by the superior court, with manifest correctness, that the plaintiff would have purchased these inventions if the defendant had performed the duty of fidelity which he owed to it both as a director and as a servant.

Accordingly, the plaintiff's exception to the ruling of the master excluding the above-mentioned vote and assignment was properly sustained; and the ruling that the plaintiff was entitled to assignments of this patent and of this application was right.

It is not necessary to consider the defendants' exceptions in detail after what already has been said. They were all rightly overruled.

It was for the judge, in the exercise of his discretion, to determine whether it would recommit the master's report as requested at different times by each party: *Henderson v. Foster*, 182 Mass. 211 447, 65 N. E. 810; *Eddy v. Fogg*, 192 Mass. 543, 78 N. E. 549. We find no error in the manner in which that discretion was exercised. Accordingly, we need not consider a large number of the plaintiff's exceptions, which are stated in the brief of its counsel to depend upon this motion. There appears to be no error in the rulings of the superior court upon the other exceptions.

It was also wholly in the discretion of the judge to determine whether it would issue, continue or dissolve an injunction, and what terms, if any, it would impose upon either party, and whether it would require the plaintiff to give any bond as a condition of issuing an injunction. And, no bond having been ordered or given, the judge correctly ruled that the defendants were not entitled to an assessment of the damages sustained by them by reason of the injunction restraining them from disposing of the patents which by the final decree they were allowed to retain. In *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. Rep. 525, 30 L. ed. 642, it was said by Bradley, J.: "Without a bond no damages can be recovered at all. Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything." Many other cases to the same effect are collected in 22 Cyc. 1061. The defendant, as to the matters in which the plaintiff fails of final recovery, is in the same condition as one whose property was attached in a suit at law which the plaintiff finally has failed to maintain. Be-

yond such costs as he may be entitled to recover, his only remedy is by an action for malicious prosecution or malicious abuse of legal process: *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; *Lindsay v. Larned*, 17 Mass. 190. Cases which have been decided as to the remedy where an injunction bond has been given are not applicable here: *Russell v. Farley*, 105 U. S. 433, 26 L. ed. 1060; *Carpenter v. Fisher*, 68 N. H. 486, 73 Am. St. Rep. 616, 38 Atl. 211. It was not necessarily unjust that the defendants should have been restrained from disposing of any of these patents until a final determination of the rights of the parties could be reached. If there were any special circumstances to be considered, they were doubtless brought to the attention of the superior court.

But there are some irregularities in the final decree entered in ²¹² the superior court which ought to be noticed. The decree does not state what amount is to be paid by the plaintiff for the acquirement of one of the patents or of the pending application for a patent, but leaves blanks for these amounts, and provides for a future application to the court to determine them. These questions should not be left open in a final decree. And the defendant should not be required absolutely to make assignments of all the patents for which he is held. As to each of these, the plaintiff has an option whether to take it at the price found by the court or not. The order should be as to each patent that the female defendant assign it to the plaintiff upon payment by the plaintiff of the sum found as to that patent by the court: *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831. Nor should the decree be without prejudice to the rights of the defendants or either of them to recover royalties or license fees under any of the patents. This should be limited to the four patents which the defendants are allowed to retain. And it should also be without prejudice to the right of the plaintiff to claim that it is entitled to a shop right or license under each of these patents. With these modifications, the decree of the superior court should be affirmed, and it is so ordered.

The Right as Between Employer and Employé to inventions made by the latter is the subject of a note to Dempsey v. Dobson, 52 Am. St. Rep. 820. In *Dempsey v. Dobson*, 184 Pa. 588, 63 Am. St. Rep. 809, it is affirmed that designs and recipes made by an employé are, as between him and his employer, the property of the latter for the purpose of his business; and although there is a patent issued to the employé for his formula, the right of the employer to continue its use in his business remains.

FARRELL v. MANHATTAN MARKET COMPANY.

[198 Mass. 271, 84 N. E. 481.]

TORT may be Maintained for the Breach of a Warranty as well as an action of contract. (p. 438.)

TORT, Scienter in, When Need not be Proved.—In tort for a false warranty, the scienter need not be alleged, and if alleged, need not be proved. (p. 438.)

SALE OF FOOD—Purpose of Purchase Need not be Stated to the Dealer.—A contract for the supply of food, without stating the purpose for which it is required, stands on the same footing as a contract to supply other articles when the particular purpose for which they are wanted has been stated to the dealer. (p. 442.)

FOOD, Liability of the Seller for Unwholesomeness of.—Provisions may be ordered by the purchaser in person in the dealer's shop in such a way as to make known to him that his knowledge and skill are relied upon to supply wholesome food, and if they are so ordered, he is liable if they are not fit to be eaten. (p. 442.)

SALE OF FOOD by One not a Dealer—Implied Warranty.—There is no implied term or condition that articles of food sold by one not a dealer are fit to be eaten. (p. 448.)

SALE—Food, Effect of Offering for Sale.—An offer of food for sale by a dealer is an implied representation that it is believed to be sound, but where there is no implied term or condition of soundness, the seller is not liable unless he knows that the food sold is not fit to be eaten. (p. 448.)

SALE OF UNFIT FOOD—Burden of Proof.—In an action to recover for injuries resulting from a sale of unfit food under an allegation that the food was sold by the defendant with an implied warranty that it was fit for food, the burden is on the plaintiff to prove that, in making the purchase, it relied on the skill and judgment of the defendant or his employé in selecting the article sold, and this burden is not met by showing that the food consisted of a fowl exhibited on a Saturday night in July, on a bargain counter, and offered at less than the usual rates, though the defendant's salesman affirmed that it was strictly fresh. (p. 448.)

A DEALER is not Liable for Selling Unfit Food, on the Ground of Negligence, when he offers several articles for sale, from which the buyer makes his selection. By such offering the dealer impliedly represents that he believes the article to be fit for food, and is not liable to a purchaser made ill by eating the food, when there is no evidence that the dealer knew it was unfit. (p. 450.)

Three actions of tort, one in favor of the mother and the others in favor of her two children, seeking to recover for injuries suffered by them from eating food sold by the defendant. The complaints alleged substantially that the defendant and his agents negligently sold her as food and with an implied warranty that it was fit, a certain slaughtered fowl, which was not safe for eating, but was poisonous; that thereupon the fowl was cooked and a part of it eaten by the plaintiff, who was made sick thereby because of its poisonous quality, and was severely injured in body and mind; that

the defendant knew, or in the exercise of reasonable care or diligence should have known, that this fowl was unfit for food, and that the plaintiff exercised due care, while the defendant, its servants and agents were negligent.

The trial judge directed a verdict for the defendant. The plaintiffs alleged exceptions.

M. A. Sullivan, for the plaintiffs.

H. T. Richardson, for the defendant.

273 LORING, J. These cases come up on an exception to a ruling directing a verdict for the defendant.

The plaintiff in the third case (whom we shall speak of as the plaintiff) was the mother of those in the other two. The defendant is a corporation engaged in carrying on a retail market and provision store. The jury were warranted in finding the following to be the facts in the case:

On a Saturday evening in July the plaintiff, in the words of the bill of exceptions, "purchased a chicken from one of the salesmen" of the defendant. She asked the salesman if it was a cold storage fowl, and he answered, "Don't you know a good thing when you see it? It's strictly fresh." She paid twelve and a half cents a pound, the price "having been reduced from twenty-five cents per pound, which was the defendant's custom on Saturday night in several of its departments."

The next morning at 10 o'clock she removed the entrails, washed the fowl, wiped, boiled and then roasted it, and at 4 o'clock she and the other two plaintiffs ate a portion of it and were made sick; what they suffered from was ptomaine poisoning.

The plaintiff introduced expert evidence that, if the chicken was not fit for food, there would be a discoloration "from the neck down the length of the backbone; that, if no such discoloration were visible, the chicken was fit for food unless it had eaten some poisonous substance, which might be shown by an examination of the crop if the meat itself were diseased; all of which could be ascertained upon inspection by anyone familiar with the examination of chickens." The plaintiff testified "that she noticed no such discoloration of any kind at any time."

It appeared "that the defendant requested its customers not to handle fowl before purchasing, which was known to the plaintiff, but that nothing was said to her in this particular at the time of the sale, and that this request was fre-

quently ignored by customers, which fact was not known to her."

At the conclusion of the evidence the plaintiffs requested the judge to rule "that a retail dealer in provisions selling chicken under the circumstances in this case impliedly warranted the chicken fit for food"; also, "that it was a question of fact for ²⁷⁴ the jury to say whether or not the chicken was fit for food, whether or not the plaintiffs were injured by eating of diseased chicken, and whether or not the defendant was negligent in failure to make a sufficient and proper examination of the chicken before selling it to the plaintiff for consumption." The presiding judge "declined to give the plaintiffs' requests, saying that he did not feel called upon to make such ruling, and ruled that there was not sufficient evidence that would warrant the jury in finding a verdict for the plaintiffs, and ordered a verdict for the defendant in all three cases."

It was held in *Norton v. Doherty*, 3 Gray, 372, 63 Am. Dec. 758, on the authority of *Williamson v. Allison*, 2 East, 446, that tort for a false warranty as well as an action of contract lies in case a chattel is sold with warranty and the warranty is broken. A number of earlier English cases to the same effect are collected by Holmes, J., in *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753, and the proposition is there repeated. To the same effect, see *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126, and *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 86 Am. St. Rep. 478, 59 N. E. 657, 51 L. R. A. 781. In tort for a false warranty the scienter need not be alleged, and, if alleged, it need not be proved: *Shaw, C. J.*, in *Norton v. Doherty*, 3 Gray, 372, 63 Am. Dec. 758; *Holmes, C. J.*, in *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. 1039, 28 L. R. A. 753, and *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126.

We assume, therefore, that an action of tort may be maintained for breach of a warranty. In the case at bar the plaintiff has alleged that the defendants sold the fowl to the plaintiff with the implied warranty that it was fit for food. The principal question in the case is whether that allegation has been made out.

In *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608, it was decided that, in the sale of a cow by a farmer to a butcher to be cut up for meat, there was no implied warranty that it was fit for that purpose. After stating the general rule to be that in a sale of goods the maxim "caveat

emptor" applies, and that the defendant contended that articles of food sold for immediate domestic use are an exception, Morton, J., said: "But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use."

²⁷⁵ *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538, was a similar decision. There the defendants, who were farmers, killed two hogs and sold them to the plaintiffs to be eaten. The presiding judge instructed the jury as to the general rule laid down in *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; next he told them that there was an exception in case of a sale of provisions by a dealer (although that had been left open in *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608), but he added that that exception did not apply to a sale by a farmer, and left the case to the jury on the defendants' knowledge of the condition of the hogs. In disposing of an exception to this instruction, Devens, J., said: "Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that the defendants were brought within it."

It becomes necessary in the case at bar to consider the question left open in these two cases, and to decide whether there is such an exception to the general rule which obtains in the sale of chattels.

A case of first importance on this subject is *Bigge v. Parkinson*, 7 Hurl. & N. 955, decided by the exchequer chamber in 1862.

Before that case was decided, the law on the subject was not in a satisfactory condition. It was laid down in a number of cases in the Year-books, collected in *Burnby v. Bollett*, 16 Mees. & W. 644, that the keeper of a tavern is liable for furnishing bad food or bad wine to his guests. The case in Year-book 9 Henry VI, 53, may be taken as an example. It is there said: "If I come into a tavern to eat and he gives and sells to me beer and flesh which are corrupt, by which I am put into a great sickness, I shall have against him my action on the case clearly, even although he made no guaranty to me." Mr. Justice Blackstone had laid it down without citing any authorities that, "In contracts for provisions it is always implied that they are wholesome": 3 Blackstone's Commentaries, 165. In *Burnby v. Bollett*, 16 Mees. & W. 644 (decided in 1847), it had been decided that in the sale of the carcass of a pig by one not a dealer, where the

carcass was inspected by the buyer, there was no implied warranty of soundness. Parke, B., in delivering the opinion of the court of exchequer in that case, suggested that the cases in the Year-books depended on statutes repealed before the sale then in ²⁷⁶ question, making it an offense for victualers, butchers and other common dealers in victuals to sell corrupt victuals. In *Emmerton v. Mathews*, decided by the court of exchequer in the same year and reported in the same volume (7 Hurl. & N. 586) as *Bigge v. Parkinson*, 7 Hurl. & N. 955, it was held that in the sale of a carcass of meat by one who sold meat on commission for his consignors, there was no implied warranty of soundness. This case, as reported in 7 Hurl. & N. 586, would seem to go on the ground that one who sells meat as a factor for others is not a dealer; but in the report in 5 L. T., N. S., 681, Pollock, C. B., is reported to have said that "the plaintiff bought on his own inspection," and in *Jones v. Just*, L. R. 3 Q. B. 197, 202, the decision in *Emmerton v. Mathews*, 7 Hurl. & N. 586, was stated to have been made on the ground that the plaintiff selected the meat.

This was the state of the law on the subject when *Bigge v. Parkinson*, 7 Hurl. & N. 955, came up for decision. *Bigge v. Parkinson*, 7 Hurl. & N. 955, was a case where the plaintiffs, being ship owners, had chartered a ship to the East India Company to carry troops from London to Bombay. They had made a contract with the defendant, who was a provision merchant, by which the defendant agreed to supply the ship with provisions and stores for the troops at so much a head. Under this contract the defendant had supplied provisions and stores which were unsound and unwholesome, and it was held that he was liable on an implied warranty that the provisions and stores supplied should be fit to be eaten.

The ground on which this conclusion was reached is thus stated by Cockburn, C. J., who delivered the opinion of the court of exchequer chamber after time had been taken for consideration: "The principle of law is correctly stated in the passage cited from Chitty on Contracts, sixth edition, page 399. Where a buyer buys a specific article, the maxim 'caveat emptor' applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no

reason why the same warranty should not be comprehended in a contract for the sale of provisions."

The rule thus laid down by Cockburn, C. J., in *Bigge v. 277 Parkinson*, 7 Hurl. & N. 955, has been followed in all subsequent cases and is now established as the law in England on the question now before us.

The first proposition laid down in *Bigge v. Parkinson*, 7 Hurl. & N. 955, is that there is no difference between a sale of provisions and the sale of other articles in respect to there being or not being an implied warranty that they are fit. In his opinion in *Bigge v. Parkinson*, 7 Hurl. & N. 955, Chief Justice Cockburn first states the general rule that caveat emptor applies where a person buys a specific article; he then states that where goods (not articles of food) are supplied under a contract and the buyer trusts to the judgment of the seller to select the goods, there is an implied warranty of fitness; he then decides that these rules apply to a contract to supply provisions. Since the decision in *Bigge v. Parkinson*, 7 Hurl. & N. 955, the question of an implied warranty of wholesomeness in the sale of provisions always has been treated as a question to be determined by the application of the rules which obtain in case of the sale of other chattels, and not as an exception: See to that effect, Chalmers' Sale of Goods Act, 1893, 32; see, also, for example, Mellor, J., in the leading case of *Jones v. Just*, L. R. 3 Q. B. 197; Fitz-Gibbons, L. J., in *Wallis v. Russell*, [1902] 2 I. R. 585.

The second proposition laid down in *Bigge v. Parkinson*, 7 Hurl. & N. 955, is that the rule which makes a dealer liable for selling unsound provisions is the rule which is applied where a chattel (no matter what kind of chattel it may be) is ordered of a manufacturer or dealer for a particular purpose. In such a case there is an implied warranty that the article furnished will be fit for the particular purpose. It was settled before *Bigge v. Parkinson*, 7 Hurl. & N. 955, was decided that this rule applied to dealers as well as to manufacturers: *Jones v. Bright*, 5 Bing. 533; *Gardiner v. Gray*, 4 Camp. 144.

We pause to point out the limitations of this rule and the principle on which it is based.

The rule was stated later with great accuracy by Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. D. 197, in these words: "Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that

the buyer ²⁷⁸ necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown v. Eddington*, 2 Man. & G. 279; *Jones v. Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own."

The principle on which this rule is founded was stated by Lord Esher (then Brett, J. A.), in delivering the opinion of the court of appeals in *Randall v. Newson*, 2 Q. B. D. 102, to be this: Where a manufacturer or a dealer contracts to supply an article for a particular purpose, and the purchaser trusts to his judgment and skill in the matter, the obligation really entered into by the manufacturer or the dealer, if written out, would be stated to be to supply an article fit for the purpose named; an article not fit for that purpose is not as matter of description the article called for by the contract. And since in the case put the obligation to supply an article fit for the purpose named is not stated in terms, the obligation to furnish such an article is an implied and not an express term or condition of the contract.

It is not accurate, therefore, to say that there is an implied warranty of fitness in case of an order for goods for a particular purpose, to be furnished by a manufacturer or a dealer. It is an implied term or condition of the contract, not an implied warranty: See to this effect, *Chalmers' Sale of Goods Act*, 1893, 31. It is so treated in the section of the *Sale of Goods Act* (56 & 57 Victoria, c. 71) in which this rule is stated:

"14. Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in ²⁷⁹ the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

For a case like *Bigge v. Parkinson*, 7 Hurl. & N. 955, decided under the Sale of Goods Act, see *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608.

There is one difference between a contract with a dealer to supply ordinary articles and a contract with a dealer to supply food: In a contract with a dealer to supply food it is not necessary to state to the dealer that the food is to be eaten. That goes without saying. A contract for the supply of food without stating the purpose for which the food is required stands on the same footing as a contract to supply other articles when the particular purpose for which they are wanted has been stated to the dealer.

Bigge v. Parkinson, 7 Hurl. & N. 955, was a case where goods were supplied under a pre-existing contract. But there is no difference between a dealer's supplying provisions under a contract previously made and a dealer's supplying provisions in response to an order to be accepted by shipping the provisions. The material fact is that the purchaser makes known to the seller that he relies on his skill and judgment in selecting the provisions ordered: *Beer v. Walker*, 37 L. T., N. S., 278, decided before the Sale of Goods Act, and *Burrows v. Smith*, 10 Times L. R. 246, decided since that act was passed, were cases of orders. To the same effect, see *Grove, J.*, in *Smith v. Baker*, 40 L. T., N. S., 261.

Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, and, if they are so ordered, he is liable if they are not fit to be eaten. That was decided in *Wallis v. Russell*, [1902] 2 I. R. 585. In that case the plaintiff sent her granddaughter to buy two nice fresh crabs for tea. The granddaughter went to the defendant, a dealer, and delivered the message. The defendant's assistant selected two. Thereupon the granddaughter, pointing to a third crab, asked the assistant if he did not think that it was a better one. The assistant took it up, felt it, said it was by the weight one should judge and not the size, and put it aside. The granddaughter testified that she relied altogether ²⁸⁰ on the assistant's judgment. In answer to a question put by the presiding judge the jury found that the plaintiff, through the granddaughter, relied on the defendant's assistant to select fresh and reasonably fit crabs. They also found that the plaintiff, through the granddaughter, had an opportunity to examine the crabs at the time of the sale, and that the defendant honestly believed that the crabs were fresh and fit

for food. There was no contention that the defendant was negligent, and on the facts such a contention would have been futile. The plaintiff and her granddaughter ate the crabs and were both made violently ill. In an action brought by the plaintiff it was held by the high court of justice and on appeal by the court of appeal for Ireland that she could recover. This case arose under the Sale of Goods Act. But not only is that act, as a whole, a codification of the law as it existed before, but the subsection in question (subsection 1 of section 14) is in substance and almost in terms the fourth rule laid down by Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 197. If the purchaser who goes in person to the provision store in fact gives his order in such a way that he leaves the selection of the food to the seller's skill and judgment, we have a case which stands on the same footing as those where provisions are supplied under a previous contract or are shipped in pursuance of a written order.

The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten: *Burnby v. Bollett*, 16 Mees. & W. 644; *Emmerton v. Mathews*, 7 Hurl. & N. 586; *Smith v. Baker*, 40 L. T., N. S., 261; *Cockburn, C. J.*, in *Bigge v. Parkinson*, 7 Hurl. & N. 955. These are all of them cases decided before the Sale of Goods Act. Since the Sale of Goods Act, if the sale is made by one not a dealer, there is no liability, by force of section 14. If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract (*Bigge v. Parkinson*, 7 Hurl. & N. 955), or in response to an order not given in person (*Beer v. Walker*, 37 L. T., N. S., 278; *Burrows v. Smith*, 10 Times L. R. 246; *Grove, J.*, in *Smith v. Baker*, 40 L. T., N. S., 261, 263), or even when the order is given in person in the dealer's shop, provided, as we have ²⁸¹ said, that the selection is left to the dealer: *Wallis v. Russell*, [1902] 2 I. R. 585. But, even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the absence of knowledge by the dealer that the provisions are unsound) if the provisions are not fit for food: *Mellor, J.*, in *Jones v. Just*, L. R. 3 Q. B. 197; *Emmerton v. Mathews*, 5 L. T., N. S., 681, and as interpreted by *Mellor, J.*, *ubi supra*; *Cockburn, C. J.*, in *Bigge v. Parkinson*, 7 Hurl. & N. 955, before the Sale of Goods Act. Under

the Sale of Goods Act this is so by force of section 14, because the case does not come within any of the subsections.

This brings us to a consideration of the law in Massachusetts outside the cases of *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608, and *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538, already referred to, where this question was left open.

It is familiar law in Massachusetts that where goods are ordered of a manufacturer for a particular purpose within the rule stated more accurately in *Jones v. Just*, L. R. 3 Q. B. 197, and in subsection 1 of section 14 of the Sale of Goods Act, there is an implied condition that they shall be fit for that purpose.

There is one case in Massachusetts where it has been laid down that the same rule applies in case of a dealer: *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639. The conclusion ultimately reached in *Hight v. Bacon*, 30 Am. Rep. 639, was that the goods there in question were specific articles bought on inspection by the buyer, and were not ordered by the buyer for a particular purpose trusting to the skill and judgment of the seller. But the rule stated above was laid down as applicable to a dealer as well as to a manufacturer, and that rule was stated to be the rule on which the case then before the court (a sale by a dealer) was to be decided.

The fact that in this class of cases the question is not, speaking accurately, a matter of implied warranty but of implied condition (as is stated at length by Lord Esher in *Randall v. Newson*, 2 Q. B. D. 102), is pointed out by Holmes, J., in *Murchie v. Cornell*, 155 Mass. 60, 31 Am. St. Rep. 526, 29 N. E. 207, 14 L. R. A. 492, and by Rugg, J., in *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682, 15 L. R. A., N. S., 855. These were cases of an implied condition that the thing sold was merchantable. The two sets of cases rest on the same principle.

In addition, Sewall, J., in *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109, ²⁸² 201 (decided in 1813), said: "Justice Blackstone (3 Blackstone's Commentaries, 164, 165) has classed the cases of deceit and breaches of express warranties, in contracts for sales, under the head of implied contracts. He says it is constantly understood that the seller undertakes that the commodity he sells is his own; and in contracts for provisions, it is always implied that they are wholesome; and in a sale with warranty, the law annexes a tacit contract that, if the article be not as warranted, compensation shall be made to the buyer; and if the vendor

knows his goods to be unsound, and hath used any art to disguise them, or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. It is obvious that, in this very general classification, the details and examples are imperfectly introduced, and with some inaccuracy. It is not implied, in every sale of provisions, that they are wholesome, any more than it is in sales of other articles, where proof of a distinct affirmation seems, in Justice Blackstone's opinion, to be requisite. The contrary may be, and often is, understood between the parties; and it is only when the false representation, to be proved in the one case, may be presumed or taken to be proved in the other, that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved, to entitle the suffering party to the remedy, equivalent to a remedy upon an express warranty, as well in the case of provisions, as in any other case. The difference is that, in the case of provisions, the artifice is proved, when a victualer sells meat as fresh to his customers at a sound price, which at the time was stale and defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade." *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109, was decided for the defendant because there was no evidence that the defendant knew of the unsoundness.

The statement that offering articles of food for sale is of itself a representation that the articles offered are believed to be sound was repeated in *Winsor v. Lombard*, 18 Pick. 57; it was on ²⁸³ this ground that *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, was decided for the plaintiff; and, finally, it was assumed in *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538, where the only question left to the jury was the defendant's knowledge that the pigs were diseased.

Field, C. J., in *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, said that "*French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, rests upon negligence, or upon an implied warranty that the hay was fit to be fed to cows." It does not appear in the report of that case nor in the original papers that the defendant in *French v. Vining*, 102 Mass. 132, 3 Am.

Rep. 440, was a dealer. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, therefore cannot stand "upon an implied warranty that the hay was fit to be fed to cows." There is no implied term or condition that articles of food sold by one not a dealer are fit to be eaten: *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608, and *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538. The opinion in *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, purports to decide the case on the ground of fraud and deceit; and in the subsequent cases of *Trambly v. Ricard*, 130 Mass. 259, *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538, and *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591, *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, is either stated to be or is treated as being a case of fraud and deceit. The difficulty in *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, was to make out that, under the circumstances there disclosed, there was proof of the scienter. The court decided that there was. It ought to be noted that in the subsequent case of *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336, which purported to follow *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, it appears from the original papers that the defendants were dealers in grain. The article of food there sold was oats.

The decisions on the question now before us in the United States outside Massachusetts are not many, and they do not deal with the question at length. There is much in these opinions in conflict with what is now the settled law in England. So far as decisions go, however, there is but one in conflict with that rule. That is the decision in *Hoover v. Peters*, 18 Mich. 51. In that case it was held that in the sale of food for immediate domestic consumption there is an implied warranty that it is fit to be eaten although the sale was made by one not a dealer. That is not the law in Massachusetts: *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Giroux v. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. 538. No cases are cited in the opinion, and there is a dissenting opinion by Christiancy, J., on the ground that to make out a liability in a sale of provisions,²⁸⁴ the vendor must be a dealer, or it must be proved that the defendant knew the provisions to be unsound.

In *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339 (decided in 1815), it was held that the plaintiff, who had bought a piece of beef which proved to be unwholesome, had purchased it from one who apparently was not a dealer. It was held that the plaintiff could recover on the authority

of the statement in Blackstone's Commentaries, and because "the verdict settles the facts that the beef was unsound and unwholesome and that the defendant below knew the animal to be diseased." This case has been followed in some subsequent cases.

In *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210 (decided in 1898), it was held that in a sale by a dealer there is an implied warranty.

Goad v. Johnson, 6 Heisk. (Tenn.) 340, referred to in *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210, as a case contrary to the decision there made, was a sale of live cattle on inspection.

We are of opinion that the rule stated above, now established in England, is the true rule as to when there is an implied term or condition of soundness in the sale of food.

We are also of opinion that offering food for sale is in itself a representation that it is believed to be sound, and that, where there is no implied term or condition of soundness, the defendant is not liable unless he knew of the fact that the food sold was not fit to be eaten.

Coming to the case at bar and to the allegation in the declaration that the fowl here in question was sold with an implied warranty that it was fit for food: To prove that allegation, the burden was on the plaintiff to prove that, in making the purchase here in question, she relied on the skill and judgment of the defendant's servant in selecting the fowl; in other words, the burden is on her to make out that the purchase of the fowl in the case at bar was not the purchase of a specific chattel, and that it was a purchase of the same kind as is a purchase where food is shipped under a previous contract or in fulfillment of an order—that is to say, where the buyer relies on the seller's skill and judgment. It is enough to dispose of this case to say that the plaintiff did not sustain the burden of proof on that issue. The evidence did not disclose how or by whom the fowl was selected; all that is stated on that point is that "the plaintiff, ²⁸⁵ Mary Farrell, went to the defendant's store at about 9:15 P. M. on Saturday, July 1, 1905, and purchased a chicken from one of the salesmen." Moreover, so far as the evidence went, it showed that, in offering the fowls from which the one in question was selected, the defendant did not offer to exercise his skill and judgment in supplying sound food. The fowl in question was bought from those exhibited on a Saturday night in July, by the defendant, on a bargain counter, to be sold at fifty cents on the dollar. It is manifest that

the defendant offered this meat for sale to avoid carrying it over Sunday in hot weather, and it is a fair inference that, like all articles on a bargain counter, the selection was to be made by the buyer. See, in this connection, the statement of Sewall, J., in *Emerson v. Brigham*, 10 Mass. 197, 6 Am. Dec. 109: "The difference is, that, in the case of provisions, the artifice is proved when a victualer sells meat as fresh to his customers at a sound price."

The plaintiff's next contention is that the defendant knew that the fowl was unfit for food and that she is entitled to recover on that ground. There are no allegations in the declaration that the defendant represented that the fowl was fit for food and that the plaintiff bought it relying on that representation. For that reason the ruling was right if made on the state of the pleadings.

But, passing that by, there was no evidence that warranted a finding that the defendant knew that the fowl was unsound.

This brings us to the allegation in the declaration that the defendant, "in the exercise of reasonable care and diligence, could and should have known that said fowl was unfit for food, and the plaintiff says that in all the premises she was in the exercise of due care, but the defendant, its agents and servants were negligent."

In support of her contention that the defendant is liable here for negligence in selling her an unsound fowl, the plaintiff relies on the rule that an apothecary is liable who sells a poison labeled as a harmless drug (as to which see *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298), and on the case of *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154.

The ground on which the apothecary is liable is that he deals ²⁸⁶ in poisons. That is quite different from dealing in food which may become poisonous. That rule does not, in our opinion, apply to the sale of articles of food.

Bishop v. Weber, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, was a case where the plaintiff alleged in her declaration that the defendant had been employed as a caterer to furnish a supper to such of those attending the triennial celebration of the Handel and Haydn Society who should buy a ticket of him for the supper; that she purchased a ticket and was poisoned by food eaten by her and so furnished by the defendant; and that the defendant was negligent in the premises. To this the defendant demurred. It was assumed by the court that the declaration was in tort

and not in contract, although the writ covered both tort and contract; and the only question discussed was whether the plaintiff, who was not a party to the contract, could maintain an action. It was held that she could, on the doctrine that an apothecary who marks laudanum paregoric is liable to a plaintiff (not a party to the contract) who swallows the laudanum in consequence of the label. There seems to be ground for holding that the declaration in *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. 154, was good as a declaration on a contract between the plaintiff and the defendant. All that was decided in that case was that the declaration was good. Whether negligence is the ground for holding a caterer or innkeeper liable for serving poisonous food was not discussed.

Whatever may be the rule in respect to caterers in serving meals, there is no case in which it has been held that in the sale of provisions by a dealer the test of his liability is negligence. If the selection is left to the dealer, due care by him is no defense. He is liable for latent unsoundness that could not be discovered: *Wallis v. Russell*, [1902] 2 I. R. 585. And see as to due care in the sale by a dealer of chattels not articles of food, *Randall v. Newson*, 2 Q. B. D. 102. As due care is no defense when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection. In offering these several articles, he impliedly represents that he believes all of them to be fit for food. That is the extent of his liability; no question of negligence is involved. The implied representation of soundness apart, there is no liability on a ²⁸⁷ vendor of food to be selected by the buyer because he did not procure and offer for sale better food than he procured and offered for sale.

As the plaintiff in the third case, who bought the fowl, cannot recover, it is not necessary to consider the cases brought by her children.

The result is that the exceptions must be overruled.

So ordered.

Implied Warranties on the Sale of Food or Provisions are considered in the note to *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 623. In *National Cotton Oil Co. v. Young*, 74 Ark. 144, 109 Am. St. Rep. 71, it is held that on the sale of feedstuffs for cattle, there is no implied warranty that they are fit for that purpose, nor that they do not contain matters injurious to cattle.

SUPPLE v. SUFFOLK SAVINGS BANK.

[198 Mass. 393, 84 N. E. 432.]

APPEAL AND ERROR.—The Findings of the Judge Who Tried the Cause without a jury must stand, if there was any evidence to support it. (p. 452.)

DEPOSIT IN BANK, Trust, When not Established by.—A deposit in a savings bank in the name of a depositor "in trust for F.," but without delivering the passbook to him, does not establish a trust in his favor, where there is no further evidence of a completed or executed intention to establish a trust, nor any communication of such intention to him or to anyone acting for him or for his benefit. (p. 452.)

DEPOSIT IN TRUST, Proof of by Admissions.—If a deposit is made in a savings bank in the name of a depositor "in trust for F.," admissions by the depositor that there had been a completed trust or an executed gift are admissible against her or her representatives, and may support a finding against her executors and in favor of F. or of the bank claiming that a gift had been made to or a trust created in his favor. (p. 452.)

EVIDENCE of Declarations Made in the Presence of a Party, and not Denied.—Where a deposit is made in a savings bank in the name of a depositor "in trust for F.," his declarations in the presence and hearing of the depositor are admissible against her executors to show his acceptance of the gift and also as declarations of a deceased person, under the statute. (p. 453.)

EVIDENCE of Nonaction of Executors, When Admissible Against Them.—In an action by an executor to recover money deposited in the name of a decedent "in trust for F.," and in which it was claimed that a trust in favor of or a gift to F. was created by such deposit, evidence is admissible against an executor to show that he knew of, but did not account for, such deposit, for his failure to so account may be found inconsistent with his claim that the property belonged to the estate of his decedent. (p. 453.)

James J. McCarthy, for the plaintiffs.

J. W. Farley and A. Ames, Jr., for the claimant.

396 **SHELDON, J.** There was, no doubt, much evidence in this case tending to show that there had been no executed gift of the deposit in question to Foley, the claimant's intestate, and no such completed trust created in his favor as to constitute him the beneficial owner of the fund. But it is not for us, as has often been said, to pass upon the weight of the evidence. The finding of the judge who tried the case without a jury must stand if there was any evidence to support it. If we assume that there was no delivery of the bank-book to Foley, then the question was whether there was evidence that Mrs. Cunningham, by her own conduct and declarations, had manifested a completed and executed intention to establish a trust in his favor, and whether this intention had been communicated to him and assented to by him, so

that both parties understood that the trust was not simply inchoate and resting in an intention to be finally consummated in the future, but actually had been fully carried out so that the beneficial interest had become irrevocably vested in him: *Gerrish v. New Bedford Institution for Savings*, 128 Mass. 159, 35 Am. Rep. 365; *Alger v. North End Savings Bank*, 146 Mass. 418, 4 Am. St. Rep. 331. It was not enough that Mrs. Cunningham should have made her deposit formally in trust for Foley; it would not be enough even that she had communicated to others the fact of her attempted creation of a trust; it could not be said to have become a completed and executed transaction until it had been communicated to him, or at least to some one acting in trust for him and for his benefit, and accepted by him: *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309, 49 N. E. 659; *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 289, 53 N. E. 823; *Bennett v. Littlefield*, 177 Mass. 294, 58 N. E. 1011; *Bailey v. New Bedford Institution for Savings*, 192 Mass. 564, 116 Am. St. Rep. 270, 78 N. E. 648; *Boynton v. Gale*, 194 Mass. 320, 80 N. E. 448. But admissions by an alleged donor that there has been an executed gift or a completed trust may, of course, be proved against her or her representatives, and may be found to include admissions that there has been either an actual delivery of the article or an effectual communication of the trust to the intended beneficiary and an acceptance of it by the latter: *McMahon v. Lawler*, 190 Mass. 343, 77 N. E. 489. In that case the gift was sustained, not because the intention of the donor had been made known to others, but because from her admissions a finding was warranted that the gift had been communicated to the beneficiary and accepted by her.

Applying these principles to the case at bar, there was evidence to warrant a finding for the claimant. The donor's declarations that she had made provision for Foley, which, standing alone, could have been accounted for by the provisions of her will, might be found on the other evidence to have applied to this deposit. Mrs. Levins testified that Foley spoke to Mrs. Cunningham of "that money she had on the book for him." Mrs. Cunningham's drafts upon the account might be found to have been for his benefit, either to pay fines for him or to put him directly in funds. And a reservation of the interest for her own benefit would not necessarily have been fatal to the gift of the principal: *Bone v. Holmes*, 195 Mass. 495, 81 N. E. 290, and cases cited.

Moreover, there was evidence on which it might have been found that at least a part of the money deposited belonged originally to Foley; and, if this fact were established, it would go far in the claimant's favor: *Hunnewell v. Lane*, 11 Met. 163; *Farrelly v. Ladd*, 10 Allen, 127. She had held bonds belonging to him; and, though she finally had turned these over to him, it might have been found that she had not fully accounted for the interest which she had previously collected.

Accordingly the plaintiffs' requests for rulings could not have been given, and the judge's finding for the claimant was warranted.

The evidence of Foley's declarations as to money which Mrs. Cunningham had belonging to him was competent both to show his acceptance of the gift and because (as we must now take it) ³⁹⁸ found by the judge to have been made by him in good faith upon personal knowledge, under Revised Laws, chapter 175, section 66: *Chaput v. Haverhill etc. Street Ry.*, 194 Mass. 218, 80 N. E. 597. If the answer of the witness, as distinguished from the question, was objectionable, the plaintiffs' remedy was to move that this be stricken out.

The exception to the admission of evidence that the plaintiffs, as executors, did not account for this deposit has not been separately argued by the plaintiff. Though of slight probative value, we cannot say that it was incompetent as an admission by the plaintiffs. They knew of this deposit; if it was not Foley's, it was their duty to account for it. In the absence of explanation, and they seem to have offered none, this conduct might be found to be inconsistent with their contention.

Exceptions overruled.

The Rule of the Principal Case that a Deposit in a Savings Bank in the name of the depositor in trust for another, without a delivery of the passbook to him, does not establish a trust in his favor, is supported by *Cunningham v. Davenport*, 147 N. Y. 43, 49 Am. St. Rep. 641; *Noyes v. Institution for Savings*, 164 Mass. 583, 49 Am. St. Rep. 484. Compare, however, *Bath Savings Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382; *Connecticut River Savings Bank v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944; *Schluter v. Bowery Savings Bank*, 117 N. Y. 125, 15 Am. St. Rep. 494. In the recent case of *Bailey v. New Bedford Institution for Savings*, 192 Mass. 564, 116 Am. St. Rep. 270, it is affirmed that where moneys are on deposit, to pass the property by a gift, there must be a delivery to, and an acceptance by, the donee, or something which is equivalent thereto; and that this rule applies to a deposit in a savings bank in the name or as trustee for another.

ELLIS v. BROCKTON PUBLISHING COMPANY.

[198 Mass. 538, 84 N. E. 1018.]

LIBEL—Question of the Application of, When for the Jury.—Whether an alleged libel was published of the plaintiff is a question for the jury, where extrinsic evidence is necessary to show to whom it applied. (p. 455.)

LIBEL—The Publication of the Retraction of a Libel is properly admitted in evidence, irrespective of any statute authorizing such admission, if made immediately upon learning of the libelous publication. It tends to establish the absence of malice, and may have the effect of showing that damages were thereby diminished. (p. 456.)

LIBEL—The Publication of the Retraction of a Newspaper Libel, however complete and prompt, does not necessarily reduce the damages recoverable to a nominal sum, nor exclude a recovery for mental suffering. (p. 456.)

LIBEL—Damages Recoverable.—In an action for libel the damages recoverable include damages for wounded feelings and loss of reputation, and this rule is not abrogated by a statute declaring that "unless the plaintiff proves actual malice or the want of good faith, or a failure to retract or to offer to retract as aforesaid, he shall recover damages only for the actual injury sustained, but in no action of libel shall exemplary or punitive damages be allowed." (pp. 457, 458.)

Tort by a minor by his next friend against a corporation for the publication of an alleged libel in the "Brockton Times" on November 20, 1906. The libel consisted of a story of the breaking and entering of a store for the purpose of committing larceny, and the charge as published had been taken from another newspaper, and in so doing the name "Harry Ellis" had been changed to "Harold L. Ellis," the name of the plaintiff. On the day of the publication the plaintiff went to the office of the defendant, and as the result of statements there made by him, the mistake was explained in the next publication of the paper. There was some conflict of evidence as to the promptness with which the mistake was corrected in a bulletin in the defendant's office.

The defendant asked the trial judge to rule (1) that the jury should find for the defendant; (2) that the plaintiff was entitled to nominal damages only; and (3) that he was not entitled to any damages for injuries to his feelings or mental suffering, nor for injury to character or reputation. The judge refused to so rule and there being some question as to whom the publication referred, he left to the jury the question whether the words charged as libelous were spoken of and concerning the plaintiff. The judge was also asked to rule that if the jury "find that so much of the alleged article as has not been shown to be true of Harold L. Ellis referred to another person, one Harry Ellis, for instance,

then their verdict should be for the defendant." Upon the question of damages, the judge instructed the jury: "If you find that some part or all of what was published by the defendant was published of and concerning this plaintiff, then you are to determine what injury, if any, he has suffered thereby. Now, that is a question entirely for the jury to determine. It is for you to say, if you reach that point, that the plaintiff has suffered, if anything has been published of him libelous in nature. The plaintiff has said, testifying in his own behalf, that he suffered in his feelings. I charge you that that is an element which you may take into account, if you reach the question of damages, and if you believe the plaintiff's testimony; and in that regard you have the testimony of the plaintiff's father and mother. How much he has suffered in his feelings, if any, it is for you to determine. And if you determine he has suffered, it is for you to determine what the compensatory damages, actual damages, are. Now, injury to feelings may be a substantial injury, and in that respect it depends upon who the party is; his age, his social standing, his connections, his business. All these circumstances, and others which will come to your attention, you have heard. You are to determine, if you reach that point, whether his reputation has in any respect been harmed. For it is his reputation and his standing, not his character, that is to be affected."

Respecting the retraction, the judge instructed the jury as follows: "Did the defendant, the publishing company, immediately, as soon as it reasonably could, make adequate retraction? You are the judges of that under all the circumstances. You will have submitted to you the account which they published. They claim that they published equally conspicuously a complete retraction so far as this plaintiff is concerned, and so that if anyone had thought that it referred to this plaintiff, they should see that it did not refer to this plaintiff. Whether that is adequate is for you to determine."

Verdict for the plaintiff; the defendant alleged exceptions.

F. E. Sweet, for the plaintiff.

R. W. Nutter, for the defendant.

541 RUGG, J. The question whether the article was published of and concerning the plaintiff was properly left to the jury to be determined as a fact. It is only where there is no ambiguity as to the meaning of the language used, in

connection with all the attendant circumstances, that it becomes a question of law: *Barrows v. Bell*, 7 Gray, 301, 66 Am. Dec. 479. But it has been said frequently that this is usually a question of fact: *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856. The published article described the plaintiff by his right name, and it contained at least one paragraph, which concededly referred to events in his life. This identified him as its subject. Although there were other statements which, to those intimately acquainted with his work and residence, might have been known not to be true of him, yet they are so connected and interwoven with the other assertions, that, plainly, it could not have been ruled as matter of law not to refer to the plaintiff. The structure of the article, published by the defendant, was such that it cannot reasonably be thought to refer to two different persons. It conveys no such intimation to the mind of the ordinary reader.

On the day when the defamatory article appeared in the "Brockton Times," the plaintiff with his mother called at the office of the defendant, and pointed out to its agents the error, so far as it concerned the plaintiff. The agent of the defendant said that everything would be done to set the matter right, and in the next issue of the defendant's newspaper a retraction was printed in a conspicuous place. No written notice was given by the defendant to the plaintiff or his attorney of an intention to publish the retraction. It was published as soon as possible after the interview between the plaintiff and the agent of the ⁵⁴² defendant. These events occurred before action was brought. The defendant contends that Revised Laws, chapter 173, section 92, applies. It is extremely doubtful whether this statute touches these facts. No "notice in writing" was given nor was any copy of the proposed retraction shown by the defendant to the plaintiff or his attorney, so that the procedure pointed out by the statute was not followed. There is ground for the argument that the statute was intended to be effective only after action brought, and not before, to which force is added from the fact that in some jurisdictions it has been held that a retraction published after the commencement of an action is not admissible in evidence: *Scripps v. Reilly*, 38 Mich. 10; *Constitution Publishing Co. v. Way*, 94 Ga. 120, 21 S. E. 139. The effect of the publication of a retraction has never been presented for decision in this commonwealth. The publication of an ample retraction immediately upon learning that a libelous article has appeared in his columns, by the pro-

prietor of a newspaper, is evidence tending to show an absence of malice. The practical value of such evidence is probably less here, where punitive or exemplary damages are not allowed, than in states where recovery of such damages is permitted. But it has been said that "no doubt a manifestation of malevolent motives might enhance damages under our rule allowing damages for injured feelings": *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. The publication of a retraction, complete in character and conspicuous in position, might be found to have a material effect in diminishing the mischief caused by the libel, and thus substantially reduce the damages sustained by the person libeled. The retraction was properly admitted in evidence quite apart from the statute. The great weight of authority supports this view: *Smith v. Harrison*, 1 Fost. & F. 565; *Brown v. Brooks*, 3 Ind. 518; *Davis v. Marxhausen*, 103 Mich. 315, 61 N. W. 504; *Turton v. New York Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009; *Taylor v. Hearst*, 118 Cal. 366, 50 Pac. 541; *Cass v. New Orleans Times*, 27 La. Ann. 214; *Lehrer v. Elmore*, 100 Ky. 56, 37 Pac. 292.

But even if it be assumed that the statute applies to a state of facts like the present, the prayers of the defendant that the plaintiff could not recover for mental suffering and was entitled only to nominal damages were properly refused. The significant words of the statute, after the provisions respecting retraction, ⁵⁴³ are, "Unless the plaintiff proves actual malice or the want of good faith, or a failure either to retract or offer to retract as aforesaid, he shall recover damages only for the actual injury sustained, but in no action of libel shall exemplary or punitive damages be allowed." As before pointed out, the recovery of vindictive, exemplary or punitive damages has never been permitted in this commonwealth: *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. Hence this part of the statute is at most declaratory of the common law. The early portion quoted is not clear in its meaning. It would have a plain purpose in jurisdictions where punitive damages are recoverable. This rule prevails in many, although not all, of the other states of the Union. In these states, "actual damage or injury" has been used in contradistinction to vindictive damages and has been construed to include damages to feelings and reputation as well as the grosser forms of injury: *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 1, 81 N. W. 1003, 49 L. R. A. 475; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608, 28 N. W. 695; *So Relle v. Western*

Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805; Western Union Tel. Co. v. Lawson, 66 Kan. 660, 72 S. W. 283; Hearne v. De Young, 132 Cal. 357, 64 Pac. 576; Lord v. Wood, 120 Iowa, 303, 94 N. W. 842. In this commonwealth the damages recoverable in actions of tort have always included only compensation for those injuries which flow from the wrong as a natural result. But, in actions of libel and slander, such damages have invariably been held to include compensation for wounded feelings and loss of reputation. The unjustifiable publication of a libel might naturally cause suffering in one's feelings quite as poignant as physical pain and pecuniary loss through injury to one's reputation fully as severe as the loss of a limb. The one is as strictly actual damage as the other: Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97. The part of section 92 which relates to retraction made certain what had not been decided in this state, that such a publication subsequent to the bringing of an action is admissible in evidence. It is more reasonable to assume that the clause as to actual damage found its way into our statute through an excess of caution, than to assume a legislative intent to use the words "actual injury" in a sense foreign to our jurisprudence. Such an assumption would render the statute extremely hard to construe, and might in some aspects involve constitutional difficulties: See Park v. Detroit ⁵⁴⁴ Free Press, 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599. It may reasonably be interpreted as merely declaratory of the common law and emphasizing the fact that punitive damages are not here recoverable, which is the effect of the latter part of the same sentence. The charge of the trial judge that the plaintiff might recover damages for mental suffering and injury to his reputation was not error.

Exceptions overruled.

Libel.—*Apology or Retraction* usually tends to diminish the damages of a defamatory publication, and hence may always be proved in mitigation of damages. It can never, however, constitute a complete defense, and hence, as a plea in justification, must be declared entirely inadequate: See note to Rutherford v. Paddock, 91 Am. St. Rep. 288.

Libel.—*The Retraction of a Libelous Newspaper Article* required by statute to constitute a defense must clearly refer to and admit the publication of the article complained of, and directly, fully and fairly, without any uncertainty, evasion or subterfuge, retract the alleged false and defamatory statements therein: Gray v. Times Newspaper Co., 74 Minn. 452, 73 Am. St. Rep. 363.

DRESEL v. KING.

[198 Mass. 546, 85 N. E. 77.]

WILLS—Legacy, When Lapses.—On the death of the legatee of a pecuniary legacy before that of the testator, the legacy lapses. (p. 459.)

WILLS—Lapsed Legacy, When Passes Under a Residuary Clause.—On a bequest of legacies to several persons, if one of them dies before the testator, his legacy is ordinarily to be disposed of under the residuary clause, if there is one. (pp. 459, 460.)

WILLS—Lapsed Legacy, When Goes to the Next of Kin and not to the Residuary Legatees.—If a testator, after making a disposition of part of his property, directs his executors to convert the rest into cash and divide it among legatees previously named in proportion to their several legacies, and one of them dies before the testator, the legacy lapses, and does not go to the other legatees under the residuary clause, but to the next of kin. (p. 460.)

WILLS—Lapse of a Legacy Given by the Residuary Clause.—If a legacy is itself part of a residuary clause, it cannot fall into that residue, and must pass as intestate estate if it lapses by the death of the legatee before that of the testator. (p. 460.)

F. S. Goodwin, for the pecuniary legatees.

A. S. Pinkerton, F. B. Smith and T. H. Gage, Jr., for the defendants.

547 KNOWLTON, C. J. This is a bill brought by an administrator with the will annexed for instructions as to the meaning of the will. The fourteenth clause of the will is as follows: "I direct my executor, hereinafter named, to convert all the rest and residue of my estate into cash, and to divide the same among the pecuniary legatees hereinbefore named, in proportion to their several pecuniary legacies; but should my estate not herein specifically devised be insufficient to pay all my debts, charges of administration and the pecuniary legacies herein given, said pecuniary legacies are to be proportionally abated."

One of the pecuniary legatees, to whom ten thousand dollars was given by the will, died before the testatrix, leaving no issue. Her legacy, therefore, lapsed, and the first question argued is whether it fell into the residuum, or passed to the next of kin of the testatrix.

We think that the residuary clause has the distinguishing characteristics of a true residuary clause which indicates a purpose of the testator thereby to include all his estate that is not actually disposed of in other parts of his will, and thus to make a complete disposition of all his property. We think it plain that this lapsed legacy is to be disposed of under the residuary clause.

The most difficult question in the case is whether the gifts in this clause are to the pecuniary legatees as a class, so that on the death of one of them the whole amount goes to the survivors, or whether they are gifts to them as individuals, to hold as tenants in common in the proportions specified. The legatees are not mentioned by name, but their identity as individuals is plainly shown. They are not in the ordinary sense members of a distinct class, for they have no relation to one another except as recipients of the testatrix's bounty. One of them is a corporation, and most of them are not relatives of the testatrix or of one another. We are of opinion that the clause should be construed as if they were severally mentioned by name, to receive each a share in the proportion specified. If this is the meaning, under the rule stated in *Jackson v. Roberts*, 14 Gray, 546, the gift to any one of them who died before the testatrix would lapse. Such a result was reached in *Sohier v. Inches*, 12 Gray, 385, *Lombard v. Boyden*, 5 Allen, 249; *Cummings v. Bramhall*, 120 Mass. 552; *Frost v. Courtis*, 167 Mass. 251, 45 N. E. 687, and ⁵⁴⁸ *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831. The strongest case cited for the pecuniary legatees on this point is *Prescott v. Prescott*, 7 Met. 141, but the language of the will in that case was much less specific, as pointing to the individuals and to distinct proportions, than it is in this. We are of opinion that the present residuary clause should be treated as if it mentioned the legatees by name, and gave his proportional share in terms to each.

In this view, the share that was given to Annette M. Alden, which was twenty two hundred and fifty thirds (20/253) of the entire residue, lapsed, and passed to the next of kin as property undisposed of by the will.

It is contended that this share goes to the other residuary legatees. But as to this share, which is a part of the residuum, they are not residuary legatees. In *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831, this court said: "But where a legacy lapses, which is part of the residue, it cannot, according to our decisions, fall into the residue, because it is itself a part of the residue, and it must pass as intestate estate." This rule was also stated and applied in *Sohier v. Inches*, 12 Gray, 385, *Lombard v. Boyden*, 5 Allen, 249; *Frost v. Courtis*, 167 Mass. 251, 45 N. E. 687, *Powers v. Codwise*, 172 Mass. 425, 52 N. E. 525, and *Best v. Berry*, 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743. It prevails in other jurisdictions: *Kerr v. Dougherty*, 79 N. Y. 327;

Hard v. Ashley, 117 N. Y. 606, 23 N. E. 177; Humble v. Shore, 7 Hare, 247; Bagwell v. Dry, 1 P. Wms. 700.

It follows that the proportional part of the residuum which would have gone to Annette M. Alden if she had survived the testatrix will be divided among the next of kin.

So ordered.

The Lapse of Legacies by the Death of Legatees prior to the death of their testator is discussed in the monographic note to Cureton v. Massey, 94 Am. Dec. 156-160. By the rules of the common law, a legacy or devise lapses and becomes void if the legatee or devisee fails to survive the testator: In re Wells, 113 N. Y. 396, 10 Am. St. Rep. 457; McNeal v. Pierce, 73 Ohio, 7, 112 Am. St. Rep. 695.

The Bequest of the Residue of the Testator's Estate to her younger children, E. G. C. and E. I. B., to be divided equally between them, is a separate bequest to each, and not one bequest to them as a class. Hence, on the death of E. G. C. during the life of the testator, E. I. B. does not take the residue, but the deceased, as to it, must be regarded as dying intestate: Best v. Berry, 189 Mass. 510, 109 Am. St. Rep. 651.

CARRAHAR v. BOSTON AND NORTHERN STREET RAILWAY COMPANY.

[198 Mass. 549, 85 N. E. 162.]

STREET RAILWAYS—Duty of Motorman to Person Whom He Sees will be Injured Through the Latter's Negligence.—When the motorman of a car sees a team which is ahead being driven in a straight line "coming in toward" the track, so that if both keep on a collision will ensue, it is his duty to stop his car if he sees that the driver of the team is going on, even though the driver ought not to go on. (p. 464.)

STREET RAILWAYS—Duty of Person About to Cross Track of.—One about to cross the track of a street railway is bound to exercise care in looking to see whether he can safely do so. (p. 464.)

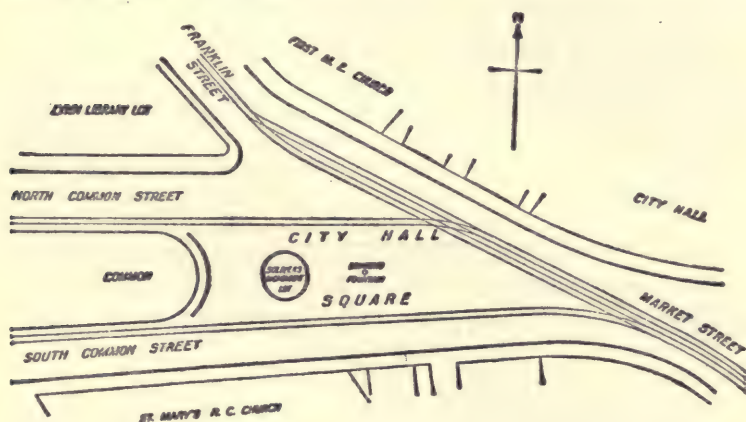
NEGLIGENCE, Contributory, in not Looking at the Crossing of a Track, When a Question for the Jury.—The fact that the plaintiff, after looking along the track of a street railway and seeing no car approaching, drove from one hundred and twenty to one hundred and forty feet without again looking, does not establish his contributory negligence as a matter of law, but the question is for the jury. (p. 465.)

STREET RAILWAYS—Right of Person Who Would Naturally Reach a Point First.—Where two are driving vehicles upon a street, the one who, pursuing his course and not increasing his rate of speed or changing his direction, would naturally reach an intersecting point first has the right of way, and the one who, not changing his rate of speed or direction, would reach such point last ought to give way to the rights of the one who would reach there first. (p. 465.)

STREET RAILWAYS—Instruction as to Right of the Party Who Would Reach a Point First, When Improper and Misleading.—In an action against a street railway to recover for injuries suffered

by the collision of a team which the plaintiff was driving and a street-car, it is error to give an instruction which the jury may understand to make the right to recover depend on who would have reached the point of intersection first, and would therefore have the right of way, where there is evidence from which the jury might infer that the plaintiff, had he exercised due care, would not have exposed himself to the injury by going on the track at all. (pp. 465, 466.)

Tort to recover for personal injuries. At the trial a plan was offered in evidence showing the situation of the streets and track at and near the point where the accident occurred. Such plan is as follows:



W. H. Southwick, for the plaintiff.

S. Parsons and H. A. Bowen, for the defendant.

550 LORING, J. The story told by the plaintiff in this case is that on the afternoon of July 21, 1903, he was driving a one-horse express wagon heavily loaded through South Common street in Lynn, shown on the plan, on his way from Boston to Nahant. The afternoon was a stormy one, with a pelting, driving, easterly rain full in his face. He had a canvas over his wagon, drawn up over a hood or shade above his seat. When he came to the end of the common he looked to see whether there was a car coming. He saw none, and drove to the drinking fountain to give his horse a drink. He then testified: "I looked around again and I could see down below the trees; there is trees at the end of the common, probably two or three hundred feet away from where I was. I should say two hundred feet anyway, and then I proceeded on. I didn't see any car, so I started across in a direct line right across Market street and about one hundred feet, one hundred forty feet from the drinking fountain I struck the

car track and I goes in the car track for about fifteen feet, ten or fifteen feet, and when I was in there at that distance I heard the car coming from behind, so I tried to get the horse to go faster; I was going very slow." He tried to get out of the ⁵⁵¹ way, but before he succeeded in doing so the car "struck the hind wheel and threw the hind part of the wagon out, and directly after that struck the forward wheel and threw that out, and about the same time it struck the horse and threw the horse down and it threw me in the back of the wagon."

It is admitted that "the plaintiff walked his horse from the drinking fountain till he got upon the car track and did not look back or listen after he left the drinking fountain."

Evidence was introduced by the defendant tending to show that the plaintiff was asleep; that the gong was sounded and he paid no attention to it, and that the car struck "in between the horse and the shaft near the hind part of the horse"; and that the plaintiff was not thrown off his seat. Some of the evidence introduced by the defendant corroborated that of the plaintiff as to the way he drove onto the car track, while other witnesses testified that the plaintiff "was driving a little ways parallel with the track and then swung across when the car was within twelve feet of him."

The motorman of the car in question testified that "at City Hall Square there was a covered team going in the same direction on an angle toward the track. When I first noticed the team I was about thirty yards in the rear. I immediately set my brake and rang my gong. My car was running at about four or five miles an hour just prior to this time. This team kept coming in toward the track, and when I was about ten feet from him I shouted and rang my gong harder, but he kept coming in toward the track and the front left-hand corner hit his right shaft."

It was also admitted that the plaintiff was thoroughly familiar with the locus, and that there were four lines of electric cars running through City Hall Square, and thirty-six cars an hour went through the square at that time of day, "averaging less than two minutes apart."

A civil engineer called by the defendant testified that a motorman in the front end of an electric car coming from Boston as the car in question was coming would have a clear view of the scene of the accident for something like thirteen hundred feet, probably more.

The defendant asked for rulings that, as matter of law, the ⁵⁵² plaintiff was negligent and the defendant was not. These were refused and exceptions were taken.

In the course of his charge the presiding judge told the jury that: "Ordinarily, where two men are driving vehicles upon the street, the one who, pursuing his course and not increasing his rate of speed or changing his direction, would naturally reach an intersecting point first, would naturally have the right of way, and the one who, not changing his rate of speed or his direction, would naturally reach such point last must give way to the rights of the one who would reach there first." To this an exception was taken.

1. The testimony of the motorman made out a complete case of negligence on his part—that is to say, on the part of the defendant.

When the motorman of a car sees a team ahead which is being driven in a straight line "coming in toward" the tracks so that if both keep on a collision will ensue, it is the duty of the motorman to stop his car if he sees that the driver of the team is going on, even if the driver ought not to go on. In place of that the motorman in the case at bar, by his own testimony, deliberately ran the plaintiff down. We are of opinion that no exception lies to the ruling by which the presiding judge left this question to the jury: *Glazebrook v. West End St. Ry.*, 160 Mass. 239, 35 N. E. 553; *White v. Worcester Consolidated St. Ry.*, 167 Mass. 43, 44 N. E. 1052; *Vincent v. Norton & Taunton St. Ry.*, 180 Mass. 104, 61 N. E. 822.

2. The question whether, as matter of law, the plaintiff was guilty of contributory negligence is a close question. But on the whole we think that this also was a question for the jury.

In such a case as that now before us the law is settled. The difficulty lies in drawing the line between what is and what is not negligence as matter of law in particular cases.

The plaintiff was bound to exercise due care in looking to see whether he could safely cross the track in question: See, for example, *Jeddrey v. Boston & Northern St. Ry.*, 198 Mass. 232, 84 N. E. 316; *Stubbs v. Boston & Northern St. Ry.*, 193 Mass. 513, 79 N. E. 795. See, also, *Sullivan v. Boston Elevated Ry.*, 185 Mass. 602, 71 N. E. 90.

The plaintiff admitted that he drove at a slow walk for one hundred and forty feet after looking before he entered on the ⁶⁵³ tracks. If he personally was at the fountain when he looked, his horse's nose must have been some ten feet or so

nearer the rail, and when he testified that he looked when at the drinking fountain, it does not necessarily mean that he was exactly opposite the center of it. This testimony might fairly be taken to mean that he looked as he started to drive away from the fountain. The length of the plaintiff's horse and wagon is not given in the bill of exceptions. It may fairly be assumed to be about twenty feet. The result is that the jury were warranted in finding that he drove about one hundred and twenty to one hundred and forty feet after looking, before his horse's nose crossed the nearer rail of the track in question. On paper that sounds like a long distance. But to drive about six lengths of his team cannot (in our opinion) be said, as matter of law, to be too long a distance to drive without looking, under the circumstances of this case. In this case the course which the plaintiff took when he left the drinking fountain and which he adhered to throughout showed that he intended to cross the tracks. When this is taken in connection with the fact that the motorman could see the point where the collision took place for "something like thirteen hundred feet, probably more," we think that the question of the negligence of the plaintiff was for the jury, as in *Jeddrey v. Boston & Northern St. Ry.*, 198 Mass. 232, 84 N. E. 916; *Stubbs v. Boston & Northern St. Ry.*, 193 Mass. 513, 79 N. E. 795; *Sullivan v. Boston Elevated Ry.*, 185 Mass. 602, 71 N. E. 90.

The case does not come within *Seele v. Boston & Northern St. Ry.*, 187 Mass. 248, 72 N. E. 971. There, after driving three-quarters of a mile parallel and close to the defendant's tracks the plaintiff pulled sharp across them without looking to see if a car was close behind him.

It should be noticed that the thirty-six cars an hour which went through City Hall Square all did not come on the tracks here in question.

3. We are of opinion, however, that the exception to the charge must be sustained.

If the word "ought" were substituted for the word "must" in the last line, the proposition stated would be correct as an abstract proposition of law.

But even then it would not have been proper to instruct the 554 jury that the rights of the parties in the case then before the court depended upon that proposition.

From what has been said the question on which the rights of these parties depended was whether the accident was caused solely by the negligence of the defendant—that is to say, was

caused by the negligence of the defendant if it was negligent, and was not caused in whole or in part by the contributory negligence of the plaintiff if he was negligent. It might well be that the plaintiff, if he had exercised due care, would have heard the defendant's gong before he did hear it and would not have gone on the track at all, or, if he had got onto it, that he would have driven off it in time to avoid a collision. The fact that the plaintiff was the first to get to the place on the tracks where he was struck was not decisive of the rights of the parties in the case at bar. The jury might well have understood the judge to tell them that it was.

Exceptions sustained.

The Duty of a Traveler Approaching a Street Railway Crossing is to exercise care to avoid a collision; the care must be that of an ordinarily prudent man in view of all the existing conditions: *Butler v. Rockland etc. St. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Marden v. Portsmouth etc. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476; *Hornstein v. United Railways Co.*, 195 Mo. 440, 113 Am. St. Rep. 693; *Drown v. Northern Ohio Traction Co.*, 76 Ohio St. 234, 118 Am. St. Rep. 844; *Ford's Admr. v. Paducah City Ry.*, 124 Ky. 488, 124 Am. St. Rep. 412.

The Motorman of an Electric Car at a Street Crossing must anticipate that persons approaching from either side may drive teams on it, and must exercise all due care and have the car under such control as to be able to stop at a crossing if necessary, to avoid accident: *Marden v. Portsmouth etc. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476. If it is apparent that a collision is likely to occur, it is his duty to be ready to use, and to use, if necessary, all practicable means to prevent it. Anything less is want of due care: *Butler v. Rockland etc. St. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Marden v. Portsmouth etc. St. Ry.*, 100 Me. 41, 109 Am. St. Rep. 476.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

HARMON v. OLD DETROIT NATIONAL BANK.

[153 Mich. 73, 116 N. W. 617.]

BANKING.—The Burden of Proving Payment by a Valid Check or other voucher is on the bank as between it and its depositor. (p. 470.)

BANKING.—Duty of Inquiry Respecting Payee of Paper Coming Through Another Bank.—The fact that a check or draft on a bank is presented to it through another bank does not exonerate the former from inquiry respecting the identity of the payee named in such check, and it is liable if payment is not made to such payee. (p. 471.)

BANKING.—Check Payable to Fictitious Person, When not Payable to Bearer.—If a check is drawn in favor of one whom the drawer supposes to be a real person, but, as a matter of fact, no such person exists, the case does not fall within the statute relating to checks drawn in favor of fictitious persons. This statute applies only when the payee is known to be fictitious. (p. 471.)

BANKING.—Payment of a Check Changed so as to be a Forged Instrument.—If a check or warrant for the payment of money is so changed after its issuance as to make it a forged instrument, the bank is not justified in paying it. (p. 471.)

BANKING.—The Duty of the Drawee to Use Diligence in Identifying the Payee of a check or warrant is not changed by the time or place of the forgery. (p. 472.)

BANKING.—Liability for Paying Check Where the Name of the Payee is Forged.—If a railway corporation intends to issue its warrant or check in favor of A, but, through the fraud of one of its employes, the paper is issued in favor of B, probably a fictitious person, and, being paid by a bank in a distant city, is by it forwarded to the bank on which it is drawn, which makes payment without taking steps to ascertain the identity of the payee, it is answerable to the railroad company for the payment so made. (p. 473.)

Action by the receiver of the Pere Marquette Railroad Company for money had and received. Judgment for the defendant; plaintiff brought error.

Henry A. Harmon and Harrison Geer, for the appellee.

In May, 1905, the railroad company was indebted to the Sunday Creek Coal Company in the sum of two thousand and ninety-seven dollars and thirty-eight cents. Its purchasing agent prepared a voucher warrant for payment. This document was prepared on a printed blank. The first page of the document, called the warrant, constituted the check or warrant of the treasurer of the company on the bank. The warrant, as prepared by the purchasing agent, reads as follows:

(Pay W. N. Cott, Treas.), Columbus, O.

Dept. No. 6706, April.

"For coal per attached statement.....\$2,097.38."

Below this were blanks for the signatures of the auditor of disbursements, comptroller and treasurer, and for the signature of the payee upon presentation at the bank. Above the auditor's signature is the following: "I certify that this warrant is in accordance with an account approved by the proper officer and duly audited."

Above the comptroller's signature are the words: "Approved for payment." Above the treasurer's signature is the following: "Will pay this warrant when properly dated and receipted if presented within 60 days from date stamped hereon."

All the above except the receipt of the payee appeared upon a carbon page called the voucher. Instead thereof there were blanks in which to show the manner in which the amount paid should be charged upon the books of the railroad company.

The purchasing agent and his clerk who prepared the papers signed their names upon the voucher, and then ⁷⁶ the original warrant and voucher, with a statement of the coal to be paid for and original invoices thereof attached, were sent to the general manager for his approval. The general manager approved the payment by signing the voucher, and

forwarded the papers to the president, who also approved the payment by signing the voucher, and then forwarded the papers to the auditor of disbursements. In the office of the auditor of disbursements, the papers passed through the hands of several clerks, each of whom had some particular duty to perform in relation to them, in verifying the computations, entering the transaction upon the books of the company, etc. Before the warrant had been signed by the auditor of disbursements, Edwin Murdock, one of the clerks in his office, fraudulently took the papers out of the office and sent them to Chicago, where the name and address of the payee named in the voucher was changed from "The Sunday Creek Coal Co., Pay W. N. Cott, Treas., Columbus, O.," to "The G. E. Fairbanks Coal Co., Pay G. E. Fairbanks, Treas., 407 Able Bldg., Cor. 63 St., Stewart Ave., Chicago, Ill.," and the statements attached to the vouchers were changed in the same manner. The altered papers were returned by mail to the office of the auditor of disbursements, where a new warrant was prepared. This new warrant was made payable to "The G. E. Fairbanks Coal Co." to accord with the altered voucher; and when some further entries in relation to the transaction had been made, the papers were, in the regular course of business, laid before the chief clerk of the auditor of disbursements for his approval. The new warrant above mentioned was signed by the auditor of disbursements without any knowledge or suspicion that the name of the payee had been changed after the voucher had been signed by the purchasing agent, general manager, and president of the company. The warrant was then sent to the treasurer of the company, who signed it and mailed it to the payee at Chicago, at the address shown in it.

The indorsement stamped upon the warrant by the different ⁷⁷ banks through which it passed indicate that the warrant was cashed by someone at a Denver bank, forwarded by that bank to a bank in Chicago, which forwarded it to the American Exchange National Bank of Detroit, which collected the amount of the warrant from the defendant bank through the Detroit clearing-house after an indorsement by the American Exchange National Bank of a guaranty of prior indorsements. This is all the light we have upon the history of the warrant from the time it left the office of the railroad company's treasurer.

The railroad company had no contract with the G. E. Fairbanks Coal Company; never had any dealings with such a

company; had never heard of the existence of such a company, and had no coal contract with anyone in Chicago.

The warrant came to the defendant in the usual course of business and was paid. This suit is brought to recover the amount paid on the warrant on the ground that it was a forgery.

The plaintiff requested the court to direct a verdict in his favor. This was refused, and the case submitted to the jury upon the theory that the railroad company was negligent in making and issuing the warrant, and that where one of two parties must suffer, the loss must be borne by the one whose negligence caused it. The jury rendered a verdict of no cause of action.

The facts in this case are not in dispute, and are sufficiently above stated. The conclusion to be drawn from them is that a trusted employé of the railroad company erased or caused to be erased, with the aid of others, the name of the real payee and the substitution of another payee, and thus caused to be issued a forged warrant or voucher. The payee in the forged instrument was either a fictitious person or a real one unknown to the drawer. The plaintiff made a *prima facie* case of a fictitious payee. The defendant introduced no evidence that the payee was a real ⁷⁸ entity. The record is barren of any evidence tending to show to whom the payment was made by the bank in Denver, Colorado, or under what circumstances it was paid. All that the record shows is that it was cashed in the Denver bank, and reached the drawee, the defendant, through other banks and was paid by it on July 1, 1905.

As between the depositor and the bank, the burden of proving payment by valid check or other voucher is upon the bank. No citation of authority is needed that he who receives money of another must account for its payment. As between the plaintiff and the defendant, the question is, Upon whom must the loss fall? There is no claim of bad faith on the part of either. The facts being conceded, the question is one of law.

Plaintiff contends that the fraud or negligence of plaintiff's employé does not relieve the bank of its burden of proving that payment was made to the payee named in the warrant. Defendant insists that the officers of the company were negligent in not ascertaining that the voucher was forged; that it exercised due care in honoring it, bearing as it did the genuine signatures of the officers of the company. If the payee named in this voucher, the G. E. Fair-

banks Coal Company, Pay G. E. Fairbanks, treasurer, had been presented to the defendant by one claiming to be G. E. Fairbanks, the treasurer of the Fairbanks Coal Company, would the defendant have been protected in payment without any investigation to determine the identity of the presenter with the payee named in the warrant? It seems to us clear that it would not. The same rule must apply when the warrant or check is presented to it, coming through other banks. If the drawee chooses to rely upon the identification by the bank which cashed the check, it does so at its own risk, and its recourse is upon that or some intermediate bank. If the G. E. Fairbanks Coal Company was a fictitious payee, the bank cannot defend under the statute (2 Comp. Laws, sec. 4870) that the check was payable to bearer. That statute applies only to cases where the drawer knowingly ⁷⁹ draws the check to the order of a fictitious payee: *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 15 Am. St. Rep. 655, 22 N. E. 866, 6 L. R. A. 625; *Shipman v. Bank of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821, 27 N. E. 371, 12 L. R. A. 791; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *Chism v. First Nat. Bank*, 96 Tenn. 641, 54 Am. St. Rep. 863, 36 S. W. 387, 32 L. R. A. 778; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; 2 *Bolles on Modern Law of Banking*, p. 716; 7 *Cyc.* 564.

In *Shipman v. Bank of New York*, 128 N. Y. 318, it is said: "We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person," citing authorities.

There are authorities to the contrary in this country, but the clear weight of authority in both England and the United States is in favor of this rule. If this warrant had been changed so as to make it a forged instrument after it had been issued by the railroad company, under all the authorities the defendant would not have been justified in paying the forged instrument. The time and place of the forgery are immaterial, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. But the drawee's duty to use due diligence in identifying the payee of the check or warrant is not changed by the time

and place of the forgery. This is not the case of *United States v. National Exch. Bank*, 45 Fed. 163. In that case the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was, of course, with the drawer and not with the drawee. To render that case applicable to this, it should have appeared that the proper officer of the railroad company went to the bank and identified the payee.

It was held in *Robarts v. Tucker*, 16 Q. B. 560: ⁸⁰ "That a banker cannot debit his customer with the payment made to one who claims through a forged indorsement and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from showing it to be forged."

It is held in *Murphy v. First Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693: "The ordinary rule is well established that a banker, on whom a check is drawn, must ascertain at his peril the identity of the person named in it as payee. It is only when he is misled by some negligence or other fault of the drawer, that he can set up his own mistake in this particular against the drawer," citing authorities.

In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colorado, where the warrant was cashed, and whether that bank took the requisite precaution we do not know. It would naturally excite suspicion that a check, drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee: 2 *Morse on Banks and Banking*, 4th ed., sec. 466 (b); *Ellis v. Ohio L. I. & Trust Co.*, 4 Ohio St. 628, 64 Am. Dec. 610. The court in that case said: "Where negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder, in relation to the genu-

ineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument."

The negligence of the Denver bank is imputable to the defendant.

⁸¹ In *Graves v. American Exch. Bank*, 17 N. Y. 205, a draft was sent payable to order of Charles F. Graves. It reached a person in the same place by the same name, and by him was indorsed and paid by the drawee. It was held that the payment, although made in good faith, did not divest or impair the title to the true owner who had not seen or indorsed the paper. It was held in fact to be a forged indorsement.

It was held in *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun (N. Y.), 475, 27 N. Y. Supp. 1070, that it is the signature of the payee that transfers title to a check; that the signature of another person by the same name as the one to whom it was drawn is just as much a forgery as if the names had been different. It is the signature of the payee that transfers title to the check. A similar holding is in *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85.

It was held in *First Nat. Bank of Chicago v. Pease*, 168 Ill. 40, 48 N. E. 160, that the fact that the drawer of a check delivers it to a party representing himself as the payee's agent, without investigating the alleged agent's authority, is not such negligence as will relieve the bank from liability for the payment of the check on a forged indorsement of the payee's name by the alleged agent.

If the payee named in the paid warrant was a fictitious person, the indorsement in the name of such fictitious party is in effect a forgery: *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131. If the G. E. Fairbanks Coal Company, and G. E. Fairbanks, treasurer, were fictitious parties, the indorsement was a forgery. If they were real parties, the indorsement by any other without authority would be a forged indorsement and would not excuse defendant's payment. It was incumbent upon it to show the existence or nonexistence of such a payee, and that the Denver bank took the proper means to identify the payee. It failed to sustain this burden, and therefore the verdict and judgment are set aside and a new trial ordered.

Blair, Montgomery, Carpenter and McAlvay, JJ., concurred.

The Rights and Remedies of the Several Parties When a Forged Check has been paid are discussed in the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889; and the liability of one receiving payment of a check on a forged indorsement is discussed in the note to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641. For recent decisions on these questions, see *Wellington Nat. Bank v. Robbins*, 71 Kan. 748, 114 Am. St. Rep. 523; *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 117 Am. St. Rep. 1014; *Cunningham v. First Nat. Bank*, 219 Pa. 310, 123 Am. St. Rep. 657.

AINSWORTH v. MUNOSKONG HUNTING AND FISHING CLUB.

[153 Mich. 185, 116 N. W. 992.]

NAVIGABLE WATERS.—The Right to Hunt Fowl on the Navigable Waters of the State is a civil right of its citizens, the protection of which is clearly within the jurisdiction of equity. (p. 478.)

NAVIGABLE WATERS.—The Right of a Citizen of a State to Hunt Wild Fowl on Its Navigable Waters is one the wrongful interference with which gives substantial injury, and is of such dignity as to require protection by the courts. (p. 478.)

EQUITY PRACTICE.—Averments on information and belief, when not denied, warrant the interposition of courts of equity. (p. 478.)

EQUITY—Injunction.—An injury is irreparable if it may not be adequately compensated in damages, or where there exists no certain pecuniary standard for the measurement of the damages, due to the nature of the right or property injured. (p. 478.)

TO HUNT OR FISH in the Navigable Waters of the State is a Public Right of which every citizen may avail himself, subject to the game laws. (p. 478.)

INJUNCTION to Protect Right to Hunt in the Navigable Waters of the State.—A citizen entitled to hunt on one of the navigable waters of the state is entitled to an injunction against a club and its members who have interposed, and intend to further interpose, to prevent the exercise of such right. (p. 478.)

E. S. B. Sutton, for the complainants.

Sharpe & Handy, for the defendant.

187 McALVAY, J. Complainants, residents of the county of Chippewa, filed their bill of complaint against defendant, praying that defendant be enjoined from interfering with, preventing and molesting complainants in the pursuit of their common right to hunt wild fowl on Munoskong Bay in said county, whose waters, as is claimed in said bill, are a part of the Great Lakes, the defendant claiming to have exclusive right to take such wild fowl.

The material matters set forth in the bill of complaint necessary to state are: That the waters referred to are navigable meandered waters; that they were hunting ducks on said waters in a rowboat about one-half mile from shore, and had set their decoys for that purpose; that the agents and servants of defendant corporation came from the clubhouse and ordered complainants to cease hunting ducks, claiming the exclusive right to hunt ducks on said waters to be in defendant, and that complainants had no right or privilege to do so; and that the agents and servants of defendant willfully, and with intent to prevent complainants from hunting ducks upon these waters, rowed their boat about among the decoys and prevented ducks from alighting near them, and prevented complainants from shooting and securing them; that complainants moved their decoys from that place to another upon the navigable waters of this bay, where they might lawfully hunt ducks, and that these parties followed them, repeating their unlawful conduct, and, acting under orders of defendant, again prevented complainants from hunting; that they followed complainants about with their boat, and finally they were unlawfully ¹⁸⁸ compelled to cease from exercising their lawful right to hunt on this navigable meandered bay; that defendant's servants when requested to keep away and desist from interfering with them refused, and said they were game-keepers of defendant, which had employed and placed them there to prevent any persons except members of the club from hunting on said waters, which right was possessed solely and exclusively by defendant; which conduct complainants allege is in violation of their inalienable rights in the pursuit of happiness and also of their personal liberty. Complainants allege that defendant club owns certain land on the border of this bay upon which land is a clubhouse, where these game-keepers remain for the purpose of keeping hunters from these waters, and that defendant claims that by reason of such ownership it has the exclusive right to hunt on said waters; that defendant through its members has publicly stated and advertised the fact that they will prohibit and prevent all persons, including complainants, at all times from hunting upon these waters.

The bill avers that this bay is navigable by large steam and sail craft; that the ownership of defendant extends only to high or low water mark, at which point the fee of the state of Michigan begins, and that they have a right, at all times

when the law so allows, to hunt upon said waters in common with all citizens of the state; that the lands covered by the waters of said bay beyond the meandered line thereof are unsurveyed, and none of them are owned or possessed by defendant, but belong in fee to the state of Michigan, held by the state as trustees for all of the people of the state, and complainants have as much right to hunt upon these waters as the members of defendant club. The bill also states that complainants desire and intend to hunt on said bay during the then approaching open season of 1907, but will be prevented from doing so by defendant's servants and agents unless they are enjoined from interfering with them to the irreparable loss and injury of each of them; all of which is alleged to be ¹⁸⁹ contrary to equity and the rights of complainants, and to their manifest wrong and injury. The bill alleges jurisdiction and contains all the usual and necessary formal parts of a bill in chancery and prays that defendant and its members, agents, etc., be restrained and enjoined from interfering with, obstructing and preventing, in any manner, complainant from the free exercise of their right to hunt wild fowl upon said waters. A preliminary injunction issued upon filing the usual bond in the sum of five hundred dollars. A motion for dissolution of this injunction was denied.

Defendant then demurred to the bill of complaint upon the following grounds:

1. Complainants have not, in and by their said bill, made or stated such a cause as entitles them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill or in any of such matters.

2. It appears by the said bill of complaint that if complainants have any cause of action relative to the matters set forth in said bill of complaint, they have an adequate remedy at law.

3. It appears by said bill of complaint that the rights affected by complainants, if any, are to their persons and not to their property.

4. That said bill of complaint fails to show any immediate danger of irreparable damage.

5. That complainants have been guilty of such laches that they are now barred and estopped from asking relief.

6. That complainants seek to restrain others from doing acts and things they have a legal right to do.

7. That the allegations in said bill of complaint are insufficient to give the court jurisdiction to grant the relief prayed for.

Upon a hearing a decree was granted sustaining the demurrer and dismissing the bill of complaint. Complainants have appealed. The demurrer admits the truth of the facts charged in the bill of complaint.

At this time, then, there is no necessity for discussing complainants' rights in the premises, and we assume that the waters upon which they were attempting to pursue, ¹⁹⁰ hunt and capture wild fowl were navigable waters, where they were entitled to exercise all the rights they claim. We may also assume that the hired servants of defendant wrongfully and unlawfully, under the instructions of their employer, the defendant, by the means stated, interfered with complainants in the peaceable enjoyment of their rights, under the claim that defendant had acquired exclusive rights and privileges for its members to hunt wild fowl upon these waters; and that such interference will continue to the damage and injury of complainants.

The only proposition to consider is whether the bill sets forth such a cause of action over which a court of equity will entertain jurisdiction, and whether the bill of complaint states facts and circumstances sufficient to entitle complainants to an injunction against defendant.

It will be unnecessary to cite and discuss text-writers and authorities as to the fundamental principles which govern courts in issuing or denying relief by injunction. The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court. This is determined by ascertaining the nature of the injury done or threatened. This is strictly an injunction bill, and to deny an injunction, preliminary or permanent, disposes of the whole case.

If hunting for wild fowl upon these navigable waters for recreation or health is a right which the complainants are entitled to exercise, no person may lawfully interfere with the reasonable and lawful exercise of that right. If it is urged that trespass will lie against defendant and its officers and agents for the wrong complained of, the repetition and continuance of the interference with complainants would require a multiplicity of suits, and if complainants must be relegated to such suits, they certainly would be absolutely deprived of the exercise of a legal and substantial right, and

the damages possible to be obtained would be wholly inadequate. Parties in such cases should ¹⁹¹ be entitled to equitable relief: *Nashville etc. R. Co. v. McConnell*, 82 Fed. 65.

The right upon which complainants insist is a civil right, and their protection in its exercise clearly within equitable jurisdiction: 22 Cyc. 757.

We think that this right is not merely a bare legal right, interference with which causes no substantial injury. To many people such rights are highly prized and their exercise valuable and necessary. To hold that such rights are not of sufficient dignity that interference therewith, and the prevention of their lawful exercise, and threatened continuance of such interference, will be taken cognizance of by the courts, and injury arising therefrom prevented, would be to deprive complainants of such rights, and to encourage wrongdoers in the assumption of the sovereign prerogative. The allegations of the bill of complaint as to the apprehended injury threatened by defendant are sufficient. The averments of the bill, not being denied, are sufficient if charged on information and belief: 1 High on Injunctions, 4th ed., sec. 35.

From the state of the pleadings, there is no dispute here as to complainants' rights; whether there is an injury for which a suit at law will furnish no adequate remedy, and whether that injury is irreparable, are the crucial questions. The first we have decided in the affirmative. Whether an injury to property or rights is irreparable depends in each case upon the nature of the right or property. "An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages due to the nature of the right or property injured": 22 Cyc. 763, 764, and cases cited.

The right to fish in navigable waters is a public right: 13 Am. & Eng. Ency. of Law, 2d ed., p. 560, and cases cited.

¹⁹² An action for damages will lie for injury to such right: 13 Am. & Eng. Ency. of Law, 2d ed., p. 584.

The authorities hold that certain injuries to fishing which, if permitted, would be irreparable or for which the law furnishes no adequate remedy, may be restrained by injunction: 13 Am. & Eng. Ency. of Law, 2d ed., p. 585, and notes.

To hunt and fish in and upon the navigable waters such as these is a public right of which any citizen may avail himself subject to the game laws of the state. The right to hunt is as valuable to the individual as his right to fish, and the

authorities which sustain and protect him in the exercise of the one may be invoked with equal force as to the other. We are unable to draw any distinction between them.

Our conclusion is that the injury to complainants' rights complained of comes within this definition. The decree of the circuit court sustaining the demurrer and dismissing the bill is reversed, with costs of both courts to complainants. The cause will be remanded and defendant allowed the time fixed by rule to answer said bill of complaint.

Grant, C. J., and Hooker, Moore and Carpenter, JJ., concurred.

That an Injunction may be had Against Hunting and Shooting, see Whittaker v. Stangvick, 100 Minn. 386, 117 Am. St. Rep. 703; L. Realty Co. v. Johnson, 92 Minn. 363, 104 Am. St. Rep. 677; note to Moore v. Halliday, 99 Am. St. Rep. 751.

That Fishing Rights may be Protected by Injunction, see Saginaw Lumber etc. Co. v. Griffore, 145 Mich. 287, 116 Am. St. Rep. 297; Morris v. Graham, 16 Wash. 343, 58 Am. St. Rep. 33.

The Fish and Wild Game in a State Belong to the People in their sovereign capacity, and they may either permit or prohibit their taking: State v. Snowman, 94 Me. 99, 80 Am. St. Rep. 380; Ex parte Kenneke, 136 Cal. 527, 89 Am. St. Rep. 177; State v. Niles, 78 Vt. 266, 112 Am. St. Rep. 917; State v. Weber, 205 Mo. 36, 120 Am. St. Rep. 715.

IN RE COLBURN'S ESTATE.

[153 Mich. 206, 116 N. W. 986.]

RES JUDICATA, When Controls the Effect of Evidence.—Testimony tending to prove that a father agreed to convey a farm to his son affords no basis for a verdict, if in a prior chancery suit the determination has been made that the right to a conveyance never existed. (p. 480.)

WILLS—Agreement to Make in Favor of a Party, Statements Which do not Amount to.—A statement by a father and mother that their son A should have the farm at their death, though made in his presence, affords no evidence of a binding contract. It is consistent with the thought that it was their purpose to give him a gratuitous preference on their decease. (p. 480.)

PARENT AND CHILD—Implied Agreement to Pay for Services.—The relation of father and son prevents the implication of an agreement that the latter should be compensated for services rendered the former. (p. 481.)

WILLS, Agreement to Make in Favor of a Son, When does not Sustain an Action for His Services.—An agreement between parents and their son that he shall live with them on a farm and work there until their death, when it is to be given to him, does not, in the event of their surviving him, support an action in favor of his

representatives for the value of his services, the farm not having been given to him nor to his heirs. (p. 483.)

ADMINISTRATION of the Estates of Decedents—Claims, in What State may be Presented.—Where there is a principal administration in one state and ancillary administration in another, a claim may be presented in the last-named state if it arose therein. (p. 485.)

Thomas P. Bradford, Chester W. Whitmore and Edmund H. Smalley, for the appellant.

Elvin Swarthout and John E. More, for the appellee.

208 CARPENTER, J. Reuben H. Colburn, deceased, was the father of Andrew K. Colburn, deceased. Reuben had other children, viz., two daughters somewhat younger than Andrew. Andrew was born in 1839. In 1866 Reuben, accompanied by his wife, Caroline, and his son, Andrew, moved onto a farm near the outskirts of Casnovia, Michigan. They resided there, constituting one household, from that time, until the death of Andrew, which occurred in 1897. Two years thereafter, Reuben's wife, the mother of Andrew, died, and shortly thereafter Reuben went to live with one of his daughters in Illinois, where he resided until his death, which occurred February 8, 1903. Proceedings to administer his estate were instituted in Illinois. Ancillary administration was undertaken in the probate court of Kent county, Michigan. Andrew's administrator presented a claim against the estate of Reuben for the services of Andrew from 1866 until his death in 1897 and for certain personal property left by Andrew on his death and converted by Reuben. That claim was presented before the commissioners appointed in the ancillary proceedings in Kent county. The commissioners allowed the claim, and from their allowance an appeal was taken to the Kent circuit court. There it was tried by a jury who rendered a verdict in claimant's favor. The claim for services was based upon the ground that they were rendered in reliance upon the promise of Reuben that at the death of himself and wife the farm should belong to Andrew. Testimony was introduced tending to prove that Reuben actually did convey this farm to Andrew. This testimony afforded no basis for a verdict. For if this farm had been conveyed it belonged to the heirs of Andrew, and it had already been determined in a chancery proceeding instituted by those heirs against the heirs of Reuben that such ²⁰⁰ conveyance was not made. We regard that determination as conclusive and binding upon the parties interested in this litigation. The testimony also showed that Reuben, shortly after the death of his

wife, entered into an agreement with his two daughters whereby the farm in question was deeded to them in undivided shares in consideration of their agreement to support and maintain him during the remainder of his life. Defendants offered to prove that on Andrew's death Reuben and his mother "had no other property than this farm in question and the personal property" connected therewith, "and the proceeds of that farm and that personal property were reasonably requisite and necessary for the maintenance of them during the remaining years of their life." This testimony was excluded. The issue was submitted to a jury, who were permitted to, and it is to be inferred did, give a verdict for the reasonable value of the services performed by Andrew and of certain personal property left by him at his death.

1. The first and most important question raised in this case is whether there was any testimony which warranted the claim for services to be submitted to the jury. As we have already stated, the testimony indicating that the farm had been conveyed to Andrew must be disregarded. That issue was determined against the heirs of Andrew in another suit.

Statements made by Reuben and his wife that Andrew should have the farm at their death were testified to by many witnesses. Some of these statements were made in the presence of Andrew, some of them when he was not present. Under our decisions they constitute no evidence of an agreement. They afford no evidence of a binding promise. They are consistent with the thought that it was the purpose of the father and mother to give a gratuitous preference to their son on their decease: See ²¹⁰ Decker v. Kanous' Estate, 129 Mich. 146, 88 N. W. 398; Rodgers v. Lamb's Estate, 137 Mich. 241, 100 N. W. 440. The relation of father and son existing between Reuben and Andrew prevents the implication of any agreement that the latter should receive compensation for his services. As stated by Justice Cooley in *Mason v. Dunbar*, 43 Mich. 407, 38 Am. Rep. 201, 5 N. W. 432: "They were father and children . . . living together as a family, and receiving mutual benefit and comfort from their association, and from the property which they enjoyed in common. No presumption can arise under such circumstances that claims were to be made by either against another for services, or for the ordinary conveniences of life which were furnished. On the contrary, we must presume that the parties were residing together on the usual terms of members of one family, and not under any contract relations."

There can be no recovery in such a case unless the evidence proves that the services were rendered and received under an agreement assented to by both parties requiring compensation: *Decker v. Kancus' Estate*, 129 Mich. 146, 88 N. W. 398, and cases there cited.

Is there any testimony in the record warranting the inference that any such agreement was made? If there is, it is the following testimony given by witness Jacob H. Shaw: "The old gentleman told me that Andrew was to have the farm when they were done with it. And the old lady told me the same thing. He said that Andrew was to work on the place the same as they did. This conversation was before Andrew's death. I had two or three such conversations. I could not tell exactly, a good many years ago. Andrew was present once. The first time we had a conversation they were all three together. This talk with the old folks about the property was sometime along in the seventies."

The foregoing statement of Reuben and his wife that Andrew was to have the farm when they were done with it obviously means—and this is conceded—that he was to have it on their death. If this statement stood alone it would, as already shown, furnish no evidence of an agreement. ²¹¹ It furnishes such evidence only because by the testimony it is connected with the statement that "Andrew was to work on the place the same as they did." If these two statements are related—and upon no other theory can an agreement be predicated upon them—the latter statement means that Andrew was to work upon the farm until the death of his father and mother. It follows that, if the foregoing testimony warrants the inference of any agreement, that agreement is this, viz., that in consideration of Andrew's work on the farm until the death of Reuben and his wife, he shall receive the farm as compensation for his services. This agreement was clearly made upon the assumption that Andrew should outlive Reuben and his wife. That assumption proved unfounded. Andrew died before either of his parents. Can it be inferred from the testimony above quoted that there was any agreement to compensate Andrew for his services rendered under these circumstances? It was held in the trial court that it could, and that the estate of Reuben was bound to pay Andrew what his services were reasonably worth. It is insisted that this conclusion was warranted by *In re Williams' Estate*, 106 Mich. 490, 64 N. W. 490, and *Sammon v. Wood*, 107 Mich. 506, 65 N. W. 529. In each of these cases an agreement was proved substantially

like that in the case at bar, but it was also proved that the claimant rendering services fully performed his agreement, and that the father for whom those services were performed refused to make the conveyance as agreed, and it was held that this refusal made his estate liable to pay the reasonable worth of the services rendered. The difference between those cases and the case at bar is manifest. There the estate was compelled to pay the reasonable worth of the services rendered as a penalty for the refusal of the decedent to perform his contract. This was a just and equitable decision. Any other conclusion would have enabled the estate of decedent to evade the obligations imposed upon it by the contract he had entered into. The principle of those cases has no application here. ²¹² Claimant never performed the contract between him and his father, and his father never failed to perform it. Upon what principle, then, can he recover the reasonable worth of his services? He cannot recover upon the contract he made with his father, because he did not perform that contract. Neither can he recover upon the basis of an implied contract deducible from the rendition and acceptance of his services under the authority of *Allen v. McKibbin*, 5 Mich. 449. There we held that though a party cannot recover upon a nonapportionable contract which he has not performed, he may "where anything has been done from which the other party has received substantial benefit, and which he has appropriated, recover upon the quantum meruit based on that benefit, and the basis of this recovery is not the original contract, but a new implied agreement deducible from the delivery and acceptance of some valuable service or thing." That principle can have no application in this case because, as we have already shown, the law will permit no agreement to be implied from the rendition and acceptance of claimant's services.

No obligation rests upon the estate of Reuben to pay the reasonable worth of the services of Andrew unless that obligation arises from their agreement. For outside of that agreement there is no such obligation. From that agreement may it be inferred that Reuben was under obligation to pay the reasonable worth of Andrew's services in the event of his surviving Andrew? The agreement, as already stated, is that Reuben will give Andrew his farm at the death of himself and wife if Andrew will work for him until that event occurs. According to this agreement, the compensation of Andrew is not based upon the reasonable worth of his services. Reuben and his wife might die in a few days.

In that event Andrew would receive much more than the value of his services. They might live for many years, and in that event Andrew would receive less than the value of his services. For the contingency which actually occurred, viz., Andrew's ²¹³ death before Reuben's, no provision whatever was made. May it be inferred that it was the intention of the parties that in such a contingency Reuben should pay Andrew's estate what his services were reasonably worth? In that event, though payment might be postponed until his death, Reuben would hold his property burdened with the obligation to pay this claim. To the extent of this claim he would be prevented from using that property for the maintenance of himself and wife during their remaining years. This would prevent his making the agreement he did make, viz., to convey the farm to the other children in consideration of their supporting and maintaining himself the remainder of his life. This would lead to very serious consequences, as shown by this case. For, as heretofore indicated, the testimony offered by contestants and excluded by the trial court would have shown that all this property was necessary for the maintenance of Reuben and his wife during their remaining years. It is scarcely necessary to say that neither Reuben nor Andrew intended that their agreement should apply in such a contingency. For the terms of that agreement clearly indicate that the right of Andrew in the farm should be subordinate to its use for the maintenance of his father and mother. I think it may also be stated that, from their agreement, it may not be inferred that either Reuben or Andrew intended, in the contingency of the former outliving the latter, the estate of the former should be fettered or burdened in any way by the claim of the latter. If they had had any such intention it is to be presumed that they would have expressed it in some way and made some equitable provision for a mutual protection of their rights. In the absence of an agreement, Andrew was entitled to no compensation for his services. The agreement provided for compensation in a certain contingency and in that contingency only. That contingency did not occur, but another and an altogether different one occurred. No principle of law or equity will permit the agreement to be applied to such a contingency, and it may not be ²¹⁴ presumed that the parties intended it to apply. It follows from this reasoning that there was no testimony in the case tending to show an obligation on the part of the estate to compensate Andrew for his services.

2. Personal property: The claim for personal property, as I understand it, is this: That at the death of Andrew there was personal property upon the farm of two classes—(a) certain property owned by Andrew which, after his death, was sold and the proceeds used by Reuben; and (b) certain property belonging to Reuben which, on the death of himself and wife, was to become Andrew's if he worked for them until that event occurred. For this latter property there can be no recovery under the principles of this opinion. The property of Andrew is obviously subject to a different rule. For that there can be a recovery.

3. In behalf of the estate of Reuben, the point is made that the claim in question should have been presented before the court in Illinois where the principal proceedings to administer the estate were taken, and that it could not be presented in Michigan where the ancillary proceedings were taken. This point is not well taken. The claim in question arose in Michigan and was in every respect a Michigan claim. The assets of the estate in Michigan were justly subject to that claim, and it is as objectionable from a legal standpoint (see 18 Cyc. 1233) as from the standpoint of good sense to compel the claimant to resort to the courts of Illinois to litigate his claim, which, if paid, must be paid from the property situated in this state.

4. Rulings relative to the admission and exclusion of testimony: Under this head appellants present many objections. Nearly all of those objections relate to rulings which arose from the claim that Andrew was entitled to compensation for his services. As we have already determined that that claim must be disallowed, we see no reason for considering these objections. We think that this opinion sufficiently indicates the course to be taken upon a new trial.

Judgment reversed, and a new trial ordered.

215 Blair, Montgomery, Ostrander and Hooker, JJ., concurred.

When a Son Seeks to Recover Compensation for Services Rendered His Parent, he is ordinarily required to prove an express contract therefor, definite in its terms; services rendered by a child to its parent are usually presumed to have been gratuitous: *Zimmerman v. Zimmerman*, 129 Pa. 229, 15 Am. St. Rep. 720; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125. See, however, *McDowell v. McDowell*, 75 Vt. 401, 98 Am. St. Rep. 831. But if an adult child removes from the home of his parent, marries, and afterward renders personal services to his parent which are voluntarily accepted, a promise on the part of the parent to pay therefor will be implied: *Winkler v. Killian*, 141 N. C. 575, 115 Am. St. Rep. 694.

SHERMAN v. ALBERTS.

[153 Mich. 361, 116 N. W. 1090.]

STATUTE OF FRAUDS—Promise to Answer for the Debt of Another, What is.—The statement of T. that if a beef is sold to McG., he, T., will pay for it, if he, McG., is working for him, is a promise to answer for the debt of another, and hence not enforceable if not in writing. (pp. 486, 487.)

Assumpsit for goods alleged to have been sold and delivered. Judgment for plaintiff; defendants brought error.

Stephen H. Clink, for the appellants.

Gaffney & Miltner, for the appellee.

361 CARPENTER, J. The defendants are copartners: They reside in Muskegon. During the winters of 1904-5 and 1905-6 they carried on lumbering operations in the county of Missaukee. They let a contract to a jobber named McGill. Their superintendent was one Thompson. Plaintiff supplied McGill with meat for the use of his men. Before doing this, as he testifies, the following conversation occurred between him and Thompson: "I asked Mr. Thompson if I sold McGill beef, would he pay for it, and he said, yes, any beef you sell Mr. McGill while he is working on our logs we will pay for."

Under this arrangement beef was sold during both seasons. It was charged upon plaintiff's books, "meat sold **362** to McGill." It was all paid except a balance of one hundred and sixty-one dollars and some cents. For this balance plaintiff obtained an order from McGill, which defendants refused to pay. He brought this suit and recovered a judgment which defendants ask us to reverse.

The important question for our consideration is this: Was the agreement testified to by plaintiff a "promise to answer for the debt . . . of another person," required to be in writing by section 9515, 3 Compiled Laws? We think it was. From the terms of the agreement itself, and from the construction placed upon it by plaintiff, it must be inferred that the contractor, McGill, was his debtor for these goods. Being a debtor he could have been nothing less than the primary debtor. The obligation of the defendants was, then, that of a guarantor or surety. It was a promise to pay the debt of another and void because it was not in writing. While the language used differs somewhat from that in *Butters Salt & Lumber Co. v. Vogel*, 130 Mich. 33, 89 N. W. 560, it is ruled

by that case. It follows that the trial court erred in refusing to direct a verdict for defendants. No other complaint demands discussion.

Judgment reversed and new trial ordered.

Grant, C. J., and Hooker, Moore and McAlvay, JJ., concurred.

WHAT, WITHIN THE MEANING OF THE STATUTE OF FRAUDS, IS A CONTRACT TO ANSWER FOR OR PAY THE DEBT OF ANOTHER.

I. Introduction, 487.

II. Original or Collateral Promises, in General.

a. Rules and Illustrations.

1. There must be a Subsisting, Binding Obligation to the Promisee, 488.
2. Intent of the Parties must be Considered, 492.
3. To Whom was the Credit Given, 492.
4. When Promise is Beneficial to Promisor, 494.
5. When Promisor Effects Payment of His Own Debt, 496.
6. New Consideration Beneficial to the Promisor, 497.
7. Discharge of Original Debtor, 505.
8. Promises of Debtor to Discharge Debt, 509.
9. Obligation of Promisor Independent of Liability of Principal, 510.

b. Contracts of Indemnity, 512.

III. Miscellaneous Illustrations, 516.

I. Introduction.

No question, perhaps, has occasioned more controversy or given birth to more nice and shadowy distinctions than those questions arising under that branch of the statute of frauds which relates to special promises to answer for the debt, default or miscarriage of another. The question is so old, and the cases bearing upon it so numerous, as to defy any attempt to make an exhaustive review of them all within the limits of a single note. Fortunately, the subject has received attention in other notes of this series, and the older cases will be found in the notes appended to *Muller v. Reviere*, 46 Am. Rep. 296; *Leonard v. Vredenburg*, 5 Am. Dec. 321; *Packer v. Benton*, 95 Am. Dec. 250; and *Smith v. Delaney*, 42 Am. St. Rep. 186, where the question whether verbal contracts of indemnity are within the statute of frauds, is specially considered. Consequently we have confined our investigation in this note largely to those cases decided within the past twelve years, so that the discussion is here brought right up to date, and by referring to the other notes mentioned, in connection with this one, our readers will find practically all of the reported cases bearing upon the subject—at least all that they will have the time or patience to examine. The frequent attempt of learned judges to classify the cases bearing upon our topic, and draw from them some rule for future guidance, has not altogether removed the conflicting doubts heretofore existing in regard to this vexatious question. There is one principle, however,

which we shall see has become firmly established, for it is found running through all the cases, and that is, that if the promise by one to pay the debt of another is a collateral undertaking, it falls within the purview of the statute of frauds and is void, but if it is an original promise—i. e., one by which the promisor makes an indebtedness of his own—it is not within the statute. But how can it be determined when an undertaking in form to pay the debt of another is to be regarded as collateral and when as original? This question is necessarily difficult to answer, for many promises which in form are absolute, and as a matter of law would be regarded *prima facie* original, under certain circumstances have been adjudged collateral. An illustration of this is furnished by the principal case: *Sherman v. Alberts*, 153 Mich. 361, ante, p. 486, 116 N. W. 1090. It is equally true, as we shall see, that many promises which are deemed *prima facie* collateral have, under certain circumstances, been adjudged original. Nor is this at all surprising, for, as was said by Mr. Justice Brewer, speaking for the supreme court of the United States: "The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language—whether they understood it to be a collateral or a direct promise": *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. Rep. 58, 35 L. ed. 826. In fact, the terms "original" or "collateral," as applied to a promise, do not appear in the statute of frauds, but have been introduced by the courts in explaining its objects and expounding its true interpretation. In many of the cases, the question whether the promise was or was not within the statute of frauds is disposed of by the simple adjudication that the promise was original and therefore valid, or that it was collateral and therefore invalid, without giving the tests applied for reaching the conclusions. In some of the cases, however, the necessity for supplying the profession with some rules applicable to this section of the statute of frauds seem to have been recognized, and we are thus enabled to present a few general rules which will afford some guide, at least, to future decisions. But after all the determination of each case must rest largely on the circumstances surrounding the transaction, and the chief merit of this note will lie in the numerous illustrations given, showing how the tests have been applied in particular cases, together with the pertinent remarks made by the judges as to the reasons which influenced the judicial mind in reaching its conclusion. In this way only can the greatest light be thrown on one of the most perplexing problems known to the law.

II. Original or Collateral Promises, in General.

a. Rules and Illustrations.

1. There must be a Subsisting, Binding Obligation to the Promisee. In order that a promise can be held to be within the statute, it is essential that there be a binding and subsisting obligation or liability

to the promisee, to which the promise is collateral, that is, the party for whom the promise has been made must be liable to the party to whom it is made: *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812; *Schotte v. Puscheck*, 79 Ill. App. 31; *McKenney v. Armstrong*, 97 Ill. App. 208; *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564. Thus in *Kilbride v. Moss*, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812, defendant was a large stockholder, and also a director and vice-president of a corporation, and held a mortgage upon the property of the company. There were also sundry other creditors of the corporation. Defendant proposed to plaintiff that the latter purchase a certain number of shares of the capital stock of the corporation, and verbally agreed that if plaintiff would make such purchase, in the event the stock become worthless or of no value, he, defendant, would return and pay to plaintiff the amount he paid for said stock. Plaintiff purchased the stock and the money paid therefor was used in paying the company's debts. The stock subsequently became worthless and of no value, and upon defendant's refusal to take the stock and return to plaintiff the amount paid for the same, plaintiff brought this action and obtained judgment. It was insisted by defendant's counsel, at the trial, that the verbal promise of defendant to return the money paid for the stock was only a guaranty, but it was held that the agreement by the defendant was an original and not a collateral undertaking, and the judgment was affirmed. Said the court: "The contract of guaranty is a collateral undertaking. It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person, either express or implied—that is to say, if there is no debt, default, or miscarriage, present or prospective—there is nothing to guarantee. If there is no primary liability of a third person to the promisee, which continues after the promise is made, it is an original promise, and need not be in writing. . . . The corporation from which he purchased the shares of capital stock owed him no duty in the premises after such purchase was consummated, except the general obligation to him, in common with all other shareholders, to fairly and impartially conduct the business of the company in such manner as would best promote the interests of all concerned. The corporation simply sold him six thousand shares of its stock, and received payment therefor. This closed the incident so far as the company was concerned. It was the defendant who entered into the contract with him, whereby, as an inducement for plaintiff to purchase, he promised to refund his money should the stock become worthless. This was an original contract." Likewise in *Crook v. Scott*, 72 N. Y. Supp. 516, 65 App. Div. 139, affirmed in 174 N. Y. 520, 66 N. E. 1106, plaintiff sought to recover from defendants, who were directors and officers of a corporation, on an agreement, whereby defendants had induced plaintiff to purchase a large amount of stock in the corporation upon the promise that he would receive yearly dividends at the rate of eight per cent upon the stock, and, in the event such

dividend was not paid by the corporation, the defendants would make up any deficiency personally. The action was defended upon the ground that the agreement was within the statute of frauds. "It seems, clear, however," said the court, "that this agreement was not within the statute of frauds. By it the defendants agree that, in the event that the corporation fails to declare eight per cent dividends in each year on its stock, they will pay the amount of money necessary to make up the eight per cent dividends thereon. Upon acquiring this stock the plaintiff acquired no right to eight per cent dividends from the corporation. It was under no obligation to pay her any dividends until such dividends should be duly declared. The agreement, therefore, was not to answer for the debt, default or miscarriage of the corporation, but was clearly an independent agreement by the defendants by which they assumed and agreed to pay a sum of money which would be sufficient to make the dividends declared by the company equal to eight per cent upon the stock. There is not, directly or indirectly, any debt or obligation of the corporation that the defendants agreed to answer for." And to the same effect is the case of *Moorhouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564, when it was said: "An original liability of another is the foundation of the collateral liability of the promisor."

And not only must there be a subsisting binding obligation of the person for whom the promise is made, but it must be one which is capable of enforcement. In *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. 875, the action was to recover damages which plaintiff claimed to have sustained by reason of defendant's failure to perform his promise to obtain a chattel mortgage upon the property of one to secure the payment of certain indebtedness to the defendant, and for which plaintiff was security. The real issue in the case was whether the promise of the defendant was an original undertaking, and therefore enforceable, or whether it was collateral and void within the statute of frauds. Plaintiff obtained judgment in the circuit court, but this was reversed by the court of appeals. The supreme court, however, reversed the judgment of the appellate court, and affirmed the judgment of the circuit court, saying: "It may be said to be the settled rule that, where the agreement is original and independent, it is not within the statute; if collateral, it is. And the agreement may be regarded as original, and not within the statute, although it directly involves the interests of or concerns a third party, or may relate to an act or the performance thereof by one not a party to the contract. . . . It is contended that the promise of Waterman, made in consideration of appellant executing as surety the two hundred and fifty dollar note, . . . to obtain a chattel mortgage on all of Ole Severson's personalty to secure the payment of that note, and also another one for like amount, previously given by the same party with appellant as surety, was a promise to answer for the debt, default, or miscarriage of another; that is, that there was an implied obligation upon the part of Ole Severson to indemnify and hold harmless his surety,

and that the promise of appellee was purely collateral thereto. This position, we think, is not tenable. In order that the promise can be held to be within the statute, it is essential that there be a binding and subsisting obligation or liability to the promisee, to which the promise is collateral; in other words, 'that the party for whom the promise has been made must be liable to the party to whom it is made.' Not only must this be so, but it is quite as well settled that the liability of the person for whom the promise is made, to the promisee, must be one which is capable of enforcement; and the doctrine is stated to be (Throop, Verb. Agr., sec. 127), 'that the principle requires that the liability to which that of the promisor is supposed to be collateral should be one which can be enforced by proceedings at law or in equity; and therefore, unless it appears that some one other than the promisor has incurred an actual liability with respect to the subject matter of the promise, the agreement is not within the statute, although the third person may be under an imperfect or merely moral obligation to respond'; for, if the third party be not liable to answer, it could not be said that the undertaking of the promisor was one to 'answer' for the former's 'debt or default,' and therefore within the statute. There being no liability of the third party to the promisee, the promisor would have nothing to answer for; and his promise, therefore, would necessarily be an original and independent undertaking, and not a collateral one. No express agreement that Severson would save harmless his surety is shown or pretended; and, while he might properly be regarded as under an implied obligation to indemnify his surety, he was not bound to do so." A ruling apparently directly opposed to the doctrine so strongly announced in the cases above quoted was recently made by the court of appeals of Kentucky in *Hunt v. Taylor*, 27 Ky. Law Rep. 978, 87 S. W. 290. Plaintiff in this case sought to recover from defendant money he had paid for certain corporate stock. Defendant had induced plaintiff to purchase the stock upon representation that the corporation was a safe, solvent and prosperous institution and that he (defendant) would guarantee plaintiff a return of the purchase price of the stock, together with a profit of twenty per cent on or before the first day of February, 1902. A demurrer to the petition was sustained by the circuit court, and it was held that the action of the lower court was clearly correct, because it contained no allegation of a breach of the guaranty, and, as was said by Judge Barker of the court of appeals: "The petition is also fatally defective in that it fails to allege that the guaranty sued on was in writing. It is within both the letter and spirit of subsection 4 of section 470 of the Kentucky statutes of 1903 (statutes of frauds), which provides that no action shall be brought to charge any person upon a promise to answer for the debt, default or misdoing of another, unless the promise or some memorandum thereof be in writing," etc. The opinion in this case is very brief, and it may be that the question whether the promise of the defendant was an original or a collateral undertaking was not directly presented to the court, but however that may

be, it is difficult to understand how the promise in this case could be regarded as collateral to any liability of the corporation to the plaintiff; and this decision would seem opposed to the doctrine established by the great weight of authority.

2. Intent of the Parties must be Considered.—In determining whether an oral promise to pay the debt of another is original or collateral, the intention of the parties at the time it was made must be regarded: *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. Rep. 58, 35 L. ed. 826. "The question whether the contract was one of original promise, or of guaranty merely, is always one for the jury (or, in this case for the trial court) to determine from the surrounding circumstances of the case": *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856. "In each case the expressions used, the situation of the parties, and all the circumstances of the case should be taken into consideration": *Atlas Lumber & Coal Co. v. Flint*, 20 S. D. 118, 104 N. W. 1046. The most frequent application of this rule is when it is employed as a test to determine to whom the promisee extended the credit, and numerous instances of its application will be found in the cases hereafter given under that heading.

3. To Whom was the Credit Given.—The question to whom the credit was given is one of the greatest importance in determining whether a promise to pay the debt of another is or is not within the statute of frauds. Its solution is often a matter of the greatest difficulty, and the only test for settling this question is a resort to the intention of the parties at the time the promise was made as indicated by the language used, the situation of the parties and all the circumstances surrounding the transaction. The rule generally supported by the cases is, that if the credit is given to the promisor alone, the promise is original and not within the statute of frauds: *Gates v. Morton Hardware Co.*, 146 Ala. 692, 40 South. 509; *Smith Bros. & Co. v. Miller* (Ala.), 44 South. 399; *Chick v. Frey Coal Co.*, 78 Mo. App. 234; *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582; *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863; *Atlas Lumber Co. v. Flint*, 20 S. D. 118, 104 N. W. 1046; *First Nat. Bank v. Greenville Oil & Cotton Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828; *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394. But if the credit is given to a third person to any extent, so that he is in any degree independently and originally liable, the oral promise of the other party is collateral: *Pake v. Wilson*, 127 Ala. 240, 28 South. 665; *Williams v. Auten*, 62 Neb. 832, 87 N. W. 1061; *Swigent v. Gentent*, 63 Neb. 157, 88 N. W. 159; *Matteson v. Moore*, 25 R. I. 129, 54 Atl. 1058; *Atlas Lumber Co. v. Flint*, 20 S. D. 118, 104 N. W. 1046; *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394; *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248. Thus where supplies, labor and materials were furnished to a subcontractor for the construction of a highway, and he was treated by the sellers as their debtor until after he absconded, the undertaking of the original contractors, if any, to liquidate such indebtedness, was not an original undertaking, but was within the statute of frauds.

"If the third person is liable to the plaintiff, this alone deprives the defendant's undertaking of the character of an original contract. If any credit at all be given to the third party, the defendant's promise is required to be in writing, as collateral": *Miller v. State*, 35 Ind. App. 379, 74 N. E. 260. But in cases where the person to whom the goods were sold and delivered and the one who orally undertook to be bound for their price are sued together as joint original promisors, the action will not be defeated as to the latter by showing that credit for the goods was given partly to one and partly to the other defendant, as the statute of frauds does not extend to a joint promise by two persons for the benefit of one of them: *East Baltimore Lumber Co. v. Waldeman*, 100 Md. 689, 62 Atl. 575, and *Oldenburg & Dorsey v. Kelly*, 102 Md. 172, 62 Atl. 576. It has been held that, in an action for goods sold to a third person on the request of another, there can be no recovery against the promisor where the goods were not charged to him on the seller's books. Such was the ruling in *Bussel v. Sagor*, 27 Misc. Rep. 810, 57 N. Y. Supp. 221, thus making the fact as to whom the goods were charged the sole test as to whether the promise was original or collateral. But the better rule and the one supported by the decided weight of authority is, that the fact that goods sold and delivered to a third person at the request of another were charged to such third person is to be considered in determining to whom the credit was given, but it is not conclusive: *Runkle & Fouse v. Kettering*, 127 Iowa, 6, 102 N. W. 142; *Newton Grain Co. v. Pierce*, 106 Mo. App. 200, 80 S. W. 268; *Ridgeway v. Corporation Liquidation Co.*, 71 N. J. L. 676, 62 Atl. 116; *Kesler v. Cheadle*, 12 Okl. 489, 72 Pac. 367; *Nixon v. Jacobs*, 22 Tex. Civ. App. 97, 53 S. W. 595. Thus in *Cruse v. Foster*, 76 Ga. 723, the question was whether the account, the foundation of the suit, was an original undertaking on the part of a father, on a collateral undertaking to answer for the debt of his son. The plaintiffs had refused to furnish goods to the son on credit, when they were informed by the father that if they would do so, he would see that they were paid. Plaintiffs then supplied the son with goods and charged them on their books to both father and son. They explained that they had charged the goods to both, in order to distinguish this account from an individual account which the father had with them. It was held that the contract of the father was an original undertaking. Likewise in *Newton Grain Co. v. Pierce*, 106 Mo. App. 200, 80 S. W. 268, plaintiff had refused to sell goods to a proposed customer until defendant had told plaintiff to let the customer have the goods and he would stand for them, or pay for them. The plaintiff then supplied the customer with the goods, and charged them on his books in the name of the customer alone for convenience and to prevent confusion. It was held that the statute of frauds was no defense to an action on the account. So, too, in *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974, plaintiff had brought action to charge defendants upon an oral promise to pay him for goods he had supplied to a third party upon defendant's promise to pay for them. The goods were charged on plaintiff's books to the party to

whom they were furnished and to defendant. It was urged that this was proof that the sales were made to such third party and upon his credit. "Such evidence," said the court, "though competent, is not conclusive that the vendor relied upon the party charged to pay for them, but is open to explanation by showing, as a matter of fact, to whom the credit was given." To same effect is *Trulock v. Blair*, 8 Okl. 345, 58 Pac. 1097.

4. **When Promise is Beneficial to Promisor.**—Another rule, and one of almost universal application in determining whether a promise to pay the debt of another is an original or a collateral undertaking, is, that whenever the leading purpose of the promisor is to gain some advantage or promote some interest or purpose of his own, rather than to become the mere guarantor or surety of another's debt, and the promise is made upon a sufficient consideration, it will be regarded as an original undertaking and not within the statute of frauds although it may in form be a promise to pay the debt of another. Thus where the consideration of a note is the parol promise by the payee, who makes the promise to subserve his own purpose, that a third person will perform a certain contract with the payor, the promise is original, and not within the statute of frauds: *Gale v. Harp*, 64 Ark. 462, 43 S. W. 144. And an oral promise of an administrator to pay a claim against the estate if the claimant would not press it is not within the statute of frauds when the promise was made to subserve the promisor's own objects and purposes, and he did in fact profit thereby: *Blake v. Robinson*, 129 Iowa, 196, 105 N. W. 401. Likewise where a contractor who had undertaken to build a house was insolvent, and the subcontractors threatened to quit work unless the owner would promise to see them paid, a promise by the owner was an independent obligation for his own benefit, and not within the statute of frauds: *Hall v. Alford*, 105 Ky. 664, 49 S. W. 444. When wood sawyers, who have lien on lumber sawed, relinquish possession to another who promises to sell the property and pay the debt, and who is thus given an opportunity to make his own claim against the owner, such promise is not within the statute, although it operates to release the owner from liability to the sawyers: *Simpson v. Carr & Parrington*, 25 Ky. Law Rep. 849, 76 S. W. 346. A promise by one receiving papers drawn by an attorney at the request of another to pay the attorney therefor is not a promise to answer for the debt of another, when the promisor used the papers in subserving some interest of his own: *Paul v. Wilbur*, 189 Mass. 48, 75 N. E. 63. A stipulation by an employé engaged as a traveling salesman that he should pay fifty per cent of the losses on customers with whom he dealt, being part of his contract of employment, was not a collateral agreement, and within the statute of frauds: *Meyer-Bridges Co. v. Badeau*, 90 Mass. 27, 43 South. 609. And the fact that defendant's agreement to pay plaintiff for threshing wheat, upon which defendants held a mortgage, was not brought within the statute because it included an agreement to pay plaintiffs for wheat previously threshed by plaintiffs under an

agreement with the mortgagor: *Hill Bros. v. Bank of Seneca*, 100 Mo. App. 230, 73 S. W. 307. So, too, an oral promise by one of two partners to pay a judgment against the other in order to prevent the issuance of an execution against the partnership property is an original undertaking and not within the statute of frauds: *Swayne v. Hill*, 59 Neb. 652, 81 N. W. 855. And an oral agreement to make sales on commission and to guarantee payment is not within the statute, though the precise amount to be received for guaranteeing, as distinguished from the commissions for making the sales, does not appear: *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494. So, too, where owners building a house promised the laborers employed by a contractor to work thereon that they would see them paid on continuing their work, which the laborers did, and the owners subsequently made part payments to the laborers for their services, the owners were liable to the laborers as upon an original undertaking, even though the liability of the contractor may remain unaffected: *Almond v. Hart*, 61 N. Y. Supp. 849, 46 App. Div. 431. On the same principle, an agreement by an agent to pay the premiums on a policy if it should be canceled was held to be an original undertaking when he thereby sought to secure his own commission on the contract: *Hess v. Rothschild*, 34 Misc. Rep. 800, 69 N. Y. Supp. 957. Again, where tenants desired to be released by their landlord, and he refused unless the owner of the leased premises would release him, a promise made by the tenants to the owner that they would guarantee him against loss if he would release the landlord, in the event the landlord released them, was an original undertaking and not within the statute of frauds: *Smith v. Schneider*, 84 N. Y. Supp. 238. But an opposite ruling was made in *Garfield v. Rutland Ins. Co.*, 69 Vt. 549, 38 Atl. 235, where an oral contract by an agent of an insurance company, upon issuing a policy, guaranteeing the solvency of the company, and a return of unearned premiums upon cancellation of the policy was held a collateral agreement and not enforceable by the statute of frauds, unless the company places funds in the agent's hands to meet the obligation. "It is doubtless true," said the court, "that the main purpose of the agents was not to procure a benefit for the company, but to subserve a business intent of their own. In some jurisdictions, this might be deemed sufficient to give the promise the character of an original undertaking. But we cannot give it that effect." And where subcontractors accepted an order for the amount due them, conditional on performance of the contract by the original contractor, who thereafter abandoned the contract, whereupon defendant (the owner) orally agreed to pay them the whole value of their work if they would finish the work, the promise of the defendant was an original undertaking not within the statute: *Riesler v. Silbermintz*, 90 N. Y. Supp. 967, 99 App. Div. 131. Likewise in *Blakeney v. Nalle & Co.* (Tex. Civ. App.), 101 S. W. 875, a parol promise to pay the note of another was held to be an original promise when the evidence showed that the promise rested upon a valuable consideration, and its main purpose was to subserve the interest of the promisor, and this

doctrine was strongly upheld by the supreme court of the United States in *Emerson v. State*, 22 How. (U. S.) 28, 16 L. ed. 360, where Mr. Justice Clifford, speaking to the question whether an oral contract to answer for the debt of another was an original or a collateral undertaking, said: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

5. **Where Promisor Effects Payment of His Own Debt.**—As an oral promise to pay the debt of a third person is not within the statute of frauds, when the main purpose of the promisor is to effect some interest of his own, it follows that where the promise effects the payment of the promisor's own debt, the undertaking is original. Thus a promise to pay the debt of another as a part of the purchase price of property sold and delivered to the promisor is not within the statute of frauds: *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216; *Daniels v. Gibson*, 20 Ky. Law Rep. 847, 47 S. W. 621; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; and a verbal promise by the purchaser of land to pay an existing mortgage thereon as part of the consideration is not within the statute of frauds, being an original undertaking to pay the promisor's own debt: *Herrin v. Abbe* (Fla.), 46 South. 183; *Senningen v. Rowley* (Iowa), 116 N. W. 695; *Van Meter v. Pooh*, 130 Mo. App. 433, 110 S. W. 5; *Deaver v. Deaver*, 137 N. C. 240, 49 S. E. 113; *Pickett v. Jackson* (Tex. Civ. App.), 42 S. W. 568; *Morgan v. South Milwaukee Lake View Co.*, 97 Wis. 275, 72 N. W. 872. In *Coffin v. Bradbury*, 89 Me. 476, 36 Atl. 988, the plaintiff had a preferred claim against the insolvent estate of one B. Mrs. B., the widow, was administratrix of the estate, and in that capacity sold real estate of her intestate to defendant, and at same time released her dower to him. Defendant paid her a part of the price of the dower interest, and orally agreed to pay plaintiff's preferred claim against the estate when he sold the land purchased. He sold the land before suit brought. It was held that the promise, though oral, was a "new, original, and independent undertaking" to pay his own debt to the appointee of the widow, the plaintiff. And in an action by one indorser of a note against another indorser for contribution, a parol agreement as to indorsing the note is not within the statute of frauds when it relates to the obligation of the indorsers inter sese and not a promise to pay the debt of another: *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157.

So, also, a parol promise by a company having control of all the funds out of which its employes are to be paid, to pay the board of such employes, is a primary agreement and not within the statute of frauds: *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041. And when D. works for R. and on settlement therefor R. verbally agrees to pay C. & S., to whom D. is indebted, the agreement is not

within the statute of frauds: *Sherer v. Rubedew*, 11 Idaho, 536, 83 Pac. 512. Likewise, where one purchases the subject of a written contract and orally undertakes its performance, the contract is binding, he having thus made it his own: *City of Tyler v. St. Louis South-western Ry. Co. of Texas* (Tex. Civ. App.), 87 S. W. 238. A verbal promise by defendant, who purchased and was given possession of the stock of goods of an insolvent debtor, to pay the holder of a third mortgage upon the stock the amount of such mortgage out of the profits of the business, is an original contract, not within the statute of frauds, regardless of whether defendant could have obtained the stock without making the promise, or whether the mortgagee could have realized anything on the mortgage if defendant had not purchased the stock: *Lessel v. Zillmer*, 105 Wis. 334, 81 N. W. 403.

6. New Consideration Beneficial to the Promisor.—The authorities are all agreed that an oral promise to answer for the debt of another which has been already created is a collateral promise, and therefore within the statute of frauds. But there is an exception to this rule when the promise is founded upon a new and sufficient consideration beneficial to the promisor. Mr. Justice Clifford, in *Emmerson v. Slater*, 22 How. (U. S.) 28, 16 L. ed. 360, states this principle thus: "Nothing is better settled than the rule that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation: 2 Addison on Contracts, 1002, and cases cited. Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action." Thus in *Roy & Titcomb v. Flin* (Ariz.), 85 Pac. 725, appellants were sureties on a contractor's bond. Appellee was a subcontractor obligated to furnish materials and complete the foundation of the structure. The original contractor defaulted after the work was partially completed, thereby releasing appellee from his contract. Thereafter, under a verbal agreement with appellants, the appellee completed his contract and demanded pay from appellants upon the basis of the full contract price with the original contractor, and upon their refusal to pay for the labor and materials which had been furnished by appellee prior to the default of the original contractor, appellee brought this suit. It was held that the oral agreement of appellants to pay the debt due appellee from the original contractor was an independent agreement and founded in a good consideration. Said Judge Sloan: "The promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of

frauds, and need not be in writing." Likewise in *Doe v. Allen*, 1 Cal. App. 560, 82 Pac. 568, a verbal promise by the consignees of a cargo of coal to pay the freight thereon if the carrier would deliver the coal was held to be an original promise based on a consideration beneficial to the promisors, and not within the statute of frauds. So, also, in an action to recover on defendant's promise to pay a debt due plaintiff on purchasing property from his debtor, an instruction on the theory that the evidence must show an absolute sale by the debtor to defendant before the latter would be liable to plaintiff is properly refused, as plaintiff was entitled to recover if defendant agreed to pay the debtor's debt to plaintiff in consideration of the debtor giving a bill of sale to secure a debt due defendant, where there was an allegation of a good consideration passing from the debtor to defendant: *Kee v. Cahill*, 86 Ill. App. 561, affirmed *Baldwick v. Cahill*, 187 Ill. 218, 58 N. E. 351. Again, an oral agreement by plaintiff to give defendants the exclusive sale of goods, in consideration of the defendants' payment of the debt of an insolvent corporation of which defendants were the officers, is valid even though the original debtor remains liable, it being an agreement with and for the benefit of defendants upon a consideration passing to them: *Durgin v. Smith*, 115 Mich. 239, 73 N. W. 361; and a verbal promise by partners to pay an existing debt of a corporation to another, in consideration of such other person giving the promisors an agency for the sale of his coal, is an original obligation and not within the statute of frauds: *McCormick v. Johnson*, 31 Mont. 266, 78 Pac. 500; also, where upon the winding up of a copartnership, of which defendant was a member, he retained some of the partnership funds and orally agreed to pay plaintiff a debt due him from the firm, the defendant's promise was upon a consideration beneficial to himself and was not within the statute of frauds: *Carlson v. Barker*, 36 Mont. 486, 93 Pac. 646. But a verbal statement by defendant that he was willing to help financially to a specified extent his brother, who was negotiating a compromise with his creditors, in reliance on which the creditors signed a compromise agreement, is a promise to answer for the debt of another, and the mere fact that a corporation, of which defendant was an officer and to which defendant's brother was indebted, obtained payment after the compromise, is not such a benefit to defendant as to make his promise an independent one and take it out of the statute of frauds: *Millard v. Steers*, 41 N. Y. Supp. 321, 9 App. Div. 419, affirmed 158 N. Y. 741, 53 N. E. 1128.

The promise by an assignee for the benefit of creditors to pay personally a debt of the assignor, in order to prevent a threatened action by the creditor to set aside the assignment, is an original promise: *Blumberg v. Begozi*, 20 Misc. Rep. 286, 45 N. Y. Supp. 672; and where title to real estate is transferred to a trustee for the benefit of a second mortgagee, an oral contract by the latter with a first mortgagee, whereby the second mortgagee agrees to pay certain taxes on the mortgaged premises, is an original undertaking and not within the statute of frauds: *Williams v. Bedford Bank*, 71 N. Y. Supp. 539,

63 App. Div. 278. Likewise when a subcontractor told the owner of a building that he would like to have the latter secure his payments, and was told by the owner to go ahead and that he would pay an order from the contractor, the owner's promise was an original one supported by a sufficient consideration: *Schild v. Monroe Eckstein Brewing Co.*, 95 N. Y. Supp. 493, 108 App. Div. 50. And a promise by the vendee of uncompleted houses that if the contractors would hurry up the work so that the buildings could be rented, that she would pay them, not only for the work of completion, but for what they had done for her vendors, was an original promise and not within the statute: *Breen v. Isaacs*, 49 Misc. Rep. 127, 96 N. Y. Supp. 741. So, too, where a subcontractor threatened to abandon work for nonpayment of money due, and the owner told him to go ahead and he would pay him when he finished the job, the promise was an original promise founded upon a new consideration, which inured to the owner's benefit, and was not void within the statute of frauds: *Sinkovitz v. Applebaum*, 56 Misc. Rep. 527, 107 N. Y. Supp. 122. Likewise where the indorsers of a note, having received and indorsed a check from the maker for its payment, on finding that the maker had not sufficient funds in bank to pay the check, promised the bank that if it would honor the check they would procure the assignment to the bank of certain outstanding accounts due the maker, and the check was paid on the transfer of the accounts to the bank without the signature of the maker, the indorsers promising to procure his signature, and the maker afterward repudiated the whole transaction, and collected the account, it was held that the promise of the indorsers was an original valid promise founded upon a new and independent consideration: *Jefferson Bank v. Starr*, 56 Misc. Rep. 656, 107 N. Y. Supp. 582.

In *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872, it was held that an oral promise to pay the debts of another in consideration of the conveyance of land by the debtor to the promisor was not within the statute of frauds and could be enforced by the promisee, although the original debtor remained liable. So, too, where a person takes over the stock of another and agrees to pay the debts for the price of the goods purchased by the previous owner, the taking of the stock is a sufficient consideration for the promise, though the creditors were not parties to the consideration: *Sargent v. Johns*, 206 Pa. 386, 55 Atl. 1051. But the fact that one who promised to pay the debts of a corporation for goods sold owned the greater part of the stock of the debtor corporation does not constitute a new consideration making the promise valid: *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 301. Delivery to a contractor of the materials necessary to perform the contract inures to the benefit of the sureties for such performance; hence the promise of the sureties to be responsible, on which the materials were delivered, is not within the statute of frauds: *Lyon v. Lindsay* (Tex. Civ. App.), 39 S. W. 1101. Likewise the oral undertaking of a banking firm to pay the debts of another bank in consideration of the latter turning over its assets and business to the firm was based on a new consideration beneficial to the promisors, and was not within

the statute of frauds: *Hoskins v. Velasco Nat. Bank* (Tex. Civ. App.), 107 S. W. 598; and the guaranty of a note is an original promise by the guarantor and not within the statute, where the note is negotiated in consideration of value received by the guarantor: *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999. Also an agreement by which the interest of a tenant in a growing crop is transferred to another, in consideration of such other promising to pay a debt of the tenant, is a valid agreement: *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101. But the verbal acceptance of an order, if made without other consideration than the debt, default or misdoing of another, is void under the statute of frauds: *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, 27 S. E. 209; and a collateral oral promise by one to pay another's debt is not binding when no benefit accrues to the party making the promise: *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248. In *Commercial Nat. Bank of Appleton v. Smith*, 107 Wis. 574, 83 N. W. 766, the payee and guarantor of a note were stockholders in a corporation in which the payee had a controlling interest, and dictated a policy unsatisfactory to the guarantor. The guarantor and maker bought the shares of the payee, neither having any interest in the shares of the others. In payment the maker gave his note, guaranteed by the guarantor, but the guarantee failed to show any consideration. It was held that the incidental benefit which might accrue to the guarantor by having the payee out of the corporation and the maker in as a stockholder did not amount to a new and sufficient consideration moving from the creditor and promisee to the promisor, so as to relieve the promise of the statute of frauds. In *Choate v. Hoogstraat*, 105 Fed. 713, 46 C. C. A. 174, plaintiffs had manufactured a quantity of lumber for a lumber company, a portion of which had not been delivered. A part of the price for such portion had been paid, and the remainder being past due and unpaid, plaintiffs refused to make any further deliveries to the company for a shipment until it was paid. Defendant, who was president of a corporation which held an unrecorded mortgage on the lumber, given by the company, and also a member of the firm which was indorser on the notes of the company, stated to plaintiffs orally that, if they would deliver the lumber, he would "go good" for what the company was shipping until he gave them further notice. It was held, that under the Wisconsin rule that "where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise," a finding by the jury, under instructions properly stating such rule, that defendant's promise was an original promise, which bound him to payment of the value of the lumber delivered in reliance thereon, would not be disturbed; and where securities had been loaned by a claimant to D., who pledged them to secure loans, and thereafter the bankrupts, a firm of which D. was a member, took over his entire property, including claimant's securities, and the moneys obtained from the loans, and assumed all his liabilities, the benefits derived from the claimant's property were thereby transferred to the bankrupt

firm, constituting a new consideration to support its original promise to return or account for the securities, which was therefore not within the statute of frauds: *In re Dresser*, 135 Fed. 495, 68 C. C. A. 207. Frequent applications of the rule now under consideration are found in those cases where the promisee has forbore to assert some legal claim or right in reliance of the promise, and the authorities are not entirely harmonious as to whether mere forbearance constitutes such a new and sufficient consideration as to take an oral promise to pay the debt of another out of the statute of frauds. In *Cox v. Halloran*, 81 N. Y. Supp. 803, 82 App. Div. 639, it was held that an oral promise by the owner of a building to materialmen, who had supplied the contractor, and who were threatening to file a lien, to pay the bill and be responsible for all additional material if they would not file the lien, was an original promise and not within the statute of frauds. And to the same effect is *Cornell v. Central Electric Co.*, 61 Ill. App. 325. In the last case it was urged by defendant's counsel that the claim of lien at the time the promise was made was not sustainable against the defendant or its property, in the improvement of which the goods and materials were furnished, for the reason that the lienor's subsequent petition for a lien was dismissed as not sustainable, but the court said: "The slightest damage to the plaintiff, or benefit to the defendant, affords a sufficient consideration to support the promise to pay. . . . It was enough that a reasonably probable cause of action, although a debatable one, existed. . . . We consider that the promise was supported by a sufficient consideration, and amounted to an original undertaking by appellant, based upon that consideration, to pay the debt, and was, therefore, not within the statute of frauds." But a directly opposite ruling was made by the supreme court of Alabama in *Clark v. Jones*, 85 Ala. 127, 4 South. 771. Here the plaintiffs, who were subcontractors, had forbore to file a lien on defendant's house, for an unpaid claim they had against the contractor, upon the verbal promise of defendant to pay their claim against the contractor. The promise was held to be collateral and within the statute of frauds. Said Judge Clopton, speaking for a majority of the court: "A party may make a valid oral contract, which operates to create a new debt of his own, if founded on a new and independent consideration, though the effect of the payment is to pay another's debt. In order, however, to have this effect, the essence of the new undertaking must be the payment of the promisor's own debt by paying the debts of a third person. The consideration relied on to support the promise of defendant, and to constitute it his own debt, is the forbearance of plaintiffs to file a lien for their claim. The plaintiffs had no lien on the property, and surrendered none. They were subcontractors, and, if they had filed the statement required to obtain a lien, they could only have subjected any unpaid balance in the hands of defendant, and would have acquired a lien in the property to secure the payment of the same only to that extent. The forbearance to file a lien was not of benefit to the defendant, and filing it would not have operated as a detriment to him in the legal

acceptance of the term"; and in *Warner v. Willoughby*, 60 Conn. 468, 25 Am. St. Rep. 243, 22 Atl. 1014, it was held that an oral promise of the owner of a building that he would see a subcontractor paid if he would forbear to file a lien on the building for money due him by the contractor for services performed and materials furnished was not an original promise. In this case, however, the court draws a distinction between a promise "to pay" and one "to see him paid," and there is a strong intimation in the opinion that had the promise been "to pay," it would have been upheld as an original undertaking. And where a loan is made to the owner of land and a portion thereof is paid to one who is furnishing materials for a house in process of construction, on condition that he will see all other bills for the house paid, and he promises plaintiff, having a claim for material furnished, to pay his bill if he will not enforce a lien on the property, it constituted an original promise for a valuable consideration: *Stephen v. Yeomans*, 112 Mich. 624, 71 N. W. 159. So, too, in *Schnanfer v. Ahr*, 53 Misc. Rep. 299, 103 N. Y. Supp. 195, where the owner of premises promised plaintiff that if he would refrain from filing a lien on the premises for materials delivered to a contractor, defendant would pay the debt owing plaintiff by the contractor, the promise was held to be based on a new consideration and not within the statute of frauds. Likewise in *J. A. Ellis & Co. v. Carroll*, 68 S. C. 376, 102 Am. St. Rep. 679, 47 S. E. 679, it was held that the oral promise of a third person to pay the debt of another in consideration of the creditor's forbearance to enforce immediately an attachment lien on the debtor's property, was an original promise, not within the statute of frauds. "Where one has a complete and enforceable lien on the property of his debtor, a promise of a third person to pay the debt on condition that the property under the lien is given up is not within the statute of frauds. . . . The test in all such cases is whether there is a new consideration moving to the promisor so as to make it an original, and not a collateral, promise. . . . If it be a damage to the other party, or a benefit to the party promised for, it will be sufficient, provided these proceed from the forbearance to enforce immediately some subsisting lien." And the same doctrine was later followed in *Lee v. Unkefor*, 77 S. C. 460, 58 S. E. 343, where plaintiff, in consideration of an oral promise by a third person to pay the amount of a mortgage on his debtor's property, stopped a foreclosure suit and assigned his security to the promisor. In *Stromberg v. Loiacono*, 45 Misc. Rep. 651, 91 N. Y. Supp. 46, plaintiff had a claim for goods sold to a third person. Defendant was about to buy such third person's property, when plaintiff threatened to bring an action against the third person and have an attachment issued. Defendant fearing that such suit and the attachment threatened would disarrange his own plans for the purchase of the property, orally promised plaintiff that, if he would refrain from bringing the suit and issuing the attachment, he would pay plaintiff's claim. Plaintiff accepted the offer and abandoned his intention of bringing the suit, and defendant thereupon purchased the property. Held, that the agreement was not a guaranty by defendant

to pay the debt of another, within the statute of frauds, but an original promise founded on a new consideration for the personal benefit of the defendant. But in order that forbearance to enforce a lien shall constitute a sufficient consideration to take an oral promise to pay the debt of another out of the statute of frauds, the promise must have been relied on. Thus in *Fuller & Rice L. & M. Co. v. Houseman*, 117 Mich. 553, 76 N. W. 77, plaintiff claimed to have forborne to file a mechanic's lien upon defendant's statement: "If you put a lien on that property, I will sue you. Nobody ever furnished any material for any of my property, or ever will, that they have not got their pay for, and you will get your pay, though it may take some time, as I may have to sell the houses first." Said Judge Grant: "This language did not take the case out of the statute of frauds. It was not a promise to pay, nor does it appear that plaintiff relied upon it as a promise, and for that reason forbore his lien." So, also, the forbearance must be of some personal advantage or benefit to the promisor, to support a sufficient consideration to take a verbal promise to pay the debt of another out of the statute of frauds. Thus an oral promise by one to pay a debt of his deceased son in law, if the creditor would not make trouble, is within the statute, when it does not appear that the promisor gained any personal advantage by the creditor's forbearance, and it is shown that by reason of the insolvency of the estate the creditor would have received nothing had he pressed his claim: *Schaafs v. Wentz*, 100 Iowa, 708, 69 N. W. 1022; and in the recent case of *Carleton v. Floyd, Rounds & Co.*, 192 Mass. 204, 78 N. E. 126, plaintiff sought to recover for services rendered the defendant corporation. Defendant Rounds was interested in the corporation and trying to obtain control of it, the concern being in an embarrassed financial condition. Plaintiff was about to attach the corporation, when defendant Rounds orally agreed that if plaintiff would not make the attachment he would pay plaintiff's claim, which he subsequently refused to do. It was held that the promise was void within the statute of frauds, Judge Hammond quoting with approval, as applicable to this case, the language of Morton, J., in *Ames v. Foster*, 106 Mass. 400, 13 Am. Rep. 343: "The defendant's promise was in its primary and essential character a promise to guarantee the debt of another. Its object was to secure the payment of an old debt, which was not extinguished. The defendant's liability was collateral and contingent, would exist as long as the original debt existed, and would be extinguished whenever the original debtors should pay that debt. It was not in any sense his debt; the original party remained liable; and there is an entire absence of any liability on the part of the defendant or his property except such as arises from his express promise. When all these elements concur, we know of no case in this commonwealth which sanctions the doctrine that such promise loses its character as collateral, and becomes an original promise, because there is a consideration which is beneficial to the promisor"; and adds: "The case is clearly distinguishable from cases where the leading object and effect of the transaction is the purchase or ac-

quisition by the promisor from the promisee of some property, . . . or the discharge of some lien upon the property of the promisor, the benefit of which discharge directly inures to the promisor. Such a transaction is in the nature of a purchase of property or of a property right." In *Gillis v. Mahoney*, 79 Minn. 209, 82 N. W. 583, the plaintiff sought to recover from a wife upon an oral agreement made by her to pay a note of her husband, in consideration of plaintiff's refraining from enforcing collection against the husband. Plaintiff undertook to prove an oral agreement on the part of the wife to pay the note and interest as follows: "If you don't ask my husband for this interest at any time, or bother him in any way about it or the note, or sue him or make him any trouble." He also offered to prove that in reply to the wife's offer to pay he stated: "Very well, I will take you, then, in your husband's place. I will look to you for the payment of the note and interest when it becomes due"; and further, that he did not seek to enforce collection against the husband; that the wife had received certain property from the husband just prior to the alleged agreement; and that since the maturity of the note the husband had not been within the jurisdiction of the court, and had no property therein. An objection to the foregoing testimony was sustained by the trial court, and its order, on appeal, was affirmed, the supreme court saying: "As the complaint stood, there was nothing to show that the wife had any interest in the payment of the note; that she would be benefited thereby, that she had assumed the debt, or that plaintiff agreed to discharge the husband. The argument alleged is a collateral agreement on her part to assume the debt and is within the statute of frauds." A like ruling in a somewhat similar case was made in *Mitchell v. Miller*, 25 Misc. Rep. 179, 54 N. Y. Supp. 180, where it was held that a wife's verbal promise to pay a debt of her husband, in consideration of the creditor's forbearance to sue out an attachment against the husband, was not a sufficient consideration moving to the promisor to take the promise out of the statute of frauds. But the oral promise of a mother to pay plaintiff her son's default if plaintiff would not expose the son's dishonor, and would retain him in his employ, and release him from all claims by reason of the defalcation, was an original undertaking based on a sufficient consideration, and not within the statute of frauds: *American Wire & Steel Bed Co. v. Schultz*, 43 Misc. Rep. 637, 88 N. Y. Supp. 396. Also an oral promise to pay the debt for which a judgment debtor is imprisoned in consideration of his release from jail, in order that he may return to the service of the promisor, is not within the statute of frauds: *Berg v. Spitz*, 84 N. Y. Supp. 532, 87 App. Div. 602. And an oral agreement to answer for the debt of another is for a sufficient consideration, when the creditor is thereby induced to relinquish a valuable lien which was a security for the original debt: *Blumenthal v. Moore*, 106 Ga. 424, 32 S. E. 344. So, too, a verbal promise by the assignee of firm assets to assume a firm debt as a part of the consideration for the assignment is not within the statute: *Metzger*

v. Edson, 25 Misc. Rep. 236, 55 N. Y. Supp. 61. But an oral promise to answer for the debt of another is not validated by the fact that the creditor, at the request of the promisor, granted indulgence to the debtor: *Berbescu v. Stearns*, 26 Misc. Rep. 841, 57 N. Y. Supp. 1; and to same effect is *Brumm v. Gilbert*, 27 Misc. Rep. 421, 59 N. Y. Supp. 237.

7. **Discharge of Original Debtor.**—We have seen that some of the cases hold that where a promise to pay the antecedent debt of another is based upon a new consideration moving to the promisor and for his benefit that the promise is original and not within the statute of frauds, notwithstanding the fact that the original debtor remains liable. Such was the ruling in at least two of the cases cited above, viz.: *Durgin v. Smith*, 115 Mich. 239, 73 N. W. 361, and *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872; and to the same effect is *Wickham v. Hyde Park Bldg. & Loan Assn.*, 80 Ill. App. 523. But there are many cases which hold that unless the original debtor is discharged, the promise is collateral and within the statute of frauds: *Abercrombie v. Fourth Nat. Bank (Ala.)*, 39 South. 606. Thus in *Strauss v. Garrett*, 101 Ga. 307, 28 S. E. 850, a parol promise to pay the debt of another was held void as within the statute of frauds, where the original debtor remained liable, although the promise was made in consideration of an agreement by the debtor to sell goods belonging to him to the person making the promise, and in further consideration of an agreement by the creditor (he, however, having no lien upon the goods), to "refrain from interfering with or preventing" such sale by "endeavoring to secure or collect" the amount due him by the debtor. Likewise, in *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308, a plasterer employed by a building contractor told the owner of the building that he would not do the work unless the owner would pay him, because he did not think the contractor good, and the owner said he would pay, and the plasterer did the work. It was held that unless the plasterer's agreement with the contractor was abandoned, the promise of the owner was collateral thereto and void under the statute of frauds; and in *Bicknall v. Bicknall*, 27 R. I. 429, 62 Atl. 976, plaintiff, a mortgagee, who had given a loan on security, falsely represented to be a first mortgage, brought action against the mortgagor to recover damages for the deceit. The defendant's son, in consideration of plaintiff's discontinuing and abandoning the suit, orally agreed to pay the amount sued for. Plaintiff did not abandon the suit, but did not release the mortgage nor the debt of the mortgagee, but only the claim for the deceit. The promise was held not to be binding but within the statute of frauds. Said the court: "Even if we concede, for the purposes of this consideration, that the extinguishment may be mentally as well as physically accomplished, a proposition not involved in the determination of this case, what evidence is there that the old obligation of Edward J. Bicknall was extinguished? A fair interpretation of the testimony of the plaintiff is that she dropped her claim for deceit against Edward J. Bicknall, but that

she held the note and mortgage as outstanding and valid against the real estate; that she did not surrender or attempt or intend to surrender them; and so, far as appears in evidence, they constitute a subsisting obligation capable of enforcement by foreclosure. In other words, she released a claim she may have had against the body of Edward J. Bicknall, but did not part with her claim against his real estate. The extinguishment must be complete and total, not partial or equivocal to serve the purposes of novation." Again, in *Starr v. Taylor* (Tex. Civ. App.), 56 S. W. 543, defendant, who was the owner of real estate which was rented, orally promised plaintiff that he would pay a debt of his tenant to plaintiff, in consideration of the crop of the tenant being turned over to him. A demurrer to plaintiff's complaint, on the ground that the contract sued on was within the statute of frauds, was overruled by the trial court, but this was held on appeal to be error, the appellate court saying: "If the plaintiff had alleged that the defendant agreed to assume the debt on condition that Miller [the tenant] be discharged, an original undertaking on the part of defendant would have been averred, and if proved, would bind him whether written or verbal." But whatever conflict of judicial opinion may exist as to whether it is necessary to the validity of an oral promise to pay the debt of a third person that the original debtor should be discharged, the authorities are all agreed that when the original debtor is discharged in consideration of the promise, the undertaking is an original one and not within the statute of frauds. Thus, when defendant assumed payment of a note made by a third person and the note was marked paid, and delivered to defendant, the transaction was a novation and not within the statute of frauds: *Abercrombie v. Fourth Nat. Bank* (Ala.), 39 South. 606. And where goods were sold to a third person on his credit, but the purchaser was thereafter released from liability upon the verbal promise of another to pay therefor, the promisor was liable as under an original undertaking: *Smith Bros. v. Miller* (Ala.), 44 South. 399. So, too, when a tenant, after planting his crop, was taken sick, and defendant bought the crop from him and orally promised plaintiff, the landlord, to pay the rent due, and plaintiff accepted defendant as his tenant, defendant's agreement to pay the rent was an original undertaking, not within the statute of frauds: *Pylant v. Webb*, 2 Ga. App. 171, 58 S. E. 329. Likewise, where defendant accepted an order of a third person in favor of plaintiff given in payment of a debt of such third person, with the understanding and in consideration that such third person was to be released, the promise is not within the statute of frauds: *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660. In *Hyatt v. Bonham*, 19 Ind. App. 256, 49 N. E. 361, a lessor of an opera-house agreed to pay the lessee twenty dollars and a balance owing by the lessee for chairs placed in said house, and the lessee agreed to surrender the lease. They went together to the creditor and stated the agreement, and the latter accepted the lessor as its debtor. It was held that there was a complete novation,

so that the statute of frauds did not apply. Said the court: "When a promise is made to pay the debt of another, the statute has no application if the original debtor is discharged. In such case the promise is treated as original, and not collateral. The promisor is substituted as the debtor, and the discharge of the original debtor is a sufficient consideration. To make the promise collateral, and bring it within the statute, it must be a promise to answer to the promisee for the debt, default or miscarriage of a third person, who is liable therefor to the promisee and continues so liable"; and to the same effect is *Jenkins v. Holley*, 140 N. C. 379, 111 Am. St. Rep. 846, 53 S. E. 237. But it has been held that when the release of the original debtor, and the substitution of the promisor, is relied upon to take an oral promise to pay the debts of another out of the statute of frauds, it must be shown that the person substituted as the debtor in the place of the person released became such as the result of an agreement in which the creditor, the debtor, and the promisor all concurred. Such is the rule laid down in *Palmetto Mfg. Co. v. Parker & Anderson*, 123 Ga. 798, 51 S. E. 714, and *Netterstrom v. Gallistel*, 10 Ill. App. 352. In the former case plaintiffs sought to recover from the defendant firm a debt originally due them from one of the defendants. The petition alleged in substance that the original debtor, J. M. Parker, had sold his entire business to the defendant firm of Parker & Anderson, under an agreement that said firm was to pay the debt due plaintiffs from said J. M. Parker. That by virtue of this agreement the defendant firm had retained out of the purchase price due J. M. Parker for the business he had sold them the amount of Parker's indebtedness to plaintiffs. It further alleged that plaintiffs were informed of the agreement between J. M. Parker and the defendants, and agreed and consented that the defendants be substituted for J. M. Parker and become plaintiffs' debtor in place of J. M. Parker, and that J. M. Parker be relieved and released from any indebtedness to them, and that defendants were notified of plaintiffs' consent to the change of debtors. A demurrer to the petition was sustained by the trial court and this judgment was affirmed on appeal. Said Judge Cobb: "The allegation that the defendants were notified by the plaintiffs that it consented to the agreement, in the absence of an allegation that the defendants and Parker then concurred in the substitution, would not prevent the case from being obnoxious to the statute of frauds."

In *Boeff v. Rosenthal*, 37 Misc. Rep. 852, 76 N. Y. Supp. 988, defendant conveyed land to K. & F., taking back a purchase money mortgage for part of the consideration thereof. Defendant then procured for K. & F. a building loan to aid them in the erection of buildings on the property, secured by bonds and mortgage on the premises, defendant being a part owner of that mortgage. Plaintiffs then agreed with K. & F. to furnish certain material to be used in the construction of the buildings, payment for same to be made as the structure progressed. K. & F. defaulted in the payments,

and defendant orally promised plaintiff in the presence of K. & F., and at their solicitation, that if they would complete their work, operations upon which had ceased when K. & F. defaulted, he would pay them for materials thereafter to be furnished and also the amount that was already due them from K. & F. "While the effect of defendant's promise," said the court, "was to pay the debt of Klein & Friedman, yet his object in so doing was to bring about the completion of the buildings erected upon the land, upon which he had a purchase money mortgage and also an interest in a building loan mortgage following it, and that promise, therefore, was a new and original one, and not within the statute of frauds. The effect of the transaction was . . . to rescind or cancel the contract between plaintiffs Klein & Friedman, and to substitute a new and original agreement." There is one case which seems to hold that the discharge of the original debtor is not a sufficient consideration to make valid a new oral promise to pay the debt of a third person within the statute of frauds, unless the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay the same to the creditor. The case to which we allude is *Hamlin v. Drummond* (Me.), 39 Atl. 551. The point at issue in this case was whether or not the original debtor had in fact been discharged, but in deciding this question the court announced the rule above stated. Plaintiff had brought suit to recover for the service of a stallion. Defendant pleaded "novation," claiming that plaintiff agreed to take another man as paymaster, in consideration of defendant's exchanging his mare, then with foal, for a horse then owned by the other, who in consideration thereof promised to pay defendant's debt to the plaintiff. The exchange was made pursuant to the agreement. Plaintiff contended that the stranger received no consideration for the promise, and therefore it was not binding upon him and could not work a discharge of defendant's debt to plaintiff, and that the promise was void under the statute of frauds. Said the court: "'Novation' is a word foreign to the common law rule, and has its natural meaning only in the civil law. It implies the substitution of a debtor, of a creditor, and of a new contract. It is never presumed, but always must be proved. The most frequent novation is the substitution of a new debtor, and his promise to pay the debt must be a valid and binding promise to work a discharge of the old debtor; and were it not for the statute of frauds, it would seem that the discharge of the old debtor would be a sufficient consideration to make valid the new promise; and it would logically follow that if the new promise be in writing, so as to comply with the statute of frauds, such promise would be valid. But where the discharge of the original debtor also works a discharge of the substituted debtor's debt to him in consideration of the substituted debtor's promise to pay to the same creditor, the statute does not apply, for the new promise is still to pay his own debt, but to a substituted creditor, and works a complete novation." It was ac-

cordingly held that the defendant had been discharged by the new promise, because the substituted debtor had agreed to pay the defendant's debt to the plaintiff in place of boot that he was to pay the defendant in the exchange of horses.

8. Promises of Debtor to Discharge Debt.—A rule very generally established by the cases is, that an oral promise to a debtor to pay his debt to a creditor is an original undertaking when founded on a new and valid consideration: *Botkin v. Middlesborough Town & Land Co.*, 23 Ky. Law Rep. 1964, 66 S. W. 747. Thus, where a grant of authority by the owner of property to an agent to sell it and apply the proceeds of the sale to the payment of a debt of the owner was agreed to by the agent, upon a sale of the property the agent was liable to the creditor, his agreement not being a special promise to answer for the debt of another within the statute of frauds: *Smith v. Caldwell*, 6 Idaho, 436, 55 Pac. 1065. Likewise the oral promise of an incoming partner to pay the firm debts in consideration of the interest acquired by his purchase is a binding obligation and not within the statute: *Dickson v. Conde*, 148 Ind. 279, 46 N. E. 998; and to same effect is *Wear-Boogher Dry Goods Co. v. Kelly*, 84 Miss. 236, 36 South. 258; *Shufeldt v. Smith*, 139 Mo. 367, 40 S. W. 887; *Bartlett v. Smith*, 5 Neb. (Unof.) 337, 98 N. W. 687; *Lyon v. Clochessy*, 43 Misc. Rep. 67, 86 N. Y. Supp. 245; *Don Gook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964. So, too, an oral agreement to pay, as part of the consideration for land, a debt due by the vendor to another, is not a promise to pay the debt of another within the statute: *Mudd v. Carico*, 104 Ky. 719, 47 S. W. 1080; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924; and to the same effect is *Flint v. Winter H. L. Co.*, 89 Me. 420, 36 Atl. 634, *Provenchee v. Piper*, 68 N. H. 31, 36 Atl. 552, and *Thompson v. Cheesman*, 15 Utah, 43, 48 Pac. 477. And a parol promise, for a valuable consideration, by the purchaser of land to pay taxes on the land prior to the date of purchase is not within the statute: *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558. But in *Hann v. Burrell*, 119 N. C. 544, 26 S. E. 111, it was held that a promise by a prospective vendee that if he purchased the land he would pay a note of the vendor to a third person, was void within the statute of frauds, though he afterward purchased the land. The ruling in this case, however, was based upon the fact that the conditional promise was made before the purchase was made and that there was no evidence to show the terms of the contract of purchase between the defendant and the vendor, nor that the promise to pay the note sued on was a part of the consideration agreed upon for the land which defendant afterward bought.

An agreement between three persons, by which the first is to pay the third a debt due him from the second, who is to be released, and who agrees to discharge a claim due him from the first, is not within the statute of frauds: *Martin v. Curtis*, 119 Mich. 169, 77 N. W. 690. So, also, where S., being indebted to A., sells goods to M., and directs him to withhold from the purchase price and pay

to A. the amount of S.'s debt to A., the promise of M. to do so is not a promise to pay the debt of another within the statute of frauds: *Adlam v. McKnight*, 32 Mont. 349, 80 Pac. 613. An excellent illustration of the rule that an oral promise to pay a debt, made with the debtor or some person interested for him, and founded on a new and valid consideration, is an independent undertaking, is found in the recent case of *Hedden v. Schneblin*, 126 Mo. App. 478, 104 S. W. 887. Here an administrator orally promised to loan to a buyer of mortgaged chattels of the estate money to pay the mortgaged debt, the buyer paying in cash the difference between the amount of the mortgage and the agreed purchase price. The administrator failed to make the loan, and the mortgage was purchased and the chattels sold for just enough to pay the mortgage debt. This action was to recover damages against the administrator for breach of his oral promise. The defendant urged that the agreement was within the statute of frauds, because it was a promise to pay the debts of his intestate, and also pleaded that it was without consideration. Neither of these contentions were sustained. Said Judge Johnson, speaking for the court: "Conceding, for argument, that the agreement of defendant had for its main object the release of the estate from the indebtedness to the bank (the mortgagee), still we encounter an insuperable obstacle to the conclusion of defendant that it was an agreement to answer for the debt of another within the meaning of the statute. Courts of this state and elsewhere repeatedly have declared that the statute applies only to promises made to the creditor, and not to those made to the debtor or to some person standing in his shoes, such as a purchaser of encumbered property. . . . Defendant is driven to say that plaintiff, under the terms of the contract of sale, assumed the relation of the estate to the debt, and, if this be true, the promise of defendant was made to the debtor, not to the creditor." Speaking to the question of the sufficiency of consideration, the court continued: "A mere promise to pay an existing debt of another without any new consideration is a nude pact, and therefore void; and, unless we can find in the argument of the parties a new consideration, defendant cannot be held liable on account of his breach of a naked promise. The promise was made at the time of the original negotiation between plaintiff and defendant for the sale of the property, which the latter held as administrator. It was incorporated into the contract of sale as an essential part thereof. Without it, the sale could not have been consummated, and, as it is impossible to disconnect it from the contract, we think the true test to be applied is not whether the promisor himself was to receive a reciprocal benefit, but whether the entire transaction, the contract of sale, of which the promise was an incident, is supported by a consideration. It is conceded that plaintiff agreed to and did give a sufficient consideration for the property, and that consideration is the aliment for defendant's promise."

9. **Obligation of Promisor Independent of the Liability of the Principal.**—Wherever there is some liability of the promisor or his

property independent of his express promise, the promise will be regarded as an original undertaking and not within the statute of frauds. The operation of this rule has been illustrated in many of the cases heretofore given, especially those where the owners of buildings agreed to pay the debt due from contractors or materialmen to prevent the filing of liens on their property. Further instance of its application is found in *Pizzi v. Nardello*, 209 Pa. 1, 57 Atl. 1100, where the surety on a contractor's bond, having to complete the contract because of the default of the contractor, verbally promised a subcontractor that if he would go on with his work he would pay him the debt due him by the contractor, as well as for his future services. It was held that the debt became the promisor's own because, being surety for the contractor, the liability was his own; and in *McCord v. Edward Hines Co.*, 124 Wis. 509, 102 N. W. 334, plaintiff was owner of a large tract of timber land. He had made a contract with a railroad company to cut, log and deliver the timber at his sawmill. These logging operations were carried on through the medium of subcontractors. It was the understanding between plaintiff and the railroad company that plaintiff would make the necessary advances to the loggers during the season, and withhold the same from the amount to become due the railroad company upon its contract when the logs were delivered. Plaintiff sold his timber land and sawmill, together with his contract with the railroad company, to defendant. This transaction involved the investigation of titles and adjustment of encumbrances which would require some time. In order that the work of logging might continue uninterrupted, it was verbally agreed between plaintiff and defendant that plaintiff should continue to make advancements of supplies and money to the loggers until a transfer of the property was consummated, when defendant would repay the same to plaintiff. It was held that the promise to repay plaintiff for the supplies and money advanced to the loggers was an original undertaking and not within the statute of frauds. Said the court: "When transfer was finally made at the prices fixed for standing timber, that timber had been advanced toward its next stage of sawlogs to the extent of the logging work done in the interim, and was enhanced in value to an amount presumptively in excess of the advances made by plaintiff, and those advances were available as a credit upon the contract price for cutting and hauling the logs, which defendant had agreed to assume. Hence, upon final conveyance by plaintiff and his company, they transferred by their written contract the timber, but also the addition thereto resulting from partial transformation into logs, and defendant thus received full and adequate beneficial consideration for a promise to pay for such addition or enhancement in value. The evidence certainly tends to support the view that, in addition to the timber, defendant in November purchased from plaintiff the enhancement of the same which his money had procured; or, in another aspect, purchased his right to a credit upon the railway company's logging contract to the amount of such advancements, and

agreed to pay him a price therefor. This, of course, would be an obviously original promise to pay a price for property purchased by the defendant, and would be in no wise affected by the fact, if it existed, that Colbroth (a logger), or anyone else, might be indebted for those advances, for it would not necessarily be collateral to, or in any wise dependent upon, either existence of such debt or default therein by Colbroth. Indeed, if such debt existed, the transaction would, in effect, work a purchase of it by defendant, not a guaranty of it. The promise was in terms not to pay what Colbroth owed, but to pay plaintiff certain sums because he had advanced them and defendant had the benefit." The promise was held to be original in this case upon the further ground that, as it could not be known at the time of the transaction the amount of the advances to be made, that the promise of the defendant was in no wise identical with the debt or obligation which the loggers might owe to the plaintiff.

b. Contracts of Indemnity.—The question whether a verbal contract of indemnity is within the statute of frauds is the subject of the monographic note appended to *Smith v. Delaney*, 42 Am. St. Rep. 186, and by reference to that note it will be seen that the conflict of authority among the earlier cases is irreconcilable. This diversity of opinion also exists among the later cases, but these opposite conclusions of the judicial mind are not based upon any conflict of opinion over the rules heretofore given, but in their application to this particular class of promises. The weight of authority upholds the doctrine that a verbal promise of indemnity is an original, independent undertaking, and therefore not obnoxious to the statute of frauds. Thus in *Burr v. Cross*, 3 Cal. App. 414, 86 Pac. 824, in an attachment suit, wherein the defendant here had been the plaintiff, he obtained an attachment which was levied by the officer on certain property of the defendant in the attachment case. The plaintiff in attachment (defendant in this case) directed the officer to place the attached property in charge of an employé of the plaintiff, verbally agreeing in consideration of his promise to save the officer harmless from all liability for any damages that might be done to the property by reason of the negligence, breach of duty, or carelessness of such employé while in charge of the property. Much of the property was lost or destroyed while in charge of the employé, and thereafter, the attachment having been released, this action was brought to recover damages on account of the loss and destruction of the attached property. A judgment in favor of plaintiff was upheld, the court saying: "The promise of the defendant was his own, made for his own benefit and upon a sufficient consideration moving to him, and he is therefore to be regarded as the principal debtor." Likewise in *Hawes v. Murphy*, 191 Mass. 469, 78 N. E. 109, a verbal promise by defendants to save plaintiffs harmless from all loss on account of a bond signed by the plaintiffs at defendant's request and relying upon the defendants' promise, was held to be an original undertaking and not a special promise to answer for the debt of another. And to the same effect

is *Esch v. White*, 76 Minn. 220, 78 N. W. 1114, where this doctrine was applied to a verbal promise by an attorney to protect the sureties on an appeal bond of his clients if they would justify as such sureties. In *Patrick v. Barker*, 78 Neb. 823, 112 N. W. 358, the president of a bank, in order to induce a third party to purchase some of its capital stock, orally agreed with such person that the bank would accept certain notes and mortgages held by him in payment of the stock, and would hold him harmless against action by the bank to recover any further amount on his indorsement of the notes. The agreement was held to be an independent obligation and not a contract to be bound for the debt of another. So, too, where a mortgagee verbally agreed to indemnify a purchaser of part of the property against certain judgment liens, for a present consideration passing to the mortgagee, such agreement was an original undertaking, and need not be in writing: *Peterson v. Creason*, 47 Or. 69, 81 Pac. 574.

In *Wattenbarger v. Hodges*, 38 Tex. Civ. App. 329, 85 S. W. 1013, one R. G. Hodges purchased land from the plaintiff under a written contract to forfeit three hundred dollars, on failure to perform the terms of the purchase within the stipulated time. He failed to perform and his brother, S. N. Hodges, then orally agreed with plaintiff, in consideration of an extension of the time, to forfeit five hundred dollars if R. G. Hodges failed to comply with the contract within the extended time. R. G. Hodges again failed to perform, and this action was brought against S. N. Hodges to recover the five hundred dollars which he had verbally agreed to pay. A demurrer to the complaint was sustained by the trial court upon the ground that the promise sued on was within the statute of frauds, but the judgment was reversed on appeal. Said the court: "Treating the promise of appellee to pay appellant five hundred dollars in case R. G. Hodges failed to consummate the sale agreed on between him and appellant as a promise to pay that sum as liquidated damages—it being so treated in the supplemental petition demurred to—we are of opinion that it was not a promise to answer for 'the debt, default or miscarriage of another,' within the meaning of the statute of frauds. To bring it within that statute, the promise must have been to answer for the same debt for which R. G. Hodges was liable by reason of his failure to consummate the sale, the language of the statute indicating, and the decisions construing it holding, that the promise required to be in writing must be a collateral, and not an original or independent, one. The promise of R. G. Hodges, both as originally made by him and as extended by appellee for him, was that if he did not take the land he would pay appellant three hundred dollars in full satisfaction of the damages. The promise of appellee was that if appellant would extend the time and forego the sale to Honecker, and if R. G. Hodges did not then take the land, he would pay on 'his own account' five hundred dollars to cover appellants' damages. The latter promise created a liability for a different and greater sum than the former, and was not one to answer for the same debt or default as the former. . . . True, this

promise was conditioned on the failure of R. G. Hodges to take the land, and in a sense was a promise to answer for that default or miscarriage, but not more so than was the promise of R. G. Hodges himself to pay the damages agreed on between him and appellant." The court then states that the rule followed in some jurisdictions that a verbal promise of indemnity, regardless of the nonliability of the person for whose miscarriage it is made, is within the statute of frauds, is not the rule in Texas. It was said, however, in this case, that if the promise sued on had been to pay the same sum as that promised by R. G. Hodges, to wit, three hundred dollars, the promise would have fallen within the statute. The same test was also applied in *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509, 102 N. W. 334, where a contract under which timber was to be cut for plaintiff provided that plaintiff should make advances to loggers as they need supplies, the advances to be deducted from installments due under the contract. Defendant, having purchased the timber and the contract, verbally agreed that if plaintiff would continue to make the necessary advancements to the loggers until the title to the property could be examined and the transfer to defendant completed, he would repay plaintiff the amount of such advances. The verbal promise of defendant was held valid, the court saying: "Clearly, he [the plaintiff] could not, at the time of his transaction with defendant, demand or sue for the amount of those advances. . . . Hence the promise of defendant to pay him that amount absolutely and without contingency was in no wise identical with the debt or obligation owing from any third person."

In *Barth v. Graf*, 101 Wis. 27, 76 N. W. 1100, one Koetting, a trustee under a will, induced defendants to become sureties on his bond in favor of the estate, upon his verbal promise to indemnify and save them harmless from any liability growing out of their signing the same. Koetting subsequently collected large sums belonging to the estate and absconded. Defendants brought an action in attachment against Koetting and attached certain real estate belonging to him, and this action was a contest between the sureties and certain attaching creditors of Koetting. It was held that while no implied promise on the part of Koetting to the sureties to indemnify them for signing the bond would authorize the sureties to maintain an action against him without first making payment of his default, and then only to recover back the amount so paid and interest, that the implied promise of Koetting to his sureties was enlarged at the time he requested them to become sureties by his verbal promise to indemnify them, and that this was an original undertaking, and not within the statute of frauds. It was further held, however, that the attachment which had been levied in favor of the sureties was invalid, because there had been no such default by Keating at the time the attachment was issued, as to authorize an attachment at the suit of the sureties. Also in *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915, the validity of verbal contracts of indemnity is upheld. In this case a father, at the time of the execution of a note to a bank, as an inducement to the making thereof, verbally agreed to be bound for his son's moiety, and to indemnify

the other indorser and maker against the same. The agreement was held to be an original undertaking on the part of the father, and not a promise to answer for the debt, default or misdoing of another within the purview of the statute of frauds.

But the doctrine supported by the foregoing cases is strongly opposed by the courts of Mississippi, Missouri and New Jersey. Thus in *Craft v. Lott*, 87 Miss. 590, 40 South. 426, an oral promise made by a son, to indemnify one against loss in consideration of his becoming surety on the bond of his father as tax collector, was held to be void as within the statute of frauds, the court saying: "That such obligation is within the condemnation of the statute of frauds is well settled in this state, whatever the rule may be elsewhere." So, too, in *Hartley v. Sanford*, 66 N. J. L. 627, 50 Atl. 454, 55 L. R. A. 206, the defendant's son was indebted to M., who desired additional security. Defendant applied to plaintiff to become surety for the son, and promised to reimburse him if he was compelled to pay the debt. Plaintiff became surety for the son as requested and was afterward compelled to pay the debt. It was held that the promise was within the statute of frauds as a "special promise to answer for the debt, default or miscarriage of another." On a previous appeal of this case (66 N. J. L. 40, 48 Atl. 1009), the supreme court held that the promise was not within the statute, but in overruling this decision Judge Dixon, speaking for the court of errors and appeals, after a somewhat lengthy review of the earlier English and American cases on the subject, said: "It seems indisputable that the defendant's promise was within the statute. It was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him—an obligation either to pay the debt for which the plaintiff was to be surety, or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee; (2) that this obligation should be the foundation of the promise—i. e., that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfillment of the son's obligation; and (3) that the obligation of the promisor should be collateral to that of the son—i. e., if the latter should perform his obligation, the promisor would be discharged, while, if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor." In *Hurt v. Ford*, 142 Mo. 233, 44 S. W. 228, 41 L. R. A. 823, an oral promise to save one signing a note as surety harmless was held to be within the statute of frauds; and in *Gansey v. Orr*, 173 Mo. 532, 73 S. W. 477, an oral promise made to induce a purchase of stock in a corporation, whereby the promisors agreed to indemnify the purchasers in case of the failure of the corporation to the amount paid by them for the stock, was held

to be within the statute of frauds. In a previous portion of this note, while discussing the rule that the statute of frauds did not apply when there was no existing liability from the person for whom the promise was made to the promisee, we cited a number of cases holding that verbal promises made to induce the purchase of stock, whereby the promisor agreed to repay the purchaser if the corporation failed, was necessarily an original undertaking and not within the statute, because the corporation was under no greater liability to reimburse the purchaser than its obligation in common with all other shareholders to conduct its business for the best interest of all concerned, and hence there was no substantive liability to which the promise could be collateral. It is interesting to note how the court in the Gansey case last above cited explained its decision with reference to this rule. Said Judge Burgess: "It is not contended by defendants that a stockholder, as such, is a creditor of the corporation, and there was therefore no debt; nor is it contended that the corporation owed or would owe to plaintiff, as stockholder, any duty, except the duty to use reasonable judgment, care and diligence in the conduct of the business, and to refund her share of any surplus remaining upon liquidation after the payment of debts. For want of care, etc., in the conduct of the business, the corporation would not be liable, nor was there any surplus upon liquidation; hence there was no default for which Mrs. Gansey could have held the corporation in a civil action. The word 'miscarriage' was clearly intended to have a broader meaning than either 'debt' or 'default,' and should be so construed as to include the failure of a third party [in this case the William A. Orr Shoe Company] to succeed in the proposed business, regardless of the fact whether its failure to do so would entitle the plaintiff to an action at law against the company or not. The requirement that an actionable duty shall exist was made first by the court in cases of debt, because, unless there was a debt owing by the third party, that part of the statute clearly did not apply. The same requirement was later extended to 'default,' meaning 'default in any duty,' and for the same reason. But the reason does not exist in the case of miscarriage (i. e., the act of a third party, whether actionable or not), and the requirement should not be made." The significance given to the word "miscarriage" in the statute of frauds by this decision is not found in any other case, and the court admits that a ruling different from the one here made "is followed in a majority of the states," but that the rule announced has been consistently adhered to in Missouri.

III. Miscellaneous Illustrations.

The accommodation indorsement of a negotiable note made contemporaneously with the execution of the note by the maker is not a collateral promise to answer for the debt, default or miscarriage of the maker, but is an original, substantive contract founded on a present valuable consideration moving from the payee to the maker: *Carter v. Odom*, 121 Ala. 162, 25 South. 774. So, also, in *Ragdale v.*

Gresham, 141 Ala. 308, 37 South. 367, it was held that the acceptance of an order as between the acceptor and the payee is an original undertaking, and not a promise to pay the debt of another. But in this case the acceptor was indebted to the drawer, and it may have been due to this fact that the ruling was made, for in *Miller v. Chicago Heights Lumber Co.*, 117 Ill. App. 468, it was held that a verbal acceptance of an order to pay money is not binding on the acceptor, if at the time there were no funds in his hands with which to pay such order, as the promise would have no consideration to support it. Where a husband, after leasing land and entering into possession with his family, dies, and his wife verbally promises to pay the rent, in consideration of retaining possession, her promise is an original undertaking and not within the statute of frauds: *Linam v. Jones*, 134 Ala. 570, 33 South. 343. In *Moore v. First Nat. Bank*, 139 Ala. 595, 36 South. 777, the action was founded on a verbal contract to pay the debt of another. A building contractor was indebted to both plaintiff and defendant. Defendant had verbally agreed with the contractor that if he would abandon negotiations for a certain contract and allow defendant to obtain the contract, he would pay his debt to the plaintiff. The contractor carried out his part of the agreement, but defendant refused to pay the contractor's debt to the plaintiff. It was held that the defendant's promise was an original undertaking, and the statute of frauds was no defense. It was further held that as the promise was made to the debtor and not to the creditor, it was immaterial whether the plaintiff had relinquished his claim against the original debtor. In *Bates v. Birmingham Paint Glass Co.*, 143 Ala. 198, 38 South. 845, the defendant had agreed to pay a contractor a certain amount for painting her house, and verbally promised plaintiff to retain from the contract price an amount sufficient to pay the plaintiff's bill for materials sold the contractor and used in the work. This promise was held to be an original undertaking on the part of the owner to pay her own debt, and therefore not within the statute of frauds. On the same principle, where defendant verbally agreed to deduct from the wages of its employes the amount of their debts to the plaintiff for board and store accounts, and to pay the same to plaintiff, the undertaking was primary and not collateral: *Cerrusite Min. Co. v. Steele*, 18 Colo. App. 216, 70 Pac. 1091; and to the same effect is *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Lenard v. Texarkana Lumber Co.* (Tex. Civ. App.), 94 S. W. 383. And if the defendant actually withheld from the wages of its employes the amount of money due to plaintiff, the debt became its own, and not that of another: *Cerrusite Min. Co. v. Steele*, 18 Colo. App. 216, 70 Pac. 1091. In *Long v. McDaniel*, 76 Ark. 292, 88 S. W. 964, the lessee of a barber-shop agreed with plaintiff, a plumber, on the price of placing certain plumbing in the shop. Before ordering the material or doing the work the plumber called on the owner [the defendant] and asked him what he thought about it. The defendant replied, "You go ahead and put the stuff in, and if Mr. Keath [the barber] don't pay for it I will, but don't say anything about my agreement, for I

don't want him to know about that; but I want the fixtures to stay in the house." Plaintiff testified that he would not have ordered the material but for the agreement of defendant, though in other parts of his testimony he spoke of plaintiff as being "security" for the debt. There was also evidence to show that at the time the plumbing goods were being shown to the barber, in the presence of plaintiff and defendant, the latter told the former that he "had better order the goods." The testimony of defendant tended strongly to show that the materials were furnished and the work done by the plaintiff for the barber, and that defendant made no promise, and took no part in the transaction. A verdict in favor of plaintiff was upheld. Said the court: "Counsel for defendant contends that, conceding the testimony of plaintiff to be true, as the jury has found it, the substance of the whole transaction was an agreement by the defendant Long to pay the debt of the barber, Keath, and that such an agreement is within the statute, and must be in writing, in order to bind the defendant. But, while the price of the work and the material had been agreed on between McDaniel [plaintiff] and Keath [the barber], McDaniel did not order the material or commence the work until Long [the defendant] promised to pay for it if Keath did not. The bath tubs, fixtures, and other improvements were to be put in a building owned by Long, and the jury were justified in finding that it was beneficial to him to have such improvement made, and that, in order to induce McDaniel to order the material and do the work, he made the promise. If the testimony of McDaniel was true, he was induced to order the material and do the work by virtue of this promise of Long that he would see that plaintiff was paid. It was then a debt of Long as well as of Keath, and the promise of Long to pay was founded on a consideration directly beneficial to him, and the statute does not apply." In a later case from the same state—*Freakle v. Vaughn Abstract Co.*, 83 Ark. 258, 103 S. W. 174—which was an action by an attorney to recover fees for services rendered in preparing an abstract of title to property purchased by defendant, the defendant was held liable in a verbal promise to pay the attorney's fees if the vendor did not, the plaintiff having relied on the promise of the defendant. But the ruling in these cases must be based entirely on the ground that there was a new consideration beneficial to the promisor, for it is generally held that a conditional promise to pay is within the statute. Thus, it was held in *Heggin v. Smith*, 87 Ill. App. 141, that an oral promise by a managing partner in a firm of contractors, that if a subcontractor did not pay for certain implements previously ordered by such subcontractor, he, said managing partner, would, is a collateral promise within the statute of frauds. It was said by the court that the language of the promise alone imparted simply a collateral undertaking. Likewise in *Newman v. Newman*, 7 Kan. App. 77, 52 Pac. 908, it was held that, where goods are sold to a purchaser at the oral request of another, the latter's oral agreement to pay for them if the purchaser does not is within the statute of frauds; and to the same effect is *Kalispell Liquor & Tobacco Co. v. McGovern*, 33 Mont. 394,

84 Pac. 709. So, also, a verbal agreement to pay for certain work if another does not is within the statute: *Loftus v. Ivy*, 14 Tex. Civ. App. 701, 37 S. W. 766. And where defendant's intestate told plaintiff's agent to ship goods to a third person "whenever he needed them until I notify you to stop and I will see you paid. Collect from him when you come around and if he fails to pay I will," the promise is void within the statute of frauds: *Garrett-Williams Co. v. Hamill*, 131 N. C. 59, 42 S. E. 448. Though in *Weeks v. Widgeon*, 23 Ind. App. 405, 55 N. E. 487, plaintiff, under promise of reimbursement by defendants, secured a third party to perform services for defendant, orally agreeing to answer to such third party for the value of the services in case he was not paid by the defendants. It was held that the agreement was not within the statute of frauds, and that plaintiff could recover from the defendants the amount he had paid thereunder. In *Diamond Coal Co. v. Cook*, 129 Cal. xviii, 61 Pac. 578, defendant had cut wood on plaintiff's property at the instance of a third party, who had agreed to pay him. The third party forfeited his contract with the owner of the property, and plaintiff so informed defendant, and told him that he could look to him (plaintiff) for his pay for the wood. Defendant told him all right, that he didn't care who paid for it, and further testified that ever since then he had looked to plaintiff for his pay and didn't consider that the third person owed him anything. Defendant, however, had held possession of the wood, and claimed a lien on it. It was held that the promise of the plaintiff was "clearly a promise to answer for the debt or default" of another, and was invalid because not in writing. "There was no evidence," said the court, "that Welch canceled the antecedent obligation of Cook, and accepted the new promise as a substitute therefor; nor does it appear that there was any consideration beneficial to plaintiff, moving from either party to the antecedent obligation." But in *McNeill v. Stitt*, 2 Cal. App. 13, 82 Pac. 1121, plaintiff sought to recover from defendant the price of certain timber. One S. had cut the timber on plaintiff's land under an agreement to pay plaintiff therefor. S. delivered the timber to defendant, defendant agreeing verbally to pay plaintiff for the same. Defendant also verbally promised plaintiff to pay her for the timber. It was held that defendant's promise was not within the statute of frauds. In *McIntire v. Schiffer*, 31 Colo. 246, 72 Pac. 1056, a husband had agreed with his wife to transfer lands in his name to her, upon which she was to borrow money and pay his note due to plaintiffs, and plaintiffs had accepted this arrangement. The wife had also agreed with plaintiffs, when such transfer was made to borrow money to pay them this note. This suit was brought to recover from the wife the amount of the husband's note. Defendant's counsel contended that the evidence failed to show that plaintiffs accepted defendant as their debtor in lieu of the husband, and also, that defendant's promise was within the statute of frauds. In affirming a judgment for plaintiffs the court said: "The principle of novation is not necessarily involved, and the real question is whether or not the evidence establishes an agreement between the

plaintiffs, appellant, and the maker of the note which rendered appellant liable for the indebtedness represented by such note. If this agreement embraced nothing more on her part than a mere verbal promise to pay that indebtedness, then it is within the statute of frauds, and cannot be enforced. On the other hand, if the real substance of her agreement was to perform an obligation growing out of the transfer of lands to her, then her promise to perform that obligation was her own, and therefore not within the statute of frauds, though in form it may have been an agreement to discharge that indebtedness, and the result of its performance is to discharge it. . . . The agreement between the parties may not have discharged the maker of the note, but that is immaterial. By accepting a conveyance of the land, and negotiating a loan thereon under an agreement with the plaintiffs and the maker of the note that she would discharge the note of the latter held by the former out of the money thus realized, she agreed to perform an obligation of her own, resulting from an original transaction to which she was a party. While this agreement was, in effect, a promise to pay the debt of another, and the result of its performance will have this effect, it was nothing more than a promise to perform an obligation in consideration of which the lands were conveyed to her by Albert W. McIntyre. This, as the trial court held, constituted an original contract upon her part not within the statute of frauds." In *Burson v. Bogart*, 18 Colo. App. 449, 72 Pac. 605, plaintiff sold goods to a tenant of defendant, and the account was opened in the name of the tenant and was so charged and entered on plaintiff's books. The evidence showed that the bill had been presented several times to defendant, and that he had made no objection to it. There was also proof that defendant had told the tenant after the debt was incurred, in the presence of plaintiff, that he would pay for the goods. The tenant had made some payments on the bill. A judgment in favor of plaintiff was reversed, the supreme court saying: "Assuming that the promise was made, it was a collateral, and not an original, undertaking, as it is undisputed that the goods were charged upon the books of plaintiff to Cobb [the tenant], or Cobb and wife; that Cobb had made several payments on account; that there was no consideration moving from the promisee to the promisor in support of an original undertaking, nor is there any testimony whatever in the record to the effect that the plaintiff released Cobb, and took the defendant as his debtor." In *Lincoln Mountain Gold Min. Co. v. Williams*, 37 Colo. 193, 85 Pac. 844, a corporation was held liable upon a verbal promise to pay the fees and expenses of certain expert witnesses who had been employed by the corporation's superintendent to testify in litigation in which the corporation was interested. So, also, in *Waid v. Hobson*, 17 Colo. App. 54, 67 Pac. 176, defendant was induced to sign a bond as surety, upon an oral guaranty of plaintiff that certain cattle represented by a bill of sale held by plaintiff, and which was to be transferred to defendant as security, were at a certain ranch, and would be turned over to defendant when called for. It was held that such promise was valid as an original undertaking and was not.

obnoxious to the statute of frauds. In *Craft v. Kindrick*, 39 Fla. 90, 21 South. 803, defendant had contracted with a firm of contractors to build a house. Plaintiff was employed by the contractors to do certain parts of the work. The contractors abandoned the work, being considerably indebted to plaintiff for work he had performed. Defendant then verbally promised plaintiff that if he would complete the work she would pay him the debt due by the contractor. This promise was held to be an original undertaking upon which defendant was liable. But in *West v. Grainger*, 40 Fla. 257, 25 South. 91, G. was continuously employed by B. from January, 1893, to August, 1898, as general overseer in B.'s turpentine business and allowed the money due him for services to accumulate until he ceased work, when there was a large balance due him. W. W. & Co., in 1896, purchased certain notes and a mortgage held by one McC. against B., and began to advance him money, and in February, 1897, B. executed to them a mortgage to secure certain notes and other advances to be made, the mortgage covering substantially all his property, and containing an obligation to ship them, as fast as manufactured, the products of his turpentine farm. About the time W. W. & Co. began business with B., one C., a member of the firm of W. W. & Co., called to see B. at his turpentine farm, and told him that W. W. & Co. had purchased the notes and mortgage held by McC., and discussed business matters with him. B. told C. he had G. employed, and stated the amount he then owed him. C. verbally stated to G. that he must continue in the employ of B., and that W. W. & Co. would see that he was paid. There was no evidence that G. was dissatisfied, or that he proposed to quit the service of B., nor that the promise was regarded as an absolute one either by W. W. & Co. or G. There was no new hiring, nor was G.'s account, which had been against B. alone, changed from B. to W. W. & Co., nor to both jointly. G. made no demand on W. W. & Co., as principals, to pay his account, and all payments on it were made by B. G. died and his administrator brought this action against W. W. & Co. to recover the amount due the deceased. It was held the promise made by C. for W. W. & Co. was merely collateral to answer for the debt of B., and not enforceable under the statute of frauds. The case of *Craft v. Kindrick*, 39 Fla. 90, 21 South. 803, last above cited, was referred to by counsel for plaintiff as showing that the undertaking in this case was original, but the court said: "That case was rightly decided upon the facts, but there are expressions in the opinion and the headnotes that are too broad. It cannot be that every absolute verbal promise to pay the debt of another upon some new consideration moving to the promisor is without the statute of frauds. The statute will not admit of that interpretation. The language of the opinion and headnotes in that case is, therefore, modified so as to confine the decision to the facts then shown."

In *Bluthenthal v. Moore*, 111 Ga. 297, 36 S. E. 689, plaintiffs held a mortgage against one H., and had foreclosed the same. W. purchased the mortgaged goods from H., and assumed the debt of H. and gave his notes to plaintiff therefor, and defendant orally agreed, in con-

sideration of plaintiff's releasing the foreclosure and allowing W. to dispose of the stock of goods he had purchased from H., to see that W.'s notes were paid. A judgment sustaining a demurrer to plaintiffs' petition in a suit to recover from defendant on this oral promise was affirmed. Chief Justice Simmons said: "While the petition alleges that Moore agreed to 'guarantee' the payment of the notes of Watkins, we think that his liability, even if the promise had been in writing, would have been that of a surety, and not of a guarantor; for the consideration of his promise was not a benefit flowing to him, but to the principal debtor. As a surety, the oral promise did not bind him; nor was the undertaking of Moore [the defendant] an original one, which would bind him without being in writing. But the petition shows that Watkins assumed this debt in writing, by giving his promissory notes, and that Moore simply agreed to see that these notes were paid, the consideration for Moore's promise being the same as that of the notes, and not flowing as a benefit to him." In *Evans v. Griffin*, 1 Ga. App. 327, 57 S. E. 921, one, J., an employé of defendant, had borrowed money from defendant, promising to remain in his service until he repaid the debt. Plaintiff desired to secure the services of J., and orally promised defendant that if he would release J. from his contract to remain in his employ he would pay the amount owed by J. It was held that this was a new and original promise, and not within the purview of the statute of frauds. Also in *Chapman v. Conwell*, 1 Ga. App. 212, 58 S. E. 137, defendant, desiring to place one of his servants in a building belonging to plaintiff until one of his own houses was completed, orally promised plaintiff that if he would permit such servant to occupy the house he (defendant) would be responsible for the loss of certain agricultural products stored in the house, in the event of fire while so occupied by defendant's servant. The said property was destroyed by fire, and it was held that defendant's promise was an original undertaking and not within the statute of frauds.

In *Sears v. Flodstrom*, 5 Idaho, 314, 49 Pac. 11, plaintiff was proprietor of a meat market. Defendant was owner of a boarding-house, which he rented to a woman who was a stranger to plaintiff. Defendant introduced the tenant to plaintiff and requested him to let her have such meats as she required and charge the same to him. Some payments on account had been made by the tenant and some by defendant. It was held that the promise was an original one and that defendant was liable for balance of account for the meats delivered to the tenant. Again, one having property of another in his hands, who agrees to sell the same and pay a debt of the owners out of a part of the proceeds, is an original promisor, so that the agreement need not be in writing: *Smith v. Caldwell*, 6 Idaho, 436, 55 Pac. 1065. In *Berkowsky v. Viall*, 66 Ill. App. 349, a materialman ought to recover from the owner of a building the price of materials furnished the contractor and used in the construction of the building. The materialman, becoming suspicious of the contractor, called upon the owner and told him that he would furnish no more materials

unless he (the owner) would secure him. The owner answered, "All right; you go on and furnish the necessary materials to finish the building and I will see that you get your money for what you put in here." It was held that the contract was not within the statute of frauds, but that a recovery could only be had for materials furnished subsequent to the owner's promise. The correctness of this ruling, however, seems to have been questioned by the same court in a later case, for in *Jenkins & Reynolds Co. v. Lundgren*, 85 Ill. App. 494, plaintiff sought to recover upon a verbal promise of the defendant, that if plaintiff would sell to a third party certain pressed brick to be used in a house then being built by defendant he (defendant) "would see that he [plaintiff] was paid therefor." It was held that the promise was not an absolute promise of defendant to pay the debt himself, and was void under the statute of frauds.

Reference is made to the *Berkowsky* case just above cited (66 Ill. App. 349), but no attempt is made to draw any distinction between the ruling there made and this case, as to the effect to be given the words "will see you paid"; the court simply stating that the real test is, to whom was the credit given, and that the evidence in this case did not show that the plaintiff extended the credit to the defendant alone.

But where a landlord tells a merchant to sell goods to his tenant, and promises that he will pay for them, the promise is an original undertaking, and need not be in writing: *Clark v. Smith*, 87 Ill. App. 409; and to same effect is *Henderson v. Hughes*, 4 Ga. App. 52, 60 S. E. 813, and *White v. Tripp*, 125 N. C. 523, 34 S. E. 686. Likewise where a contractor told a grocer to furnish certain subcontractors with what supplies they wanted, and he would pay for them, such promise was an original promise, and not one to answer for the debt of another within the statute of frauds: *Lusk v. Troop*, 89 Ill. App. 509, affirmed 189 Ill. 127, 59 N. E. 529. And the same principle is applied to an employer who tells a grocer to furnish goods to his employé and he will pay for them: *Cauthron Lumber Co. v. Hall*, 76 Ark. 1, 88 S. W. 594; *Pulaski Stave Co. v. Sale*, 32 Ky. Law Rep. 669, 106 S. W. 786. In *Knisely v. Brown*, 95 Ill. App. 516, plaintiff sought to recover upon an oral promise of defendant to pay an antecedent debt due to plaintiff by a third person, upon the alleged consideration that such third party would turn over to defendant a certain livery business. The livery business was turned over to defendant and plaintiff released said third party from his obligation to plaintiff. It was held that the defendant's promise was an original undertaking, the court saying: "Counsel admit the law to be, as it certainly is, that if Knisely's promise to pay Perkins' debt to appellee was supported by a valuable consideration moving to Knisely, then the promise was an original undertaking, and not within the statute." This rule, however, is qualified in *Netterstrom v. Gallistel*, 110 Ill. App. 352. Here appellant, having a contract to pave a certain street in Chicago, sublet a portion of the work to one Colson. Colson abandoned his work before completion, leaving appellant indebted

to him in a large sum for the work he had done. Colson was indebted to appellee, and the latter agreed to take an order from Colson for the amount due him from appellant, and complete Colson's contract, and released Colson's debts to appellee, but did not tell appellant. Appellant verbally agreed with appellee that if he would complete Colson's contract, that he [appellant] would pay the amount due Colson upon the order. Appellant subsequently refused to pay the order, and in an action to recover the amount pleaded the statute of frauds. It was urged that the evidence showed not only a promise, but a consideration moving from appellee to appellant which would take the case out of the statute, but the court said: "This is too narrow a construction of that act. Every enforceable contract is founded upon a consideration. In addition to a consideration the statute requires that the promise to pay the debt of another must be in writing." It must be that the court considered the consideration in this case not sufficient, and only intended by this language to say that there must be a sufficient consideration moving to the promisor from the promisee, for we find no other case which holds that an oral promise, though in form to pay the debt of another, is obnoxious to the statute of frauds, when the promise is based on a new consideration beneficial to the promisor. Thus in *Cedar Val. Mfg. Co. v. Starboard* (Iowa), 89 N. W. 14, where a materialman, from whom a contractor had ordered materials for building defendant's house, refused to furnish the balance except upon the owner's promise to pay therefor, the verbal promise of the owner to pay for such as might thereafter be required was held to be an original undertaking, and not within the statute.

Again, in *Boos v. Hinkle*, 18 Ind. App. 509, 48 N. E. 383, defendant was owner of a note, secured by mortgage. The maker of the note was insolvent and the property covered by the mortgage not sufficient to pay the debt. Plaintiff, desiring to get the landed security, verbally promised defendant that if he would transfer the note to him (plaintiff) and procure the maker thereof to convey the mortgaged premises to plaintiff, that plaintiff would deliver to defendant certain personal property. The note was transferred and plaintiff delivered the property to defendant as agreed, but defendant failed to secure the deed from the mortgagor as agreed, and plaintiff sought to recover the money expended in foreclosing the mortgage. It was held that defendant's promise to procure the deed was not within the statute of frauds as a promise to pay the debt of another.

In *Blumenthal v. Tibbitts*, 160 Ind. 70, 66 N. E. 159, plaintiffs brought action to recover from defendants certain taxes paid by plaintiffs on realty owned by defendant's husband. The complaint alleged in substance that immediately after the husband's death, plaintiffs were about to enforce their claim for taxes, but refrained from doing so upon defendant's oral promise that she would pay the taxes. It was held that the complaint was demurrable as failing to show any consideration for the promise, because it neglected to allege that defendant's promise to pay the taxes was based on a promise

of plaintiffs to refrain from the enforcement of their claim for any definite time. The court was also of opinion that the promise was a collateral rather than an original undertaking.

In *Indiana Trust Co. v. Finitzer*, 160 Ind. 647, 67 N. E. 520, plaintiff's decedent, one Koepper, had been a wholesale liquor dealer, and for many years had supplied defendant's husband, who was a retail liquor dealer, with his stock. The husband fell behind in his payments and his indebtedness to Koepper became large. Defendant was owner of considerable real estate, including that occupied by her husband as a saloon. Koepper had a conference with defendant and her husband regarding an adjustment of the amount due him by the husband, and then told defendant that he could not sue John (the husband) any longer, that John had nothing and was already largely in debt, that the property was all hers, and he would not longer sue the husband, but, "if she would be responsible, he would continue to supply John with what stock he wanted." She replied, "I am running this business. Send in the goods and I will be responsible." Koepper further told defendant that he would have to open the account in her name, and her answer was, "Send on the goods, and I will be responsible." As a part of the same arrangement defendant borrowed money by mortgaging her real estate and paid Koepper her husband's account in full to date. Koepper changed the accounts on his books on that date, and thereafter billed all goods sent to the saloon to defendant. The liquor license was continued and renewed in the name of defendant's husband, and he continued to conduct the business, ordered, received and sold the goods, and made payments thereon, but the goods shipped by Koepper were marked in the name of defendant. A judgment in favor of defendant was upheld. Said the court: "Does the language exchanged between Koepper and appellee on the occasion of her husband's debt constitute appellee a purchaser of the goods thereafter delivered at the saloon, or a parol promise on her part to answer for the debt, default or miscarriage of her husband? . . . It is not claimed that appellee in terms agreed to become the purchaser of the goods. The most charged against her is that, on being informed by Koepper that he would not longer sell to her husband, but, if she would become responsible, he would continue to supply 'John'—not appellee—with what stock he wanted, she replied, 'Send on the goods, I will be responsible.' Her answer was by no means equivalent to saying that she would purchase the goods herself; and her declaration that 'I am running this business' does not amount to a claim of ownership of the saloon, or of the stock in trade, and there is no evidence that she received in person, or in benefit to her property, any part of the profits or proceeds of the sales subsequently made." This strikes us as a very close decision, and one which affords an excellent illustration of how hard it is to apply any fixed rules in determining what, within the meaning of the statute of frauds, constitutes a contract to pay the debt of another. The intention of the parties seems to have been clear, and the credit seems also to have been extended

to the defendant and the goods were charged to her; and as the wife was naturally interested in the success of her husband's business, it would look as if there was a sufficient consideration to support the promise. In contrast to this case is that of *Cox v. Peltier*, 159 Ind. 355, 65 N. E. 6, where it was said that when goods are furnished to a third person on the order of another, the person giving the order is regarded as the purchaser, and it was accordingly held, in an action on an undertaker's bill against the employer of decedent's husband, that a complaint alleging that a coffin was furnished and services rendered at the special instance and request of the employer, was not demurrable because of failure to allege that the credit was extended to him. In *Harlan v. Harlan*, 102 Iowa, 701, 72 N. W. 286, a father had devised land to his son J., who was an imbecile, for life, with remainder to his two other sons. The latter agreed with J.'s guardian, after the father's death, to each take care of J., a year at a time, alternately, and did so for several years, when one of them orally agreed to convey his interest in the land to the other if the latter would take care of J. as long as he lived, and the promisee did so. It was held that the promise was not collateral, because the estate was chargeable with the expense and care of J.'s maintenance, but was an original undertaking and not within the statute of frauds. But in *Griffin v. Hoag*, 105 Iowa, 499, 75 N. W. 372, when a lessor permitted a lessee to remove property subject to his lien, on the oral promise of a third person to see that the rent was paid, that he would pay it before a certain time, it was held that the promise was within the statute of frauds, the lessor not having released his lien, but merely parted with possession of the property. In *Marr v. Burlington etc. Ry. Co.*, 121 Iowa, 117, 96 N. W. 716, a restaurant-keeper sought to recover damages for defendant's breach of a contract whereby plaintiff had agreed to board a certain number of nonunion strikers, who defendant had agreed to supply as patrons for plaintiff's restaurant and for whose board it would pay. The contract was held not to be within the statute of frauds. So, also, a promise by defendants that, if plaintiff, a stockholder, would pay over the money lent to P., then, in the event plaintiff should be obliged to return any of the stock to L., defendants would repay plaintiff, and save him harmless, on the faith of which plaintiff paid the wager to P., was an original promise, and not within the statute of frauds as a promise to answer for the debt of another: *Himmelman v. Pecant*, 133 Iowa, 503, 110 N. W. 919.

A note executed by the only two bona fide stockholders of a corporation, one of whom was a married woman, for money used by the corporation, was an original undertaking, and not a contract to answer for the debt or default of another, within a statute providing that no part of a married woman's estate shall be subjected to the payment of a liability upon such a contract unless such estate shall have been set apart for that purpose: *Williams v. Farmers' & Drovers' Bank*, 20 Ky. Law Rep. 1273, 49 S. W. 183. And a parol promise by a devisee to pay a bill for the funeral expenses of the testator,

for which she was liable to the extent she had received assets and for which there was a lien upon the property devised to her, was a direct promise and not within the statute of frauds: *Withers' Admr. v. Withers' Heirs*, 30 Ky. Law Rep. 1099, 100 S. W. 253. In *Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342, defendant, an agent, had negotiated the sale of a farm to plaintiff and also certain personal property situated on the farm. Before the contract of sale was consummated, plaintiff claimed that some of the personal property was being removed from the premises. Defendant then agreed in writing that he would see that plaintiff was paid for every article sold to him, and which belonged to the owners of the farm, that was removed before the contract of sale to plaintiff was consummated. It was held that the agreement was an original undertaking on the part of the agent, and not a collateral one within the statute of frauds, as it was made at a time when plaintiff could have rescinded the contract of sale, and was presumably made to induce plaintiff to consummate the contract so that defendant would get his commission. But an oral promise by which defendant guaranteed the payment of a mortgage debt, in consideration that plaintiff, who was not the equitable owner of the debt, would forbear to enforce the same for a reasonable time, was a contract within the statute of frauds: *Commonwealth Bank v. Kirkland*, 102 Md. 662, 62 Atl. 799. In *Phelps v. Stone*, 172 Mass. 355, 52 N. E. 517, plaintiff had built a house for defendant's father and had been paid, but he performed certain extra work and furnished extra materials upon the oral promise of defendant to see him paid therefor. For this extra work and materials the credit was extended to defendant and the items charged to him. Before this suit was brought plaintiff saw defendant and he made no objection to the claim, but said he had no money to pay it. It was held that the defendant's undertaking was not within the statute of frauds, notwithstanding the fact that defendant was not pecuniarily benefited, and that the father's payments were made at the hands of the defendant, and that the father owned the building.

In *Reelman v. Grosfend*, 140 Mich. 681, 104 N. W. 331, an action to recover the price of certain lumber was brought against a husband and wife, the real contest being over the liability of the wife. The contract for furnishing the lumber had been made by plaintiff with the husband alone and the credit extended to him. A draft upon the husband for the first carload shipped had been returned to plaintiff unpaid. In the meantime the plaintiff learned that the husband was not financially responsible and did not own the lots upon which the intended building was to be erected. Plaintiff called upon defendants for the purpose of recovering back the lumber shipped, and then met the defendant wife, and told her he could not let the lumber go. The wife then agreed that if he would leave the lumber and ship the balance that she would see that it was paid for. In pursuance of this promise plaintiff let the lumber remain and shipped the balance, and changed the account on his books to "Mrs. & Mr. Grosfend." The future correspondence regarding the material was

carried on by plaintiff with the husband and the bills were sent to him. The building was erected on lots owned by the wife. The wife had stated it was built as a dwelling for both defendants and for their mutual benefit; and that she wanted and intended that plaintiff should have his pay for the materials that were put in the house. The contention of the plaintiff was that after the first carload of the lumber was shipped, and when he was in a condition to recover it back, a new arrangement was made with the defendant wife, whereby the credit was extended to both defendants, and that the defendant wife was therefore liable for the debt. Plaintiff recovered judgment but this was reversed on appeal, upon the ground that the record failed to show that there was such a new arrangement between plaintiff and the defendant wife as to take her promise out of the statute of frauds. Said Moore, Chief Justice: "If all that was said by Mrs. Grosfend to the plaintiff was 'that if he would leave the building material there, and would ship the balance, that she would see that it was paid for,' the point (that it was a collateral promise and within the statute of frauds) would be well taken. At that time the credit had been extended to the husband, and the language quoted was in effect a statement that, if her husband did not pay for the lumber and material, she would. Such a promise would be void unless in writing." The court here referred to the fact that the testimony was not returned, and continued: "If, after the first load of lumber was shipped, and while it was in the power of plaintiff to secure its return, he in fact made an agreement by which the material which was to go into the building to be erected upon land owned by Mrs. Grosfend (the building to be occupied by both defendants) was left at Middleville, and the balance of the material was shipped, the two defendants agreeing to pay for the same, and the credit was then and there and from that time extended to both of them, we think such an agreement could be enforced. By making such an agreement property was acquired for the purposes of having it attached to the real estate of the wife. As to the husband, there is nothing in the way of his making such an agreement. As to the wife, it was an agreement which resulted in acquiring property which was to be attached to her real estate, and the moment it became so attached it became hers."

But in *Fuller & Rice Lumber & Mfg. Co. v. Houseman*, 114 Mich. 275, 72 N. W. 187, plaintiff sought to recover from defendants the price of certain lumber furnished third parties. Defendants were owners of certain lots which they had contracted to sell to S. & K., and had agreed to furnish S. & K. money with which to erect buildings on the lots. S. & K. purchased lumber to build the houses from plaintiff, saying that defendant would pay for it. Plaintiff wrote defendant a letter asking if the statement made by S. & K. that he would pay for the lumber was correct, and requesting a reply in case their statement was not correct. Defendant failed to reply to plaintiff's letter. After the lumber had been delivered by plaintiff

to S. & K., defendant verbally promised to pay for it. It was held that defendant's undertaking was within the statute of frauds.

And where each of the signers of a subscription agreed to pay the sum opposite his name to defray any loss that might be incurred in a certain public enterprise, about to be undertaken, such promise was not a collateral guaranty of the antecedent liability of the person to whom the promise was made as an inducement to undertake the enterprise, but was an original undertaking and not within the statute of frauds: *Laramie v. Tanner*, 69 Minn. 156, 71 N. W. 1028. In *King v. Franklin Lumber Co.*, 80 Minn. 274, 83 N. W. 170, plaintiff's husband had a contract with defendant to do certain logging. Defendant verbally agreed with the husband that it would pay for the board of the men employed by the husband in connection with his logging contract. The husband requested plaintiff, who was running a boarding-house, to board the men, and she refused unless defendant would agree to be responsible for their board, and was then told by her husband that defendant had agreed to pay for their board. Plaintiff boarded the men, and a part of the board was paid for by defendant upon an order given by the husband, but declined to pay the balance, claiming it had made no contract with plaintiff, and that she must look entirely to her husband for compensation. It was held that the defendant was liable for the board of the men, as upon an original promise, and not void under the statute of frauds, as it was to the interest of the defendant that the logging contract should be carried out, which probably could not have been done, unless the verbal agreement giving credit to the husband had been made.

So, also, where at the special request of a father and on his promise to pay for the past and future services to his daughter, a helpless member of his family, a doctor rendered her service, the promise of the father is an original one and not within the statute of frauds: *Biglane v. Hicks* (Miss.), 33 South. 413. But a promise of defendant to plaintiff's manager that, if he would supply certain third parties with goods, "I will see you paid," is a collateral undertaking within the statute of frauds: *Wray v. Cox*, 86 Miss. 638, 38 South. 344.

Likewise the oral agreement of a man to pay for the board of his paramour and her child while at the house of another is an original undertaking for which he is bound, and to which the statute of frauds does not apply: *Beeler v. Finnel*, 85 Mo. App. 438. But in *Fissell v. Williams*, 87 Mo. App. 518, the action was against the directors of a corporation, as individuals, and plaintiff based his right to recover on a verbal promise made by such directors. Plaintiff and defendants had been negotiating for the employment of plaintiff as engineer for the corporation, of which defendants were directors. The corporation not having the money to pay the price of plaintiff's services and expenses and assistants, at a meeting of the directors, at which plaintiff was present, the directors agreed to bor-

row the necessary money and pay plaintiff monthly, and plaintiff then entered into the performance of his duties as engineer of the corporation. The money was borrowed by the defendants for the corporation and deposited to the credit of its treasurer. Plaintiff's monthly payrolls were made out against the corporation and had been paid in checks by its treasurer. The corporation having refused to allow a bill for certain expenses claimed by plaintiff, and to pay the same, this action was brought to recover from the directors individually. In holding that no original promise had been made by defendants, the court said: "The contract was for services to be rendered for the levee district, and was made with the defendants in their official capacity; there was, therefore, no individual or personal liability incurred by the defendants unless, when the contract was made for the services of plaintiff and his assistants, there was then and there made to plaintiff an original promise by the defendants that he was to look to them solely for payment. If such was the contract and agreement, the defendants are bound, notwithstanding the agreement was not in writing. To establish the agreement, the evidence should show that the defendants agreed to be individually liable, and that on the faith of this agreement the plaintiff accepted the employment and looked alone to the defendants for his pay. To make out the promise, plaintiff relies upon the following statement he says was made by Dr. Williams, the president of the board, when the contract was made, while the board was in session, to wit: 'We have agreed to borrow the money and pay you at the end of every month.'" The court then refers to the evidence as showing that the district was without means to pay plaintiff, and continued: "That to secure the money, the directors agreed to pledge their individual credit and borrow the money for the district. This they did, and the money was placed to the credit of the district and was paid out by the district to the plaintiff through checks drawn in his favor by the district treasurer. This agreement, this transaction, falls far short of an original promise by the members of the board to become individually liable to the plaintiff for his services."

Again, where, after the goods had been sold to a third person for whom defendant had agreed to answer, defendant's agreement to pay for the goods in consideration of the release of his property from attachment is not within the statute of frauds: *Kalispell Liquor & Tobacco Co. v. McGovern*, 33 Mont. 384, 84 Pac. 709.

In *Learn v. Upstill*, 52 Neb. 271, 72 N. W. 213, plaintiff sought to recover for labor performed and materials furnished by him in the opening of a public highway upon an oral promise by defendants to pay for the same. Defendants had been appointed a committee by a public meeting of citizens of a village to cause a public highway to be opened and improved, and had employed plaintiff to do this work at an agreed price, and promised to pay him for the same. Defendants urged that plaintiff's action against them individually to recover for this work was grounded upon a verbal contract to answer for the debt of another, but it was held that defendant's promise

was not conditional, but an original undertaking, and not within the statute of frauds. Also, a verbal promise by the defendant in a pending cause to pay the fee of plaintiff's attorney on a discontinuance of the action is an original promise and not within the statute of frauds: *Weilage v. Abbott*, 3 Neb. (Unof.) 157, 90 N. W. 1128. Likewise on the trial of a suit for the price of goods delivered to a subcontractor for use in a building on land owned by defendant and erected with his funds, it was proved that the subcontractor, being denied credit for the goods, referred the seller's agent to the defendant, and that the agent, by telephone, made inquiry of the defendant, through an employé who answered the call, and who reported at once the inquiry to the defendant, and telephoned back as his reply: "I have just spoken to Mr. Moore. He will pay this bill for the goods." It was held that the promise was original, not collateral, and therefore need not, under the statute of frauds, be in writing: *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74, 48 Atl. 525. So, too, in *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413, plaintiff and defendant were accommodation indorsers of a promissory note, and this action was based on an oral agreement made between them prior to the indorsement of the note by either of them, to the effect that, if plaintiff would become indorser, defendant would likewise indorse and could pay the note at maturity and indemnify the plaintiff, and save him harmless against all loss by reason of his indorsement, in consideration of certain valuable property to be placed in his hands by the maker. The trial justice granted a nonsuit upon the ground that the defendant's promise was within the statute of frauds, but this judgment was reversed on appeal, and the promise of defendant was held to be an original obligation and not within the statute of frauds.

In *Griffin v. Condon*, 18 Misc. Rep. 236, 41 N. Y. Supp. 380, an undertaker sued an employer to recover for the burial expenses of one of defendant's employés. In a conversation between plaintiff, defendant and a son of the deceased, had before the burial, defendant, to assure plaintiff that his pay was safe, told plaintiff that he (the defendant) had become possessed of certain money which deceased had in bank; he also said that the deceased had been insured for a certain amount which would go to the son, and that the plaintiff should try and get his bill from the son; "but, in the meantime, if he don't pay you, I will pay you." It was held that the promise was not within the statute of frauds. "The circumstances of the transaction," said the court, "and not the mere words, determine whether the statute of frauds applies. No personal obligation was entered into by the son, so that the promise of the defendant was an original, and not a collateral, one. It was not a promise to answer for the said debt, for he had created none. The plaintiff was to try and get the money from the son. He made every reasonable effort to do so, according to the defendant's request, and, not succeeding, the defendant became liable on his promise. Credit was undoubtedly given to the defendant."

But a written guaranty of payment for goods to be furnished by a firm to a third person cannot be extended by parol to include goods furnished by the partner remaining after dissolution of the firm: *Friedlander v. New York Plate Glass Ins. Co.*, 56 N. Y. Supp. 583, 38 App. Div. 146; and a parol promise by an attorney to pay whatever judgment might be rendered against the client is within the statute of frauds, though based on consideration of the opposite party waiving costs, since the attorney was not under any present duty to pay what he promised: *Lippman v. Blumenthal*, 29 Misc. Rep. 335, 60 N. Y. Supp. 510.

In *Block v. Galitzka*, 100 N. Y. Supp. 173, 114 App. Div. 799, plaintiff was a subcontractor under one who had contracted to build a house for defendant. While the work was in progress, but before much of it had been done, plaintiff told defendant that he did not feel safe in regard to his payments, and did not care to go on with the work unless defendant would guarantee his payment. Defendant replied, "All right; if that is the case, I will see that you are paid." Defendant also told plaintiff at a later time, "Don't fear; I will take care of you." It was held that the above promises of defendant constituted a valid, enforceable contract. But when a bank refused to loan money to a corporation and the directors of such corporation thereupon agreed with the bank that each would guarantee their proportionate share of the loan, and the loan was then made, the promise of the directors was not an original undertaking, but a promise to answer for the debt of another, and was within the statute of frauds. "It is undoubtedly true that the money was advanced to the beer cask company in reliance upon the promise of the defendant and his co-promisors to be responsible for the loan, but it was clearly a loan to the company, and not to the promisors. . . . This was the company's debt, and the agreement sought to be enforced was an agreement to answer for the company's debt, and not the debt of the promisors": *Mechanics' & Traders' Bank v. Stettheimer*, 101 N. Y. Supp. 513, 116 App. Div. 198.

In *Satterfield v. Kindley*, 144 N. C. 455, 57 S. E. 145, plaintiff was the creditor of an insolvent corporation, whose debt was secured by mortgage on real property. He had foreclosed his mortgage and the property had been advertised for sale. Defendant was a stockholder in the insolvent corporation, and he verbally agreed with plaintiff that he (defendant) would buy the property at price of plaintiff's mortgage, and pay the indebtedness in full, whether the public bidding reached that figure or not. Relying on this agreement plaintiff did not bid at the sale, and the property was "knocked off" to defendant for a sum much less than the amount of plaintiff's mortgage. The sale was confirmed, and defendant refusing to pay to plaintiff the difference between the amount of the mortgage and the sum for which he had bought the land, this action was brought to recover such difference. In behalf of defendant it was earnestly contended that defendant's promise was void under the statute of frauds, both because it was a contract to convey and purchase land

and because it was an obligation to answer for the debt of another. Both contentions were held untenable, the court saying as to the latter: "The contract or agreement as testified to by plaintiff, upon which he sues, is an original contract between the parties upon a sufficient legal consideration."

So, also, in *Grand Forks Lumber & Coal Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901, the suit was to recover from defendant on a parol promise to pay for fuel furnished by plaintiff to a gas company. Defendant pleaded the statute of frauds, but the court said: "It is urged that it was sought to establish a parol promise to pay the debt of another in violation of the statute of frauds. This is a misapprehension. It is entirely competent that the promise to pay should be an original promise, although the goods were furnished to a third person. The delivery of the goods on the strength of the promise being a detriment to the promisee furnishes the consideration. But circumstances may be such as to make the delivery to the third person a direct benefit to the promisor. Such was the case here. The gas company was largely indebted to the bank of which defendant was receiver. It had contracted to deliver to him its bills at the end of each month. But unless it continued to furnish gas it would have no bills to deliver, and it could furnish no gas unless its running expenses were provided for. Hence, it was clearly to defendant's interest, or to the interest of the corporation which he represented, that these expenses should be paid and the gas plant kept running. The promise, if made, was an original promise." Likewise in *Manary v. Runyon*, 43 Or. 495, 73 Pac. 1028, defendant, the president of a corporation, had orally agreed to reimburse plaintiff for the expenses and attorney's fees incurred by plaintiff in certain negotiations between plaintiff and the corporation of which defendant was president for the purchase of stumpage, in the event that the contract for the stumpage was not consummated. It was held that defendant's promise was original, and not the promise of the president to pay the debt of the corporation. A very good illustration of the rule that there must be some existing liability of the person for whom a promise is made, in order to bring such promise within the statute of frauds, is found in *American Brewing Assn. v. Gassett* (Tex. Civ. App.), 107 S. W. 357. The appellee in this case had sold certain saloon fixtures to one White upon the promise of appellant to pay therefor, the fixtures to belong to White when paid for, and had retained title to the fixtures until the price was paid. White subsequently paid part of the price and before the purchase price of the fixtures was fully paid desired to sell his saloon business, but pending negotiations with a prospective purchaser, the latter refused to buy unless some satisfactory arrangement was made with plaintiff for payment of the balance due on the purchase price of the fixtures. Appellant wished the purchaser to consummate the trade, as it would thereby retain a customer for its beer. Whereby appellant verbally agreed with plaintiff to pay him the balance of the unpaid purchase price of the fixtures if he would not

enforce his claim then past due, and allow the negotiations for the sale of the saloon to be consummated. The purchaser, being satisfied with this arrangement, closed the trade for the saloon business. Appellant having failed to pay the balance due on the purchase-price of the fixtures, this action was brought to recover on his oral promise. The promise was held to be original, because in the first transaction of the sale of the fixtures to White the sale was made on appellant's promise, and White did not become liable to appellee therefor, and hence the second promise made after the debt was created was not a promise to pay the debt of another. Said Chief Justice Wilson: "Before it could be held that such a recovery was sought, it would have to appear from the allegations that an indebtedness in fact existed, or was claimed to exist, in appellee Gassett's favor against some other person for the payment of which said appellee was seeking to hold appellant liable."

In *Reynolds-McGinness Co. v. Green*, 78 Vt. 28, 61 Atl. 556, the defendant, as executor, employed plaintiffs, who were real estate brokers, to sell certain real property of the estate. Plaintiffs found a purchaser, but the defendant refused to convey, and declined to pay the plaintiffs the commission he had orally promised to pay. The promise was held to be an original undertaking and not within the statute of frauds. Said Judge Start: "The fact that the services contracted for were for the benefit of the estate does not excuse the defendant from personal liability. In making the contract he did not limit his liability. . . . The debt was not a debt of the estate, and could not be made such, except so far as it might be a charge by the defendant as executor in the settlement of his account for administration expenses, and the defendant's promise was not a promise to answer in damages for a debt due from the estate to the plaintiffs out of his own estate, but was a promise made by him personally, in order to obtain the performance of services which it was his duty to perform."

In *Engleby v. Harvey*, 93 Va. 440, 25 S. E. 225, a bridge construction company, being the lowest bidder for the erection of a bridge, assigned its rights to J., who entered into the contract as sole contractor. The plaintiff, a materialman, who was furnishing lumber for the bridge, refused to furnish more unless he was certain to be paid for it, whereupon he was told by the engineer of the bridge to supply the lumber and he would get his money as soon as the work was completed. It was held that even if the engineer had the authority to make any such promise or agreement with plaintiff, such promise did not bind the bridge company. "Jones was the sole contractor for the lumber, and he alone was liable for the payment of what had been furnished and that which was to be furnished. It was his debt, and in no respect that of the bridge company. . . . The contract for furnishing the lumber had in good part been performed, and the alleged undertaking was to pay for the lumber already furnished, as well as for that to be thereafter furnished. The promise was not confined to the part of the debt to become due, but included also the part already due. It was simply a verbal promise to pay the whole debt. Where

such promise is entire, as was the case here, and it relates in part to a matter which renders it necessary under the statute of frauds that the promise should be in writing, the whole promise is void. Jones was not a party to the undertaking, nor was his liability for the debt in anywise extinguished or reduced by it. His original liability remained unaffected. . . . Being purely a collateral undertaking, and not in writing, it was void under the statute." But an oral contract whereby the promisors retain an attorney to defend a third person charged with crime, made before any substantial services are rendered, is an original undertaking and not a promise to answer for the debt of another: *James v. Carson*, 94 Wis. 632, 69 N. W. 1004.

In *Champlain Construction Co. v. O'Brien*, 117 Fed. 271, a firm of contractors had a written contract with a construction company to build a railroad. The bid of the contractors was reduced by their agent without their knowledge, and they refused to execute the contract. To induce them to go on, the president of the railroad company orally offered to pay five cents per yard in addition to the contract price for a certain class of the work, in consideration of which they executed the contract and performed the work. It was held that the agreement was valid and binding on the promisor. Said Judge Wheeler: "The consideration moving from the contractors was the execution of the contract with the construction company, and was ample. Although founded upon, this promise was independent of, and not collateral to, the written contract of the company. It never agreed to pay this five cents per yard; that was not, and never could be, its debt, nor a failure to pay that be its default; and claimant's agreement was not one to answer for the debt or default of the company, but one that created a debt of his own."

IN RE VITALI.

[153 Mich. 514, 116 N. W. 1066.]

CRIMINAL LAW—Power to Impose a Legal After Imposing an Illegal Sentence.—Where the trial court has imposed an illegal sentence, it has power to substitute for it a legal sentence, notwithstanding the illegal sentence has been partly executed. (p. 536.)

HABEAS CORPUS will not Lie on the Ground that there has been an illegal sentence, if it is one which may be corrected by a new and legal sentence. Habeas corpus will not be permitted to perform the functions of a writ of error. (p. 536.)

Joseph T. Schiappacasse, for the petitioner.

John E. Bird and George S. Law, for the respondent.

⁵¹⁵ **MOORE, J.** The petitioner was convicted of murder in the second degree. He was sentenced to the Michigan state

prison at Jackson for life and is now serving sentence. It is his claim that he is entitled to be discharged, because section 3 of Act No. 184 of the Public Acts of 1905, known as the indeterminate sentence law, repeals that part of the statute allowing a sentence for life as punishment for the crime of murder in the second degree. No claim is made that the proceedings leading up to and including the conviction were not proper, but it is said that the sentence does not comply with the provisions of the indeterminate sentence law and is void and the prisoner should be discharged.

The case of *People v. Farrell*, 146 Mich. 264, 109 N. W. 440, is authority for the proposition that where the trial court has imposed an illegal sentence, it has the power to substitute for it a legal sentence notwithstanding the illegal sentence has been partly executed.

In re Butler, 138 Mich. 453, 101 N. W. 630, and the cases there cited, sustain the rule that when there is a valid conviction and an irregular sentence which may, under the law, be corrected by a new sentence, habeas corpus will not be permitted to perform the function of a writ of error. It follows logically that the prayer of the petitioner cannot prevail.

His petition is denied, and he is remanded to the custody of the respondent.

Grant, C. J., and Blair, Carpenter and McAlvay, JJ., concurred.

On the Power of a Court to Amend or Correct Its Judgment in a Criminal Case, see the note to *Commonwealth v. Weymouth*, 79 Am. Dec. 776; and the subsequent cases of *In re Black*, 52 Kan. 64, 39 Am. St. Rep. 331; *Knefel v. People*, 187 Ill. 212, 79 Am. St. Rep. 217.

A Judgment in a Criminal Case Irregular in that it imposes a sentence greater or less than that prescribed by law is not void, and hence the prisoner is not entitled to discharge on habeas corpus: *Martin v. District Court*, 37 Colo. 110, 119 Am. St. Rep. 262; *In re Reed*, 143 Cal. 634, 101 Am. St. Rep. 138.

MARTIN v. THISON'S ESTATE.

[153 Mich. 516, 116 N. W. 1013.]

DIVORCE—Alimony, Presentment of Claim for Against the Estate of a Decedent.—If by a decree of divorce a wife is allowed a specified sum of alimony, to be paid at a designated rate per week, and the husband dies without seeking any modification of the decree and with arrears remaining unpaid, the court having jurisdiction of his estate may entertain and allow the claim as against the defendant for the amount of such arrears. (p. 540.)

Walter Barlow, for the appellant.

Julius J. Thiede, Ari E. Woodruff and Frank W. Atkinson, for the appellee.

516 MOORE, J. In September, 1887, the claimant married John Thison, now deceased. On March 10, 1897, she filed her bill of complaint against him in the Wayne circuit court, in chancery, for divorce. He was duly served with process. A decree of divorce was granted the claimant, and she was awarded permanent alimony in said cause to the amount of twelve hundred dollars, to be paid to her in installments of fifteen dollars a week. The decree was filed August 6, 1897.

The claimant married Mr. Martin, December 20, 1897. After this Mr. Thison made two payments to her of fifty dollars each to apply on the decree for alimony. At the time **517** the decree of divorce was granted her, Mr. Thison owned no real estate, but had in the neighborhood of nine hundred dollars in the bank. He was a saloon-keeper. John Thison died intestate on January 25, 1906, leaving Peter Thison, his father, and Theresa Thison, his mother, as his only heirs at law. Administration of his estate was granted March 21, 1906, and commissioners on claims appointed therein.

The claimant filed a claim against the estate for sixteen hundred and sixty-eight dollars and forty cents as the amount due her on said decree. The commissioners on claims disallowed the claim in full and an appeal was taken to the circuit court. At the conclusion of the testimony, the court directed the jury to return a verdict in her favor for three hundred and ninety dollars and ninety-one cents, the amount claimed to be due from the date of the decree of divorce to the date of her marriage to her present husband. The case is brought here by writ of error.

The question involved in the case, as stated by counsel, is, Has a court at law jurisdiction to determine questions aris-

ing over the nonpayment of alimony granted a wife by a court of chancery in a divorce case? We quote from the brief:

"Our statute, 3 Compiled Laws, section 8641, provides: 'After a decree for alimony or other allowance for the wife . . . the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance and the payment thereof, . . . and may make any decree respecting any of the said matters which such court might have made in the original suit.'

"This statute confers exclusive jurisdiction on the court of chancery, granting a decree for alimony to a wife in a divorce case, to conserve the interests of the parties by exercising its power to alter and revise at any time a decree for alimony granted for her support.

"The statute takes away from a decree for alimony the element of a fixed judgment for money—a debt—such as will sustain an action at law or separate suit to recover the amount claimed to be due upon such decree. The amount claimed to be due on a decree for alimony must be enforced or modified on the petition of either of the parties filed in the original suit wherein the decree for ⁵¹⁸ alimony was granted. The original suit on the question of alimony is always pending and subject to an application on the petition of either of the parties to alter, revise and even vacate the decree upon a sufficient showing being made for that purpose. No other court has any jurisdiction over the matter of the collection of the amount due on such decree for alimony, nor over the modification or revision of it. This question is well settled in this state: *Nixon v. Wright*, 146 Mich. 231, 109 N. W. 274." And also citing other cases to be found in the brief.

A reference to the cases will show them to be distinguishable from the case at bar.

The case of *Nixon v. Wright*, 146 Mich. 231, 109 N. W. 274, was commenced as an action at law in the circuit court during the lifetime of the husband, who might at any time have moved the court for a modification of the decree. In the case at bar the claim was presented to the probate court after the death of the husband, who during his lifetime did not seek a modification of the decree. Counsel has not called our attention to, and we have been unable to find, a case on all-fours with the one before us. At the end of a chapter in relation to procedure in alimony, it is said: "The practice

of the courts in awarding, securing and enforcing the payment of alimony differs in our states as respects mere form, but in substance it is the same in all. The needful facts must be set out in pleadings, they must be proved, and due steps must accompany the rendition of the decree. The processes for enforcing it are not quite identical in our states, and commonly there is a considerable election among them. In most of the states there is the attachment for contempt. In some, there may be an execution. Quite widely a suit will lie on the decree regarded as a judgment; sometimes there may be *scire facias*; sometimes a bill in equity": 2 Bishop on Marriage, Divorce and Separation, sec. 1114.

In *O'Hagan v. O'Hagan's Executor*, 4 Iowa, 509, the wife was granted a decree for alimony. Later she filed a bill asking for a modification of the decree so as to allow her a larger sum as alimony. While this bill was pending the husband died and his executor was made a party. ⁵¹⁹ The court stated that the only question involved was whether the death of the husband abated the proceedings, and, in deciding that it did, the court used the following language: "But it is said that a decree may be made giving to the wife an annual or other allowance during her life, which may extend, and be enforced against his estate beyond the life of the husband; and if so, a court may also modify a former decree, either in favor of or against the husband, after his death. The answer to this is, that in such a case, the court has acted upon the whole question, during their joint lives, and has decreed to her a definite and fixed sum. This decree has the same force and validity as any other judgment, and may be collected in the same manner. It is a fixed, ascertained and subsisting debt against him, and, upon his death, against his estate. Not so, however, with a claim for alimony which never has been settled; or where the wife, after his death, seeks to increase the amount allowed in his lifetime. It is not a demand, definite in its character, to which she has an absolute right. By the decree giving her an absolute sum during her life, she stands as any other creditor, and her right to payment does not depend upon the amount of his estate, whereas the ability of the husband, and their condition in life, are important to be considered in awarding alimony, or in changing a dower for the same. The case of *Gaines v. Gaines' Exr.*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425, expressly decides that the claim to alimony, as such, ceases at the death of the husband, and the petition of the wife therefor was refused, though pending at his decease—the court

saying: 'We are of opinion that such claim, though asserted before his death, will cease by that event, and cannot be afterward availably asserted, unless it has been before ascertained and fixed by decree.' And to the same effect, see Bishop on Marriage and Divorce, sec. 559." See, also, *Ulman v. Ulman*, 148 Mich. 353, 111 N. W. 1072, and the cases cited therein.

In *Knapp v. Knapp*, 134 Mass. 353, it was held that the writ of scire facias was an appropriate process to obtain execution against the estate in the hands of an executor for arrears of alimony awarded against the testator in his lifetime.

520 Section 9367, 3 Compiled Laws, reads in part as follows: "When letters testamentary or of administration shall be granted by the judge of any court of probate, such judge may, in his discretion, appoint two or more suitable persons to be commissioners, to receive, examine and adjust all claims and demands of all persons against the deceased except in the following cases."

The exceptions do not affect the question at issue here. It will be observed that the statute refers to "all claims and demands of all persons against the deceased." We think it very clear that the decree obtained by the claimant constituted a claim or demand against the deceased. As the defendant did not seek to have it modified in his lifetime, and as no showing was made why the installments which had accrued between the date of the decree and the marriage of the claimant should not be paid in full, we think the judge did not err in directing a verdict for the amount.

Judgment is affirmed.

Grant, C. J., and Blair, Carpenter and McAlvay, JJ., concurred.

An Allowance of Alimony to a Divorced Wife so long as she may live has been held to subsist against the estate of the husband after his death: *Stratton v. Stratton*, 77 Me. 373, 52 Am. Rep. 779; *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417. But in *Wilson v. Hinman*, 103 Am. St. Rep. 820, it is held that the obligation to pay a wife alimony during her life terminates on the death of the husband, although, in pursuance of the directions of the court, he gave a mortgage to secure the performance of the decree awarding alimony.

KNIGHTS OF COLUMBUS v. McINERNEY.

[153 Mich. 574, 117 N. W. 166.]

BENEFIT ASSOCIATION—Mother, When not Entitled to be Regarded as a Beneficiary.—If a benefit certificate issues payable to the mother of a member, providing she is at the time of his death his lawful beneficiary under the charter, constitution and laws of the order of Knights of Columbus, and the member marries and afterward dies, leaving a wife and children, the mother, not being a member of his family, is not entitled to the payment of the sum designated in the certificate. (p. 544.)

BENEFIT ASSOCIATIONS—Conflict of Laws.—If a state wherein a benefit association organizes interprets the charter or law governing the association, such interpretation should be accepted and followed by the courts of another state in which the same question is raised. (p. 544.)

BENEFIT ASSOCIATIONS—Payment of Dues Under a Mistake of Fact.—That the sister of a member of a benefit association pays the assessments accruing against him in the belief that their mother was the beneficiary does not affect the right of his widow and heirs to the amount called for in the certificate in the event of the death of such member. (p. 544.)

BENEFIT ASSOCIATION, Power of to Change Beneficiary, When does not Exist.—Though a benefit association has power, "for special reasons," to accept the designation of a beneficiary out of the order, yet if the member dies and his widow and children are in law the persons entitled to the benefit, the association has no power to change their rights by any action taken in favor of another. (p. 545.)

BENEFIT ASSOCIATIONS—Release by a Widow, She Being the True Beneficiary.—The fact that the widow of a deceased member of a benefit association, without consideration, executed a release of all claim to the fund under the belief that the mother of the deceased was the legal beneficiary, does not entitle such mother to the sum specified in the certificate, nor prevent such widow from asserting a claim to the amount of the certificate, when she is the person who, under the laws of the order, is entitled to the fund. (p. 545.)

De Vere Hall, for the defendant Margaret McInerney.

William J. Doyle and Gilbert W. Hand, for the defendant Louis B. McInerney.

575 HOOKER, J. The complainant is a nonresident fraternal beneficiary association, organized under the laws of Connecticut. On April 16, 1899, Cornelius J. McInerney was a member, and received a benefit certificate of that date for one thousand dollars payable, according to its terms, to Margaret E. McInerney, his mother, provided that she was at the time of his death his lawful beneficiary, under the charter, constitution, and laws of said order, and the laws of the state of Connecticut. At the time said certificate was issued, the member was an unmarried man residing with his parents. Louise B. McInerney is the widow, and Paul B.

and Ruth M. McInerney ⁵⁷⁶ are the minor children, of Cornelius J. McInerney, deceased. A dispute having arisen over the right to the fund due upon this certificate complainant filed a bill of interpleader and this controversy is between the defendants thereto. The learned circuit judge made a decree dividing the fund remaining, after payment of costs, between the mother, Margaret McInerney, and the children, in equal shares, and all of the defendants have appealed.

The mother bases her claim upon the fact that she was designated as beneficiary when the certificate was taken, and no other beneficiary has since been designated, the fact that for several years her daughter has paid the assessments, and the further fact that a release by Louise B. McInerney to the complainant of all her claims to the fund was given. Louise B. McInerney, on behalf of herself and her children as heirs of the deceased, claims that in accordance with the laws of the order, the laws of Connecticut, and the terms of the contract itself, Margaret McInerney is not entitled to the fund, not having been a member of the family of her son at the time of his death, and that, according to the charter and laws of the order, she and her children are entitled to it.

The certificate provides: "The Knights of Columbus hereby promises and binds itself to pay to Margaret E. McInerney, provided such person is the lawful beneficiary of said member at the time of his death, a sum not exceeding \$1,000, in accordance with and under the provisions of the laws of the Knights of Columbus."

The charter in force during the life of the certificate provides the order in which beneficiaries shall be designated, as follows:

"Which said beneficiaries shall be specified only in the following order, to wit:

"(a) To such person or persons of the immediate family of said member as by him designated.

"(b) To such person or persons in default of such family of the blood relatives of such member as by him designated.

⁵⁷⁷ "(c) In default of any designation by said member or out of the order named, except by the permission of the board of directors or their successors for cause shown, then such aid shall be rendered by said corporation to such family or relatives who are heirs at law of such member, in the manner above arranged."

The following laws of the order are applicable to this controversy:

"Sec. 38. The board of directors shall have full power and authority:

"4. To determine to whom a death benefit shall be paid when nonbeneficiary is designated; and, should a member in good standing die without having named and having had recorded in the books of the national secretary the name of any person or persons to whom the sum shall be paid, then to determine to whom said sum shall be paid, provided, however, that in all cases the beneficiaries shall not be in conflict with the provisions of the charter of the Knights of Columbus.

"Sec. 73. Upon the death of any member legally elected and in good standing at the time of his demise, the order of the Knights of Columbus shall pay to the beneficiary, person or persons named by the deceased prior to his death, and entered upon the books of the national secretary as the beneficiary, the person or persons to whom the death benefit shall be paid in case of his demise, such sum as the deceased may have been insured for, subject to the provisions of the preceding sections, and shall take duplicate receipts therefor, one of which the national treasurer shall retain and the other forward to the national secretary.

"Sec. 78. Should a member in good standing die without having named and having had recorded in the books of the national secretary the name of any person or persons to whom said sum should be paid, or the designation of the beneficiary is contrary to the provisions of the charter, or the beneficiary designated has died, then the board of directors, upon the advice of the national advocate of the order, shall determine to whom said sum shall be paid; provided, however, that in all cases the beneficiaries shall not be in conflict with the provisions of the charter of the Knights of Columbus.

"Sec. 80. A member desiring to change his beneficiary
578 shall give written notice and surrender his benefit certificate to the financial secretary of his council, directing that a new certificate be issued to him, payable to such beneficiary or beneficiaries as such member may designate in accordance with the laws of the order.

"Sec. 82. No officer, employé or agent of the order, or any council thereof, has the power, right or authority to waive any of the conditions upon which benefit certificates are issued, or to change, vary or waive any of the provisions of the constitution or laws. Each and every benefit certifi-

cate is issued only upon the conditions stated in and subject to the constitution and laws of the order."

The evident intent of the law of Connecticut is to secure to the immediate family of the beneficiary, at the time of his death, the benefit of financial aid generally necessary at such times. It endeavors to put it out of the power of the member to deprive his family of such aid, by means of a designation of others, by fixing the order of designation, and making payment contingent upon the continuance of the relation, and this design is emphasized by the contract, which contains a proviso that, to be entitled to payment, the proper relation must exist at the time of the death of the member. Plainly, on the face of the contract, the mother is not entitled to payment. A similar contract was construed in *Knights of Columbus v. Rowe*, 70 Conn. 545, 40 Atl. 451, a case closely resembling the present case, and it was held that the parent was not entitled to the fund, and that the widow and the infant were. This case interpreted the law of the state of Connecticut, which required the complainant to make contracts according to its terms, and we think where, as in this instance, the contract in terms is made subject to the law, i. e., charter, the construction of such law by the highest court of the state is conclusive here, and we are bound to follow it, because it is the agreement of the parties, if for no other reason. The case of *Larkin v. Knights of Columbus*, 188 Mass. 22, 73 N. E. 850, is another similar case, where the same view hereinbefore expressed was entertained.

⁵⁷⁹ Some reasons are suggested for departing from the rule of the cases cited.

Payment of Assessment: It is claimed that a sister of deceased has been allowed to pay the assessment for some years, with the understanding and expectation on her part and that of the widow that the mother was a lawful beneficiary. There is nothing to show that such payment was more than this, and the widow is not, and certainly the infants are not, chargeable with any duplicity in the case. The sister simply paid money under a mistake of fact. It does not entitle her mother to the property of the widow and orphans, and the alleged equities in her favor are not conspicuously greater than those of her daughter in law and grandchildren, whose necessities are quite likely to be as urgent as her own. The record shows that her husband was not well off. But it is not a case in which necessity or apparent equity can be controlling. The question is one of legal rights.

Counsel assert that it was the duty of the complainant to pay the fund to the mother, they having authority, "for special" reasons, to accept a designation out of the order. There was no designation by the member after the first, and during his life the complainant did not act upon the subject. It was not asked to do so, and had it been, it could not have been compelled to do so. It is enough to say it did not. When the member died, the right to this fund vested in his heirs, and the complainant was powerless to change those rights by any action it might take in favor of another.

Release by Widow: The widow, without consideration, and supposing that the mother was a legal beneficiary, and at the solicitation of the secretary of the company, whose officers hesitated to pay to the mother, executed to it a release of any claim to the fund. We do not see that the release affects the question. The mother certainly secured no rights under it and lost nothing by it, and the complainant did not act upon it, and makes no claim under it. The fund is still in the hands of the complainant, ⁵⁸⁰ and it is willing to pay it to those lawfully entitled to it. We are of the opinion that the entire fund should be paid to the widow, one-third in her own right as heir and the remainder as guardian for the two children, each of them being entitled to half of the remaining two-thirds. Defendant Louise, in her own right and as guardian, is entitled to costs of both courts against defendant Margaret McInerney. The decree of the circuit court will be modified in accordance with this opinion, a new decree to be entered in this court.

Grant, C. J., and Moore, Carpenter and McAlvay, JJ., concurred.

If the By-laws of a Benefit Society Provide that the Beneficiary Designated by the member and named in the certificate "shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him," such provision must be construed as referring to the relationship at the date of the certificate, and a designation of a beneficiary, valid in its inception, so remains, although such relationship has ceased by divorce, or otherwise, unless it is otherwise stipulated in the contract of membership: Courtois v. Grand Lodge, A. O. U. W., 135 Cal. 552, 87 Am. St. Rep. 137; but, as a general rule, a person not of the class for whose benefit a mutual benefit association is organized cannot be a beneficiary: Warner v. Modern Woodmen of America, 67 Neb. 233, 108 Am. St. Rep. 634.

WALSH v. COLBY.

[153 Mich. 602, 117 N. W. 207.]

APPEAL AND ERROR—Order Brought Up by the Appeal.—

An appeal from an order confirming a sale of real estate and directing the commissioner to prepare a new deed for the purpose of correcting a description in a deed previously issued in the same cause brings up all proceedings which led to such order, including an order granting the petition for the vacation of the order of confirmation and for the correction of the error in the first deed. (p. 547.)

JUDICIAL SALE—Power to Correct an Error After Confirmation.

—After a sale under a decree of foreclosure and the confirmation of such sale, the court has power to permit the commissioner making the sale to file a new report showing a mistake in his first report in describing the property sold, and thereupon to set aside the first order of confirmation and confirm the sale as disclosed by the second report, the ultimate object and effect of these proceedings being to make the record speak the truth. (p. 548.)

JUDICIAL SALE EN MASSE, Confirmation of, When not Im-

proper.—The confirmation of a sale will not be denied nor held erroneous on the ground that the lots were sold as one parcel and not separately, when it appears that the decree of sale was in the form prescribed by the statute, and no issue is made that the premises could be sold in parcels without injury to the parties. The presumption is that the commissioner followed the mandate of the decree and of the law. (pp. 548, 549.)

JUDICIAL SALE, Correcting Deed After the Time Allowed

by Law for Filing It with the Register of Deeds.—If a foreclosure sale is made pursuant to the directions of a decree, and the deed is filed with the register of deeds within twenty days after the sale as prescribed by statute, and it subsequently appears on petition and application that the report of the sale by the commissioner did not describe the lots sold correctly, the court, on application and petition, may set aside the first order of confirmation and direct the confirmation of the sale as actually made, and authorize the issuing of a new deed properly describing the property sold, though more than twenty days have elapsed since the sale was made. (p. 549.)

Shaw, Warren, Cady & Oakes, for the complainant.

Jasper C. Gates, for the appellant.

603 McALVAY, J. Upon a bill filed by complainant to foreclose certain mortgages in the Wayne circuit court, in chancery, a decree was granted in his favor June 16, 1902. This decree was affirmed by this court as to defendant and appellant Colby: Walsh v. Robinson, 135 Mich. 16, 97 N. W. 55, 99 N. W. 282.

This decree ordered the premises described in the mortgages to be sold in the usual manner. The sale was made by Samuel L. May, circuit court commissioner, on March 29, 1906. His report was filed March 31, 1906, and September 19, 1906, an order nisi was entered confirming this report.

In this report of the commissioner and in his deed a clerical error was made in describing the property sold. The correct description, as given in the mortgages, the decree, and notices of sale, is: "All and singular . . . lots numbered consecutively from seventy-four (74) to ninety-three (93), both inclusive."

The error consisted in inserting in such description the number "seventy-nine (79)" instead of the first number "seventy-four (74)."

The complainant, who was the purchaser at the sale, discovering this error, filed his petition in the cause, together with an affidavit and notice of hearing, praying that the order nisi confirming the commissioner's report of sale be vacated for the purpose of allowing the correction ⁶⁰⁴ of said clerical error in the description. On the hearing of this petition, notice of which was given to all parties interested, defendant Colby appeared and contested. The court made an order granting the petition and correcting the error, on November 22, 1906. From this order defendant Colby appealed to this court. This appeal was dismissed January 4, 1907, on the ground that the order was not a final one. On February 8, 1907, Commissioner May filed another report of sale correcting the error above described. This report was filed nunc pro tunc, by order of the court, as of March 31, 1906, which was the date of the first report. An order nisi for the confirmation of such report of sale was made and entered, and within eight days the defendant filed exceptions to such report, which were overruled by the court upon a hearing, and on January 9, 1908, an order to that effect was entered, said report being ratified and confirmed and the commissioner ordered to prepare a new deed for the purpose of correcting the description in the first deed and canceling the same. Defendant Colby, who is the only defendant interested in these proceedings, and who since the decree first named has been in possession and received the rents from said premises, has appealed from this last order and decree of January 9, 1908, including in his claim an appeal also from the former order of November 22, 1906.

The final order appealed from is so closely connected with the order of November 22, 1906, that an appeal from it brings all of the proceedings which led up to said final order before the court for consideration.

Defendant urges that through the operation of the order nisi the sale had become final and conclusive, and that the court possessed no power to disturb it. He relies upon the

provisions of Chancery Rule 19b and decisions of this court relative to it. It seems to us that defendant has misconceived what was sought to be done by complainant. The decree of the court in the foreclosure case was not to be disturbed, nor the sale of the property described ⁶⁰⁵ in that decree and actually sold under it. A clerical error (not disputed by this defendant) had occurred in the report of the sale, and also in the deed, in the number of a lot in the description, an error which was apparent from the face of the record. The application to correct this error was in fact not to disturb the decree and proceedings under it, but to make the record state the actual facts and conform with and speak the truth. For this purpose a petition was filed with supporting affidavit showing the facts, a hearing and a judicial determination in which this defendant participated was had, and the prayer of the petition granted. It was not contended at that time, and is not contended now, that the record as it now stands does not speak the truth.

The cases defendant cites in support of his contention are not in point. He refers us to no case, and in our investigation we have been able to find none, in which the right of a court to correct a purely clerical error in its records is disputed or denied. The authority to do so has been recognized as inherent in courts of general jurisdiction: 17 Ency. of Pl. & Pr. 912 et seq., and notes. In the notes to this reference, citations are made from the federal court and nearly all of the state courts in support of this proposition. This court has recognized and affirmed this doctrine: *Jerome v. Seymour*, Walk. Ch. (Mich.) 359; *Bates v. Garrison*, Har. Ch. (Mich.) 221; *Emery v. Whitwell*, 6 Mich. 474; *Souvais v. Leavitt*, 53 Mich. 577, 19 N. W. 261.

The court had ample authority to make this order of November 22d, and the proceedings to do so were regular.

Defendant contends that the court erred in confirming the report and sale for the reason that the twenty lots were not sold separately but as one parcel, contrary to section 528, 1 Compiled Laws.

The decree was drawn in conformity with the statute, and the sale was made under the decree. The presumption is that the commissioner followed its mandate. No showing was made on the hearing of the exceptions that ⁶⁰⁶ this was not done, or that the premises could be sold in parcels without injury to the interests of the parties. Complainant's brief states that the commissioner "first offered the property in parcels, and, receiving no bid, offered and sold the same in

entirety." This is not contradicted or challenged as it would have been had it been false. The statute was intended to require a sale to be made in such manner as would realize most to the parties interested. The sale as made conformed with the statutory provisions.

It is further contended that the order of January 9, 1908, is void because of the requirement of law that the deed on such sale must be filed with the register of deeds within twenty days after the sale and indorsed when the same shall become operative. The record shows that the first deed was duly filed within the time prescribed by law. The records in the cause showed that the premises actually sold were the premises described in the mortgage and the decree. The clerical error in the description contained in the report of sale and the deed was apparent upon the face of the record. This second deed recites that it is given for the purpose of correcting the former deed. The sale has not been disturbed. The time for redemption has not been extended or shortened. Defendant Colby makes no showing that he has been in any manner injured. In fact, from the record it appears that the delay in finally terminating this litigation is not chargeable to complainant, and that defendant Colby has profited by such delay.

The circuit court was not in error in overruling the exceptions of defendant Colby and in ratifying and confirming the commissioner's corrected report of sale hereinbefore mentioned and described, and in ordering the commissioner to make, execute, and file a proper deed.

The decree of the circuit court is affirmed, with costs.

Grant, C. J., and Blair, Montgomery and Carpenter, JJ., concurred.

It is Presumed that the Description in a Deed Made by a Court Commissioner in pursuance of an order for a judicial sale of land follows the description contained in the pleadings and judgment, but if, through neglect or mistake, such description is wrong in the deed only, the court may at any time permit its commissioner to correct the conveyance and make a new deed, conforming to the description contained in the judgment: *Forrester v. Howard*, 124 Ky. 215, 124 Am. St. Rep. 394. If a commissioner's deed executed in pursuance of a sale at foreclosure is defective in stating the parties whose title is conveyed thereby, the grantee is entitled to have it corrected by a court of chancery: *Gates v. Gray*, 85 Ark. 25, 122 Am. St. Rep. 19. And equity will relieve a mistake in the quantity of land sold at a judicial sale, where the mistake is such that relief could be granted were the sale a private one: *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179. On the reformation of writings in general on the ground of mistake, see the note to *Steinmeyer v. Schroepfel*, 117 Am. St. Rep. 227.

PEOPLE v. CALDER.

[153 Mich. 724, 117 N. W. 314.]

STATUTES, Motives of the Legislature in Enacting—Effect of Misrepresentation.—Evidence is not admissible to prove that legislators voted in favor of a statute without investigating the merits and without exercising their judgment and discretion on the merits in compliance with a custom relating to local measures, in reliance upon the representations that the representatives of the counties supposed to be affected were unanimous in favor of the measure. (pp. 551, 552.)

STATUTES.—The Motives of the Legislature in Enacting a Statute are not admissible in evidence to defeat it, though fraud and corruption are alleged to annul their action. (p. 552.)

STATUTES.—The Presumption of Good Faith on the Part of the Legislators in enacting a statute must be indulged and held conclusive. (p. 552.)

STATUTES, Notice of Hearing Before Enactment, When Unnecessary.—The provision of a state constitution declaring that previous notice of any application for the alteration of the charter of any corporation shall be given in such manner as shall be prescribed by law does not require any additional notice to be given to the corporation, when the statute in question is introduced in the legislature in the regular manner and one day's notice is given by the legislator of his intention to introduce it, and the corporation learns of such introduction and is allowed to be heard before the governor, but denied the right of a hearing before either house of the legislature. The bill thus introduced by a member cannot be regarded as an application for which any special notice must be given to entitle the legislature to dispose of it. (p. 553.)

CONSTITUTIONAL LAW—Right to Repeal the Charter of a Corporation or the Law Under Which It was Organized.—If a corporation is organized under a statute incorporating it for the purpose of supplying water to a municipality, with no limits upon the life of the corporation, except that implied from the declaration that the legislature may at any time amend or repeal the act, a statute repealing such act reserving the right to the corporation to present a claim against such municipality for the value of its tangible property, such repealing statute is not unconstitutional on the ground that it impairs the obligation of a contract, deprives the corporation of its property without due process of law, or takes private property for a public use without compensation. (pp. 554, 555.)

CONSTITUTIONAL LAW—Repealing Statute, Effect of upon Rights of Bondholders of a Corporation.—The fact that a repealing statute destroys the right of a corporation to continue in existence under the statute repealed does not make such repealing statute unconstitutional even as against bondholders of the corporation. The execution of the mortgage and the issuing of bonds secured by the property of the corporation do not affect the right of the legislature to repeal the statute. (p. 555.)

ESTOPPEL Against Enforcement of a Repealing Statute.—If a statute organizing a corporation is repealed, no estoppel against the right to enforce the repealing statute exists on the ground of certain wrongful conduct of officials of a municipality, where the repeal was for the benefit of the entire inhabitants of a great city who were guilty of no wrong. (p. 555.)

CONSTITUTIONAL LAW—Statute Giving a Corporation the Right to Present a Claim for the Value of Its Tangible Property.—Where the charter of a corporation is repealed, with a provision that it may present against a municipality a claim for its tangible property, such provision will not be held unconstitutional on the ground that it permits property to be taken for a public use without determining the necessity for such taking, or that the compensation provided is inadequate. The provision is not compulsory, and has no force unless the corporation chooses to accept it. (p. 555.)

Kingsley & Wicks and John E. More, for the appellants.

John E. Bird, attorney general, Moses Taggart and Gan-son Taggart, for the appellee.

726 CARPENTER, J. This is a quo warranto proceeding instituted in the Kent circuit court to test the right of respondents to act as a corporation under the name and style of the Grand Rapids Hydraulic Company. The Grand Rapids Hydraulic Company was incorporated under Act No. 223 of the Laws of 1849, for the purpose of supplying water for the use of the inhabitants of Grand Rapids. The act contained no limitation upon the life of the corporation save this: It was provided that "the legislature may at any time hereafter amend or repeal this act." In 1905 the legislature exercised this authority, and by Acts No. 455 and No. 492 of the Local Acts of that year repealed said Act No. 223 of the Laws of 1849. At the same time it gave to said company the right to present a claim for the value of its tangible property to the common council of the city of Grand Rapids.

The question in this case is whether said repealing acts are constitutional. Relators contend that they are. Respondents deny this. The circuit court held that they were constitutional and entered a judgment of ouster against respondents. Respondents bring the case to this court for review. They contend that the repealing acts are unconstitutional for various reasons, which will be considered under the following heads: 1. Motives of the legislators; 2. Notice and hearing; 3. General constitutional objections; 4. Estoppel; 5. Provision for presentation of claim.

727 1. Motives of the legislators: The respondents admit that more than two-thirds of the members-elect to each house voted for the repealing laws in question. They complain because they were denied the right to prove that they so voted without investigating the merits, and "without in fact exercising their judgment and discretion on the merits" in compliance with a custom relating to local measures, and

in reliance upon the representations of the members of Kent county to the effect "that the delegation from Kent county was a unit in favor of said bill, and that it did not involve a subject in which the people of the state of Michigan were interested." We think the ruling complained of was correct. In *People v. Gardner*, 143 Mich. 104, 106 N. W. 541, we quoted with approbation from Cooley's *Constitutional Limitations*, seventh edition, page 257, as follows: "And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. The reasons are the same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people."

In this connection we notice the contention of respondents that in repealing that law the legislature must act in good faith. It is sufficient to say that the courts must conclusively presume that the legislature did act in good faith. Under the rule above stated the courts have no authority to investigate that question. The only cases to which our attention is called, which oppose this principle, relate to certain proceedings of municipal bodies. The principle of those cases is limited. It does not extend even to legislative action of municipal bodies. It certainly does not apply to this case. This was decided in *People v. Gardner*, 143 Mich. 104, 106 N. W. 541.

728 2. Notice and hearing: Respondents contend that they were not given the notice and hearing to which they were entitled by section 16, article 15, of our constitution. That section reads: "Previous notice of any application for an alteration of the charter of any corporation shall be given in such manner as may be prescribed by law."

The repealing law was enacted twice by the legislature in 1905. One of these laws is Act No. 455, Local Acts 1905; the other is Act No. 492, Local Acts 1905. Act No. 455 received the approval of the governor April 5, 1905. Act No. 492 received the approval of the governor April 25, 1905. It appears from respondents' plea that they had no formal notice of this pending legislation. They did, however, learn of it, and were afforded a hearing by the governor, but were denied a hearing by each house of the legislature. It also

appears by their plea that the bills were introduced by legislators from Kent county, who had been requested to take this action by the municipal authorities of the city of Grand Rapids. It also appears that the legislator who introduced the bill had given more than one day's notice of his intention so to do. Each of the acts was passed in due form. Act No. 492 received a vote of more than two-thirds of the members-elect to each house. Under these circumstances, were respondents denied any rights given them by section 16 of article 15? At the first session of the legislature, after the constitution of 1850 took effect, it passed a law providing for the giving of notice in cases coming under said section 16. That law is found in sections 8569, 8570, and 8571, 3 Compiled Laws. Of this law it was said by Justice Christiancy, in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103: "The effect of this act, and of the constitutional provision under which it was framed, would be to justify the legislature in disregarding, and probably—while the act remains in force—to impose upon them the duty to disregard ⁷²⁹ the application as such, until the proper notice should have been given as provided by the act. It does not, however, operate to restrict the right of the legislature itself to make such amendment as they may think the public interest may require; nor does it restrict the right of any member of either house of introducing a bill for that purpose on giving one day's previous notice of his intention so to do. Nor do we think, as insisted by the counsel for the respondents, that the notice, when given in either house by a member, is by this act required as in case of an 'application' in behalf of the corporation or individuals, 'to set forth briefly the nature of the alteration applied for.' This provision applies only to cases where alterations are 'applied for' from without the legislature itself, and is coextensive only with the provision requiring the publication of the notice of such application. The provision allowing a member of either house to give one day's notice of the intention to introduce a bill for such purpose was, we think, intended to recognize the almost universal custom or practice in legislative bodies in this country to require one or more days' notice from a member of his intention to introduce, or ask leave to introduce, a bill; in which case nothing more than the title or general object of the bill is usually required.

"It is urged that if this be the true construction of the constitution and the act, both may be readily evaded; as it would always be practicable for the corporation to procure some member of the house or senate to give the one day's

notice, and to introduce the bill on his own responsibility as a member. This may or may not be true; but if true, it is a difficulty inherent in the nature of the subject itself, and for which the courts cannot provide a remedy. A proper respect for a co-ordinate branch of the government requires us to presume that each member of the legislature acts upon his individual conviction of public duty, and that he will not become the willing instrument of designing parties, to enable them to evade the statute or the constitution."

This reasoning, which we thoroughly approve, answers every argument advanced by respondents in support of their claim that they were entitled to notice under section 16 of article 15 above quoted. Perhaps it might also be stated that section 16 of article 15 has no application to a repeal of a charter. There is a distinction between an ⁷³⁰ alteration and a repeal: See *Yeaton v. Bank of the Old Dominion*, 21 Gratt. (Va.) 593.

3. General constitutional objections: In the circuit court respondents urged that the repealing act impaired the obligations of the contract between the hydraulic company and the state, contrary to the provisions of the constitution of the United States; that it deprived the company of its property without due process of law, contrary to the provisions of the constitution of the state of Michigan and of the fourteenth amendment of the constitution of the United States; that it took its private property for public use in contravention of section 2 of article 18 of the constitution of Michigan. In our judgment none of these objections are tenable. The repealing act does not take from the corporation any personal or real property acquired during its legal existence. It does take from it this, and only this: Its right to continue to be a corporation. It takes from it no right, franchise, or power which does not depend for its existence upon the granting clause of the charter, and these it had a legal right to take: *Greenwood v. Union Freight R. R. Co.*, 105 U. S. 13, 26 L. ed. 961. These rights it obtained from the legislature of the state of Michigan. By its terms the law granting these rights might at any time be repealed by the legislature. The corporation would exist until, and only until, the legislature repealed the law creating it. The life of the corporation expired, according to the terms of its charter, with the repeal of the law. Any argument that the repeal destroyed any constitutional right must rest upon the impossible assumption that the corporation had a legal right to exist for a term longer than that specified in its charter. It had no such

right. If authority in support of this reasoning be needed, we think it is found in *Greenwood v. Union Freight R. R. Co.*, 105 U. S. 13, 26 L. ed. 961.

In this connection, we consider the claim of respondents that the constitutional rights of certain holders of bonds of the corporation are impaired by the repealing acts. ⁷³¹ These holders of bonds are creditors of the corporation who are secured by mortgages upon the corporate property and franchises. We deem it sufficient to say that the franchise mortgaged to secure these bonds was no other than that granted to the corporation. Nor did the mortgage in any way change its effect or lessen the right of the legislature to repeal it at any time. The bondholders acquired no greater rights than the corporation had. The existence of the bonds secured by the mortgage is, therefore, an entirely immaterial circumstance, and in no way affects the correctness of the foregoing reasoning.

4. Estoppel: Respondents contend that the repealing acts cannot be enforced because they were passed in consequence of the wrongful conduct of certain officials of the city of Grand Rapids. Whether the principle of estoppel can ever be invoked to prevent the enforcement of a valid legislative enactment, we do not decide. We do decide that it cannot be invoked in this case. Here the repealing acts are sought to be enforced, not for the benefit of those whose conduct was wrongful, but for the benefit of the entire inhabitants of a great city who were guilty of no wrong. Their right to have the law enforced cannot be affected by the circumstance that some agent of the municipality acted improperly in procuring its enactment.

5. Provision for presentation of claim: The repealing acts give the corporation the right to present a claim for its tangible property to the common council of the city of Grand Rapids. It is contended that this provision is unconstitutional because (a) it permits property to be taken for the public without the determination of necessity as provided in the constitution; and (b) that the compensation provided therein is unlawful and inadequate. It is a sufficient answer to each of these claims to say that this provision is not compulsory. It has no force unless the corporation chooses to accept it. If the corporation does accept, it voluntarily sells its property on the terms stated ⁷³² in said provision. To this there is no constitutional objection.

It results from this reasoning that the judgment of the circuit court must be affirmed.

Grant, C. J., and Blair, Moore and McAlvay, JJ., concurred.

If a Corporate Charter is by the express terms of the statute creating it repealable, no right or license that arises solely out of its terms, and that has not been acted upon, can be deemed to be beyond revocation by the legislature: *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 118 Am. St. Rep. 754. But the acceptance of privileges granted by the laws of a state to a corporation and a franchise granting permission to use its streets duly given by a city, followed by expenditure of money by the corporation in valuable improvements, constitutes a contract which cannot be impaired or destroyed, unless under power reserved in the grant itself, or conferred by the state constitution: *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520. See further, on the right to amend or repeal a corporate charter, *Danville v. Danville Water Co.*, 178 Ill. 299, 69 Am. St. Rep. 304; *Virginia Development Co. v. Crozier Iron Co.*, 90 Va. 126, 44 Am. St. Rep. 893; *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 199; *Vanderpoel v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601; *Macon & Birmingham R. R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135; *Wagner Free Institute v. Philadelphia*, 132 Pa. 612, 19 Am. St. Rep. 613; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

EX PARTE HARRISON.

[212 Mo. 88, 110 S. W. 709.]

LIBERTY OF SPEECH and of the Press.—The constitutional liberty of speech and of the press grants the right to freely utter and publish whatever the citizen may desire, and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious or scandalous in character, so that they become an offense against the public, and by their malice and falsehood injuriously affect the character, reputation or pecuniary interests of individuals. (pp. 560, 561.)

LIBERTY OF SPEECH and of the Press, Limitations upon the Power of the Legislature to Restrict.—If a publication is neither blasphemous, obscene, seditious nor defamatory, no court has the right to restrain it, nor any legislature the power to provide for its punishment, if the constitution of the state declares that no law shall be passed impairing the freedom of speech, and that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty. (p. 561.)

LIBERTY OF SPEECH and of the Press—Statute Making Criminal the Publication of the Reports of a Civil League.—A statute prohibiting the publication of the reports of a civil league and making such publication criminal unless it states in full the facts on which the report is based, and gives the name and address of the person furnishing the information concerning candidates or nominees, and states in full the information furnished by such person, is in conflict with the provision of the state constitution declaring that no law shall be passed impairing the freedom of speech, and that every person shall be free to write, say or publish whatever he will on any subject, being responsible for all abuse of that liberty, and is therefore void. (p. 561.)

CONSTITUTIONAL LAW—Impairing of a Right, What Amounts to.—Anything which makes the exercise of a right more exclusive or less convenient, more difficult or less effective, impairs that right. (p. 561.)

HABEAS CORPUS—Questioning the Constitutionality of a Statute.—One imprisoned on a conviction for the violation of a statute is entitled to his release on habeas corpus if the statute is unconstitutional. (p. 562.)

House & Manard and J. McD. Trimble, for the petitioner.

I. B. Kimbrell, for the respondent.

⁸⁹ GANTT, J. This is a proceeding under the habeas corpus act, in which petitioner seeks to be discharged from further prosecution under an information filed by the prosecuting attorney of Jackson county, in the criminal court of said county, on the 9th of March, 1908, charging the petitioner with a violation of an act passed by the legislature of this state and approved April 12, 1907, entitled, "An act to regulate civic leagues and like associations and providing how their reports and recommendations shall be published and what they shall contain, and fixing a penalty for the violation of, and liability for the same": Laws 1907, p. 261. A warrant was duly issued upon the information and the petitioner was arrested.

The said information charges that the Kansas City Civic League is, and was at all times therein mentioned, a league, society and association incorporated under chapter 12, article 11, Revised Statutes of 1899, and was formed for the purpose of investigating the character, fitness and qualifications of candidates and nominees for public office. And that it was at all times mentioned, and for a long time prior thereto, the custom and purpose of said Kansas City League to make reports and recommendations on such candidates; that on the 24th of December, 1907, in Kansas City, Jackson county, Missouri, the said Kansas City Civic League did, through its executive committee, then and there in executive session assembled, write, make and adopt a recommendation and report upon the fitness and qualification ⁹⁰ of John M. Rood and William J. Campbell, who were then and there candidates and nominees for the election to the office of sheriff of Jackson county, Missouri, at the special election to be held in said county on the 27th of December, 1907, which said recommendation and report, with the signatures of the president and secretary of the said Kansas City Civic League, is in words and figures as follows:

"CIVIC LEAGUE REPORT.

"Report of the Kansas City Civic League on Candidates for Sheriff to be voted-for on December 27, 1907.

"John M. Rood, Democrat.

"Born on a farm near Quincy, Illinois, in 1858. Went to Carroll county, Missouri, in 1877. Taught school and was engaged in general merchandise business at Carrollton, Mis-

souri, until 1887, when he came to Kansas City, since which time he has been engaged in the lumber business. He served one term in the upper house of the city council, 1900 to 1904. His record was approved by the Civic League at the end of his term. We regard Mr. Rood as a citizen of high type, and well qualified for the office of sheriff.

“William J. Campbell, Republican.

“Was born in Ripley, Ohio, in 1863, and came to Missouri about 1879. Was station agent for the C. B. & Q. Ry. Company at Parkville from 1884 to 1887. Was in the general merchandise business at Parkville from 1887 to 1889, when he came to Kansas City and became a member of the present real estate and insurance firm of Tilhor and Campbell. He served one term in the lower house of the city council from 1900 to 1902. The Civic League said of him at the end of his term, ‘He made a good record in the council.’ He was appointed sheriff of Jackson county on September 30th, 1907, by the county court. The services of both Mr. Campbell, and the deputies under him, have been highly satisfactory,⁹¹ and the League consider him well qualified for the office.

“By order of executive committee.

“J. McD. TRIMBLE, President.

“A. O. HARRISON, Secretary.”

That said report and recommendation did not state in full on what facts the said report and recommendation were based, and did not give or contain the name or address of any person or persons furnishing the information of and concerning said candidates and nominees in said report and recommendation contained, or upon which said report was based; that on the twenty-fourth day of December, 1907, said Allen O. Harrison, who was then and there a secretary of said Kansas City Civic League, did unlawfully and willfully deliver a copy of said report and recommendation to the Burd & Fletcher Printing Company in Kansas City, Jackson county, Missouri, and caused two hundred and fifty copies thereof to be printed and published by said printing company upon postal cards of the United States, and did thereafter, on said 24th of December, 1907, unlawfully and willfully place upon said postal cards, upon which said report and recommendation had been printed, the names and addresses of two hundred and fifty different persons residing in said Kansas City, and willfully and unlawfully circulate said postal cards by depositing the same in the United States postoffice in said city, with intent that they should be delivered to the persons

to whom they were addressed, contrary to the statute of this state.

Petitioner seeks his release from imprisonment on said charge on the ground that said act of March 12, 1907, is unconstitutional and void, because in contravention of section 14 of article 2 of the constitution of Missouri, which provides "that no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will ⁹² on any subject, being responsible for all abuse of that liberty," and also of section 53 of article 4 of the constitution of Missouri, which forbids special or class legislation:-

Section 1 of the act of the legislature of March 12, 1907, providing how reports and recommendations of civic leagues and like associations shall be published, provides: "Leagues, committees, associations or societies, incorporated or unincorporated, formed for the purpose of investigating the character, fitness or qualifications of candidates or nominees for public office, and making reports on the same, shall in each and every printed or published report or recommendation as to such candidates or nominees, state, in full, on what facts they base their report or recommendation, giving the name and address, in full, of all persons furnishing the information of and concerning such candidate or nominee, and state in full the information furnished by such party. Any report or recommendation printed or published by such league, association or society, which does not contain all of the above information shall be unlawful, and any person printing, publishing or causing to be printed, published or circulated any such report or recommendation without such information, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in the sum not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than one year, or by both such fine and imprisonment."

The constitutional liberty of speech and of the press grants the right to freely utter and publish whatever a citizen may desire, and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious, or scandalous in their character, so that they become an offense against the public and by their malice and falsehood injuriously affect the character, reputation or pecuniary interest of ⁹³ individuals: *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938; *Patterson on Liberty of Speech*, p. 5;

Cooley's Constitutional Limitations, 6th ed., 518; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79.

The General Assembly, under the legislative power granted it by the people subject to the limitations of the state and federal constitutions, unquestionably has the power to enact penal statutes and prescribe civil remedies, "for all abuses of that liberty" of speech, or publication. If a publication is neither blasphemous, obscene, seditious or defamatory, then, under the constitution of this state, no court has the right to restrain it, nor the legislature power to punish it. The report which the petitioner published has nothing in it either blasphemous, seditious, obscene or defamatory, and clearly falls within the liberty of speech or publication granted by the constitution, but it is equally certain that this publication was forbidden by the statute of March 12, 1907, because it did not state in full all the facts on which said report or recommendation was based, and did not give the name and address in full of all persons who furnished any information concerning the said nominees therein mentioned for the office of sheriff, and did not state in full the information furnished by each of the persons who furnished the same. It seems too clear for argument that this statute is in conflict with section 14 of article 2 of the constitution. Prior to the enactment of the act of March 12, 1907, it is not to be doubted that the petitioner would have had the right to have stated all that was said in the said report and recommendation without stating anything more, but under this act that right is now denied unless he prepares and pays for publishing all of the facts upon which he based said recommendation and report, and gives the names and addresses of all persons who gave him any information of or concerning either of said candidates and a full statement of all the information that each of them furnished him. Anything which⁹⁴ makes the exercise of a right more expensive or less convenient, more difficult or less effective, impairs that right.

In *Gladney v. Sydnor*, 172 Mo. 318, 95 Am. St. Rep. 517, 72 S. W. 554, 60 L. R. A. 880, it was said by this court: "Impair means to make worse, to lessen the power, to weaken, to enfeeble, to deteriorate." The right to speak freely is necessarily attended by the correlative right to remain silent. In *Wallace v. Georgia C. & N. R. R. Co.*, 94 Ga. 732, 22 S. E. 579, it appears the legislature had passed an act entitled: "An act to require certain corporations to give to their discharged agents or employes the cause of their removal or

discharge, when discharged or removed." The supreme court of Georgia held said act unconstitutional, and, in doing so, said: "A statute which undertakes to make it the duty of incorporated railroad, express and telegraph companies to engage in correspondence of this sort with their discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence, enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law." The act of March 12, 1907, is not confined to forbidding and punishing abuses of the liberty of speech or publications, but undertakes to punish speech or publication without any reference to whether they fall within the legal ⁹⁵ exceptions of blasphemy, obscenity, sedition or defamation.

Without further discussion or elaboration we think it is perfectly obvious that the act of March 12, 1907, transcends the power of the legislature, and is in conflict with the constitution and therefore void. As an unconstitutional act is utterly void, the petitioner is entitled to be discharged under the habeas corpus act from further prosecution on the information filed in the criminal court against him: *Ex parte Neet*, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218. The prisoner is discharged.

Fox, P. J., and Burgess, J., concur.

Freedom of Speech and Liberty of the Press, guaranteed by the constitution, can neither be impaired by the legislature nor hampered nor denied by the courts: *Marks & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440; *State v. Shepherd*, 177 Mo. 205, 99 Am. St. Rep. 624. While the legislature has no power to suppress newspapers or prohibit their publication generally (*Ex parte Neill*, 32 Tex. Cr. 275, 40 Am. St. Rep. 776), it may, nevertheless, make it a criminal offense to publish or circulate publications principally made up of immoral or criminal news: *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627; *State v. McKee*, 73 Conn. 18, 84 Am. St. Rep. 124.

STATE v. EXCELSIOR SPRINGS LIGHT, POWER,
HEAT AND WATER COMPANY.

[212 Mo. 101, 110 S. W. 1079.]

CRIMINAL STATUTES, Deficiencies in Which will not be Supplied by the Courts.—Though a statute should not be held invalid on the ground of uncertainty if susceptible of any reasonable construction which will support it, still if no judicial certainty can be settled upon as to the meaning of the statute, or if it omits, in defining a criminal offense, certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or to undertake to make the statute definite and certain. (p. 567.)

CRIMINAL LAW—Statute Attempting to Make Criminal the Suffering or Permitting of an Act.—A statute declaring guilty of a misdemeanor any person who shall suffer or permit any poisonous or deleterious substance to be thrown, run or drained into the waters of the state in quantities sufficient to injure, stupefy or kill fish, without providing that the suffering or permitting shall be on the premises or under the control of the accused, does not so define any act which the legislature has power to declare criminal as to sustain a conviction. (p. 568.)

Harris L. Moore, for the appellant.

Herbert S. Hadley, attorney general, and Rush C. Lake, assistant attorney general, for the state.

¹⁰⁴ FOX, P. J. This cause is here upon appeal by the defendant from a judgment of the circuit court of Clay county, for a violation of the provisions of section 28 of what was commonly called the game and fish law, enacted by the General Assembly of this state in 1905: Laws 1905, p. 163. The information based upon the provisions of the section of the statute heretofore referred to and upon which this judgment rests, omitting formal parts, was as follows:

“Ralph Hughes, prosecuting attorney within and for the county of Clay in the state of Missouri, informs the court (upon the affidavit of W. A. Higbee, a deputy game and fish warden of the state of Missouri, herein filed), that the Excelsior Springs Light, Power, Heat and Water Company, a corporation organized and existing according to law, did, on the twenty-third day of May, A. D. 1906, at the county of Clay and state of Missouri, by and through its servants and employes, willfully and unlawfully suffer and permit certain coal tar, coal gas, and other poisonous and deleterious substances to be thrown, run and drained into certain waters of the state of Missouri, to wit, into a stream or branch commonly known and designated as the Dry Fork of Fishing River, and from thence to run and drain into certain

other waters of the state of Missouri, to wit, into a stream commonly known and designated as the East Fork of Fishing river, in quantities sufficient to injure, stupefy and kill the fish which inhabit said waters, at and below the point where said coal tar, coal gas and other poisonous and deleterious substances were suffered and permitted to be thrown, run and drain into such waters, as aforesaid, against the peace and dignity of the state."

In order to determine the legal propositions involved ¹⁰⁵ in this case it may be conceded that there was some evidence tending to show that the refuse from the gas plant which went into the river contained some coal tar, but as to the amount of coal tar in it, or as to whether it was the coal tar or some other substances in the refuse which caused the danger or killed the fish, the evidence is not entirely satisfactory.

The court instructed the jury and the cause was submitted to them and a verdict was returned finding defendant guilty and assessing its punishment at a fine of two hundred dollars. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. From the judgment which was entered in accordance with the verdict, the defendant prosecuted this appeal and the record is now before us for our consideration.

The record before us discloses that the offense of which defendant was convicted was a misdemeanor, but it also is made to appear that the appeal was granted to this court for the reason that the validity and constitutionality of the section upon which this prosecution is based was challenged. Numerous errors are assigned as a basis for the reversal of this judgment.

1. Complaint is made that the trial court did not properly declare the law upon the facts developed at the trial.

2. It is earnestly insisted that section 28 upon which this prosecution is predicated is void, for the reason that it does not intelligently describe or define an offense.

It is apparent that the second proposition, which involves the validity of this statute, is the vital and overshadowing one in this cause, and if the insistence of learned counsel for appellant is to be maintained, the necessity for discussing other questions presented can be dispensed with, hence we will direct our attention first to the discussion of the second proposition.

¹⁰⁶ 1. Section 28, Laws of 1905, page 163, upon which this prosecution is based, provides that "it shall be unlawful for

any person or persons, firm or corporation to suffer or permit any dyestuff, coal tar, oil, sawdust, poison or deleterious substances to be thrown, run or drained into any of the waters of this state in quantities sufficient to injure, stupefy or kill fish which may inhabit the same at or below the point where any such substances are discharged or permitted to flow or thrown in such waters. Any person or persons, firm or corporation offending against any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense."

It will be observed that the provisions of that section undertake to create and define an offense by simply saying that any person or persons, firm or corporation who shall suffer or permit any poisonous or deleterious substances to be thrown, run or drained into the waters of this state in quantities sufficient to injure, stupefy or kill fish, shall be deemed guilty of a misdemeanor. No one can read the provisions of that section and escape the conclusion that it is a marked departure from the usual legislation along that line which undertakes to define criminal offenses. It will be observed that the provisions of this section do not condemn the act of throwing poison or deleterious substances into the waters of this state, but is simply directed against those who suffer or permit such act to be done. In other words, A may throw the poison or deleterious substances into the waters of this state, but his act is not embraced within the provisions of this section. On the other hand, if B suffers or permits A to do this act, he is guilty of a criminal offense. As it is very tersely stated by the learned attorney general in his brief now before us, "a person who actually and flagrantly ¹⁰⁷ does place poison or deleterious substances in the waters of this state escapes punishment, and the one who suffers or permits it to be done is punished." Another marked feature of this statute is the omission of necessary provisions which are absolutely essential in order to stamp the acts of persons permitting or suffering substances to be thrown into the waters of this state as a wrongful or criminal act. It nowhere provides that the permission or suffering of the acts to be done must be upon premises or in the operation of a plant under the control of the persons, firm or corporation designated by the statute, or that the persons committing the act are in the employ of such persons, firm or corporation. In other words, there is an entire absence from that section of provisions which in any way impose the

duty upon the persons, firm or corporation designated by the statute to prevent the throwing of poisonous substances into the waters of this state or that such persons, firm or corporation as mentioned in the statute occupied any position which would impose upon them either the moral or legal obligation of not suffering the commission of such acts. Manifestly the provisions of this section were intended to be directed toward persons, firms or corporations operating sawmills or other plants along streams of water in this state where poisonous refuse matter from such plants might be thrown, run or drained into such streams of water, but the difficulty in holding that this statute intelligently defines a criminal offense is that the court cannot supply the essential and necessary provisions which would impress the acts committed by those designated in the statute as wrongful or criminal.

The people of this state have long felt the necessity of appropriate legislation for the preservation and protection of game and fish, and this court would not hesitate in giving its unqualified approval to a law which condemned the throwing of dyestuff, coal tar, oil, sawdust, poisons or other deleterious substances into any ¹⁰⁸ of the waters of this state in quantities sufficient to injure, stupefy or kill fish, and which condemned the acts of any person, firm or corporation in throwing, running or draining such poisonous substances into the waters of this state, or in permitting or suffering the same to be done in the operation of their plants upon premises under their control or by persons upon such premises in their employ.

Our attention is directed by the attorney general to the case of *State v. Probasco*, 62 Iowa, 400, 17 N. W. 607, where the court indulges in the discussion of the meaning of the word "permit." In treating of this word, it is said: "It implies express assent or license to do an act, or a failure to prohibit or prevent it. If it is the duty of one to prevent or prohibit an act, and he fails to do so, or to use efforts to do so, he permits it. He permits the act which he could have prevented. This is the common meaning of the word, and it is used in that sense in the statute before us." It is sufficient to say of that discussion that it simply emphasizes the correctness of the conclusion reached upon this statute. It is there plainly pointed out that "if it is the duty of one to prevent or prohibit an act, and he fails to do so, or to use efforts to do so, he permits it. He permits the act which he could have prevented."

Recurring to the provisions of section 28 upon which this prosecution rests, it will be noted, as before stated, that there is an entire absence of the necessary and essential provision which imposes the duty upon those designated in the section to prevent or prohibit the acts therein specified.

Our attention is also directed to the expression of the views of this court upon the provisions of section 7456, Revised Statutes of 1899, and section 29 of the game law of 1905, in *State v. Hodges*, 207 Mo. 517, 106 S. W. 51. While the opinion in that case is on file in this court, yet, after it had been delivered, the court's attention having been called to the fact that the record failed to show any final judgment¹⁰⁹ entered against the defendant, that opinion was withdrawn, and the case was remanded with directions to enter up judgment upon the verdict as returned by the jury: *State v. Hodges*, 207 Mo. 517, 106 S. W. 51. Therefore, the case of *State v. Hodges*, to which our attention has been directed, has not been, and will not be, officially reported. That case has no application to the proposition involved in the case at bar. While section 7456 and section 29 of the game law of 1905 relate to the preservation of game and fish, yet it is only necessary to read the two sections in order to demonstrate that they relate to the commission of entirely different acts, the commission of which constitutes the respective offenses designated by those sections, and have no reference to the acts embraced in section 28 involved in the case at bar.

Recurring again to the provisions of section 28 upon which this proceeding is based, we are not unmindful of the well-settled rule that legislation should not be held invalid on the ground of uncertainty if susceptible of any reasonable construction that will support it. But, on the other hand, it is equally well settled that if no judicial certainty can be settled upon as to the meaning of a statute, or if it omits in defining a criminal offense certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or undertake to make the statute definite and certain.

In 26 *American and English Encyclopedia of Law*, second edition, 656, the rule as above indicated finds substantial support. In the text it is there said: "When the language of an act appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate, it is simply void; for if no judicial certainty can be settled upon as to its meaning, courts are not at liberty to supply

the deficiency or make the statute ¹¹⁰ certain. But legislation cannot be nullified on the ground of uncertainty, if susceptible of any reasonable construction that will support it." Numerous authorities are cited in the notes which doubtless furnish at least substantial support to the announcement of the rule.

Mr. Bishop, in his treatise on Statutory Crimes, third edition, in the third subdivision of section 41, thus states the rule: "Where the statutory terms are of such uncertain meaning, or so confused, that the courts cannot discern with reasonable certainty what is intended, they will pronounce the enactment void."

It is apparent that the provisions of section 28 are not susceptible of a proper and intelligible enforcement by the courts of this state, unless by implication we are willing to treat as embraced within the provisions of that section the essential and necessary provisions heretofore pointed out. This we are unwilling to do.

Having reached the conclusion as herein indicated upon the main proposition, there is no necessity for giving any attention to the errors complained of respecting the declarations of law given by the court.

We have indicated our views upon the section of the statute now in judgment before us, which results in the conclusion that the judgment of the trial court should be reversed and the defendant discharged. It is so ordered.

All concur.

As to the Acts Which may be Made Criminal by legislative enactment see the note to Booth v. People, 78 Am. St. Rep. 235. That it is competent for the legislature to forbid the pollution of the water of a lake, see State v. Griffin, 69 N. H. 1, 76 Am. St. Rep. 139.

MOSS v. FITCH.

[212 Mo. 484, 111 S. W. 475.]

JURISDICTION—Process, Service of Out of the State.—No personal jurisdiction can be had on process served out of the state, whether personal or by publication, or whether the defendant has been a resident of the state whence the process issued or not. (pp. 574, 577.)

DIVORCE—Judgment for Alimony, When Void.—A judgment entered in a divorce suit awarding the plaintiff alimony, if based on service of process made without the state, is, as to such alimony, void. (p. 578.)

PLEADINGS—Relief, When Restricted to the Facts and Purposes Alleged.—In a suit to have certain conveyances declared fraudulent as against the complainant and for relief therefrom on the ground that she holds a judgment for alimony against the grantor of such deeds, she is not entitled to have a decree permitting her to redeem on the ground that she is entitled to so redeem because of her inchoate right of dower, the right of redemption not having been made an issue by the complaint. (pp. 578, 579.)

PLEADINGS—Nature of Irregular Action, When cannot be Changed by the Plaintiff's Reply Pleadings.—A plaintiff, having set out one cause of action in his complaint, cannot, in his reply to the defendant's answer, introduce and obtain relief upon an entirely different cause. (pp. 578, 579.)

Hewitt & Hewitt and James T. Blair, for the appellant.

Spencer & Landis and Wm. M. Fitch, for the respondent.

490 GRAVES, J. Action for injunction and for the cancellation of a certain quitclaim deed and a certain deed of trust.

From December 2, 1900, to October 23, 1902, the plaintiff was the wife of defendant Oliver Grant Mills, by whom she had one child. At this latter named date she was divorced from Mills and had judgment for alimony in gross in the sum of two thousand three hundred and eighty-seven dollars and fifty cents, and for custody of the child. Judgment was by default. In this divorce proceeding the defendant Mills was not served with process in this state, but was personally served with summons in the state of Wyoming, under our statute providing for such a service. Prior to the marriage, Mills was the owner of seventy-five acres of land in De Kalb county. After the marriage he purchased from Sarah R. Ross et al. for a home for himself and wife a ten acre tract of land, for two thousand dollars, upon which there was an encumbrance of four hundred dollars due to James Ewart from Ross. In order to pay for this ten acre tract Mills borrowed sixteen hundred dollars from the said Ewart. To secure this ⁴⁹¹ last-named sum Mills and plaintiff, his then wife, executed a note and deed of trust, which covered both tracts of land. A. B. Chrisman was the trustee in this deed. Later Mills, by quitclaim deed, prior to the divorce, but about the time thereof, conveyed all the property to defendant Ekin. This deed was acknowledged before a notary public in Wyoming. Defendant William M. Fitch was the successor in trust of Chrisman. After the judgment for alimony was entered plaintiff caused execution to be issued and all the land sold, and the same was bought in by her prior to the institution of this suit.

The petition sets out most of the facts hereinabove stated. It then charges a conspiracy to defraud her and other creditors of Mills as having been entered into between Mills and Ekin, a resident of Wyoming, when the quitclaim deed was made, and charges said transaction as a fraud, and that Ekin really held the property for Mills. The remainder of the petition and the prayer thereof is as follows:

"That thereafter, to wit, on the — day of March, A. D. 1903, the trust deed hereinbefore mentioned, as having been executed by defendant Mills and this plaintiff to A. D. Chrisman for use of James Ewart, being still outstanding and in the hands of said Ewart and being then and there a legal debt and liability in the sum of twelve hundred and thirty-five dollars, and no more, of and against said Oliver G. Mills, defendant; that said Mills in the further prosecution of his fraud against this plaintiff and toward the consummation of his wicked, wrongful and fraudulent design against the lawful right of this plaintiff, conspired with the defendant Lahrman and Landis to aid and assist him, the said Mills, whereby the said Lahrman and Landis, for a consideration to be paid by said Mills to said Lahrman and Landis, agreed to take the money which said Mills then and there promised to furnish sufficient ⁴⁹² to discharge the trust deed and debt hereinbefore mentioned, due and owing to said James Ewart as aforesaid, and purchase said debt and security from said Ewart, and take a pretended assignment thereof in the name of said Lahrman, and foreclose said trust deed and turn the proceeds from said sale over to said Mills, and then and thereby defeat the lawful rights of plaintiff and defraud her of the title to said lands.

"Plaintiff says that in pursuance of, and toward the fulfillment of, said agreement and consummation of said fraud, said Landis paid said money to said Ewart and took said security in the name of said Lahrman, and the said Lahrman, toward the fulfillment of his unlawful, wicked and fraudulent agreement, is now pretending to be the lawful owner of said debt and security aforesaid; and in the further prosecution of said wicked and fraudulent and unlawful agreement so entered into as aforesaid between said Lahrman, Mills and Landis, said Lahrman, under and by virtue of the authority vested in the trustee, and his successors in trust mentioned in said trust deed, has appointed one William M. Fitch as successor in trust to said Chrisman, and said Fitch as said trustee is, at the instance and request of said Lahrman, the pretended owner of said debt and security, threaten-

ing to sell all of said lands under said trust deed, and is now advertising said lands for sale in the 'De Kalb County Democrat,' a newspaper printed and published in the city of Maysville, De Kalb county, Missouri, as will more fully appear by a copy of said advertisement hereto attached, marked 'Exhibit B' and made a part hereof, and will, if not restrained from so doing, sell said lands on the thirty-first day of August, A. D. 1903, and then and there and thereby cast a cloud upon the title of this plaintiff's said lands, and irreparable injury and damage would thereby result to this plaintiff. ⁴⁹³ That she is without adequate and efficient remedy at law.

"Wherefore, plaintiff prays that a restraining order and injunction be issued directed against said Wm. M. Fitch, trustee as aforesaid, and defendant Lahrman and each of them, and that they and each of them, their agents and representatives, be enjoined and restrained from making said sale, or selling, assigning or disposing of said debt and security, or in doing anything further in the premises toward the consummation of their fraudulent acts, until this cause can be heard upon its merits, and that upon a hearing of said cause said injunction and restraining order may be made perpetual, and the aforesaid quitclaim deed be declared null and void, held for naught, and that said debt mentioned and described in the trust deed be declared paid off and discharged and the lien of said trust be declared discharged and satisfied and held for naught, and for all such other orders, judgments and decrees granting relief as shall be meet and proper in the premises."

Defendants Fitch, Lahrman, Ekin and Landis file answer in which they say:

1. They admit the marriage of plaintiff and Mills on the date alleged.

2. They deny that there has been a legal dissolution of the marriage, because of certain defects in the proceedings not necessary to mention at this point.

3. They aver the judgment for alimony to be void.

4. They admit that Mills at one time had title to all the property described.

5. They admit the execution of the deed of trust as pleaded, and aver that it is a subsisting lien upon the land, and in this connection further say: "These defendants further answering expressly deny that said Lahrman and Landis, or either of them, assisted the ⁴⁹⁴ said Oliver G. Mills, directly or indirectly, to pay off the said note secured by said trust deed;

but that defendant Landis himself purchased the said note from James Ewart, for value received, out of his own funds; that afterward he assigned the said note to said Lahrman, for value received, and that the said Lahrman then became the absolute owner thereof, and that neither the said Mills nor the said Ekin had any interest in the said note whatever."

6. They aver that A. B. Chrisman refused to act as trustee, and that under the power granted by the deed of trust Lahrman appointed defendant Fitch as trustee, who advertised and sold the premises, and that defendant Ekin, being the highest and best bidder, became the purchaser at the sale.

7. They admit that the execution sale was made and that deed was made to plaintiff, but aver that the judgment execution and all proceedings thereunder were void, and that plaintiff in trying to enforce said judgment is doing so in violation of section 1 of article 14 of the United States constitution and of the constitution of Missouri and the laws of this state.

8. They admit the record of plaintiff's deed, and aver it casts a cloud on the title of defendant Ekin.

9. Defendant Ekin expressly denies that the quitclaim deed was fraudulent or voluntary or without consideration, or was made in pursuance of a conspiracy to injure or defraud plaintiff, but avers that it was made in good faith and for a valuable consideration.

10. All things not expressly admitted were expressly denied by all the defendants.

The prayer of the answer is as follows: "Wherefore, these defendants pray this honorable court to set aside and for naught hold the judgment rendered against defendant Mills and in favor of plaintiff, which is alleged in plaintiff's bill and in this answer, ⁴⁹⁵ and that the deed from William Duncan, as sheriff herein, and in the said bill referred to, be canceled and for naught held, and that the quitclaim deed from Mills and Ekin, herein and in said bill referred to, be held good, and that the said trust deed, and the foreclosure sale thereunder and trustee's deed executed thereon, be confirmed and made valid and binding on all concerned; and that plaintiff's said bill be dismissed and for naught held, and for their costs herein laid out and expended, and for all other relief, orders and decrees meet and proper in the premises."

There was a motion to strike out a part of the answer, but nothing seems to have been done with it, and plaintiff filed reply, the substance of which was:

1. General denial of all allegations of new matter and a prayer for judgment as in the petition prayed.

2. That if the allegation in the answer be true, that Lahrman purchased the note secured by the deed of trust, and that neither Mills nor Ekin had any interest therein, "the said Lahrman was an intermeddler and not therefore entitled to the relief prayed, nor for any relief, and it would be inequitable and unjust to permit said defendant Lahrman to retain title obtained by the foreclosure of the deed of trust," and then the plaintiff asks to be permitted to redeem upon the payment of the note, interest and costs, including expenses of foreclosure, and that she have reasonable time in which so to do, and for all proper relief.

It should be stated here that no temporary injunction was granted, because plaintiff failed to give a six hundred dollar bond therefor as required by the court and the sale under deed of trust took place prior to the trial.

The court nisi at request of plaintiff made a finding of facts in these words:

496 "The court finds that on the — day of — Oliver Grant Mills was the owner of and had the fee-simple record title to the property in question, and that on the eighteenth day of July, 1901, he executed a deed of trust on said property to one A. B. Chrisman as trustee for James Ewart for the sum of sixteen hundred dollars, executing his note therefor, and that his wife, Lora Mills, joined with her husband in the execution of the said deed of trust, also the note given in the sum of sixteen hundred dollars.

"That on the eighteenth day of July, 1901, the said Oliver Grant Mills and wife, Lora L. Mills, executed a deed of trust to one James Ewart upon the following described real estate, being all the real estate in suit in 'Exhibit A'; and that the said Oliver Grant Mills by himself and without his wife Lora Mills joining with him in the deed, executed a quitclaim deed to James K. Ekin on the twenty-fourth day of March, 1902, upon the following described lands, being all the lands in suit. The court finds from the facts and from the record in this case that the said Oliver Grant Mills executed a quitclaim deed to James K. Ekin fraudulently and for the express purpose of cheating and defrauding this plaintiff, and his creditors; the court does not find from the evidence that said James K. Ekin, or any of the other defendants herein, joined in or participated in said fraud, but finds the other parties connected with this transaction were not guilty of any fraud in regard to the transfer of the said real estate.

The court further finds that the aforesaid deeds of trust were executed regularly and in a legal way, and that there was no fraud in the transaction. The court further finds that at the sale of the said real estate the plaintiff herein, through her attorneys and agents, offered to redeem said property by paying the debt and interest as set up in plaintiff's reply, but the court determines that the plaintiff cannot ask ⁴⁹⁷ for that relief in a reply. The court finds that in all other respects the sale of the said real estate was conducted in a legal way. The court further finds that this plaintiff was divorced from her first husband, Oliver Grant Mills, in this court on the twenty-third day of October, 1902, and that the service in said case was personal service upon defendant in the state of Wyoming, and that judgment was rendered in said case for alimony in the amount of two thousand three hundred and eighty-seven dollars and fifty cents.

"The court further finds that the court was without jurisdiction to enter up judgment for alimony in said divorce case. The court further finds that upon the judgment rendered in said divorce case an execution was issued out of this court and levied upon the lands in question and sold under said levy, and that the purchasers at said sale who purchased the lands under the judgment for alimony in said case acquired no title, as the court was without jurisdiction to enter alimony in said case."

Judgment was entered dismissing the plaintiff's bill and adjudging the costs against her, from which, after unsuccessful motion for new trial, plaintiff has appealed.

1. To determine just where the plaintiff stands in this case we take up two preliminary questions: First, what is the status of the judgment for alimony under which the plaintiff, on execution sale, purchased the property? To our mind, whatever may be the rule in other states, the rule is firmly established in this state that no personal judgment can be had on process of this state, executed outside of the state, or upon service by publication. The service provided for by section 582, Revised Statutes of 1899, is a substituted service for that of the service provided for in sections 575 et seq., which last sections provide for orders of publication. To our mind the legislature had no intent ⁴⁹⁸ of giving the service in section 582 a broader scope than that of publication, but was simply providing another method of accomplishing the same thing—i. e., giving some kind of a notice that the court had seized the res, whether that res was property or the marriage status, and would proceed to determine the rights

of the parties in and to the res, which was within the jurisdiction of the court. There is no purpose in either service to acquire jurisdiction of the person so as to enter a personal judgment.

In the early case of *Smith v. McCutchen*, 38 Mo. 415, this court said: "No sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Jurisdiction must be founded either upon the person of the defendant being within the territory of the sovereign where the court sits, or his property being within such territory; for otherwise there can be no sovereignty exerted, upon the known maxim, '*Extra territorium jus dicenti impune non paretur*.' Even, therefore, should a legislature of a state expressly grant such jurisdiction to its courts over persons or property not within its territory, such grant would be treated elsewhere as a mere attempt at usurpation, and all judicial proceedings in virtue of it held utterly void for every purpose: Story on Conflict of Laws, sec. 539. A judgment obtained against a party who has no notice is void. It is unnecessary to cite adjudged cases in support of principles so well settled as these."

Following this is the case of *Latimer v. Union Pac. R. R. Co.*, 43 Mo. 105, 97 Am. Dec. 378, where Wagner, J., said: "The well-established and settled principle is, that to give a court jurisdiction, a real defendant, against whom the plaintiff is entitled to a judgment, must be found and served with process within the limits of the jurisdiction; or some property or chose in action of his must be found there upon which the court can proceed in rem. Every ⁴⁹⁹ attempt on the part of one nation or state, by its legislature, to grant jurisdiction to its courts over persons or property not within the territory, is regarded elsewhere as mere usurpation; and all judicial proceedings in virtue thereof are held utterly void. This proceeds upon the known maxim, '*Extra territorium jus dicenti impune non paretur*': Story on Conflict of Laws, sec. 539."

Again, in a case very much like the one at bar, the case of *Ellison v. Martin*, 53 Mo. 575: "A judgment on order of publication can only be given in proceedings in rem. A divorce suit is a proceeding in rem, and the res is the status of the plaintiff in relation to the defendant, to be acted on by the court. This relation being before the court in the person of the plaintiff, the court acts on it, and dissolves it by a judgment of divorce. But there was nothing before the court to act on in regard to alimony in this case.

Whether property can be brought before the court by describing it in the petition, and demanding a judgment in rem for alimony, is a question we are not now called upon to decide. This judgment was a general judgment in personam, and such judgments cannot be rendered in this state merely on publication of notice." In this case *Parmelia Martin* had sued her husband, *French Martin*, for divorce and alimony. The service was by publication. Judgment went for divorce and alimony, and under the judgment for alimony an execution was issued and the land sold to *Ellison*. This court declared both the judgment and deed void.

And later, *Sherwood, J.*, in the case of *Wilson v. St. Louis & S. F. R. R. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286, reviews all the authorities. There the process, for such Judge *Sherwood* holds it to be, was a notice and motion which was personally served in New York, in a proceeding in Missouri. In that case the learned judge said: "It will not be intended that the statute authorizes such a method of ⁵⁰⁰ service as that on which plaintiff relies; but if the statute did, in terms, require the personal service of such notice outside of the state on a nonresident in order to the rendition of a personal judgment, or its equivalent, on a money demand, such statute would be wholly void as to such extra-territorial service. It scarcely requires to be stated that this position is sustained by abundant authority; indeed, it seems to be questioned by none." On page 600, he further says: "But, for reasons already given, such service, though personal, was valueless, because made outside of our jurisdiction." And further on in the opinion, he says: "Any process, whether notice, writ or motion, which when served upon a party will have the effect to authorize an order or judgment in personam against him, upon the rendition of which a general execution may issue, leviable upon all the property in the state of which he may be possessed, cannot be regarded in any other light, so far as that party is concerned, than as an independent proceeding. Were such a party sued in another form of action, no doubt could be entertained of the necessity for notice, proper in form and substance, and served within the proper jurisdiction in order to its validity."

The St. Louis court of appeals, in a case like the one at bar, *Hedrix v. Hedrix*, 103 Mo. App. 40, 77 S. W. 495, says: "In the opinion of this court a true and correct interpretation of section 582 of the statutes does not contemplate nor attempt to authorize, nor does it purpose a personal judgment based upon service of process on defendant beyond the

boundaries of the state of Missouri. Whatever views at times may have prevailed in other states (2 Freeman on Judgments, 4th ed., sec. 567), the courts of Missouri early recognized the principle that the authority of a judicial tribunal was confined to the territorial limits of the state establishing it, and the line of decisions in this ⁵⁰¹ state recognizing that involuntary jurisdiction could be acquired of the person of the defendant only by service of process upon him within the limits of the state is unbroken: *Smith v. McCutchen*, 38 Mo. 415; *Wilson v. St. Louis & S. F. R. R. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286; *Latimer v. Union Pac. R. R. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Ellison v. Martin*, 53 Mo. 575. The case of *Ellison v. Martin*, 53 Mo. 575, differed from the case at bar only in the respect that service was had upon the defendant by publication in lieu of the method of personal service now substituted by statute, and resorted to herein. The judgment for alimony therein was held void, as was the title obtained by execution sale thereunder, and the court in turn holds that the legislature never contemplated that general judgments might be rendered merely on publication of notice without appearance of defendant. Alike on principle and authority the judgment for alimony in the divorce proceeding was void, the garnishment writ was rightly quashed, and the judgment of the lower court is affirmed."

So that we repeat that whatever may be the holdings elsewhere, our court places the acquisition of jurisdiction upon which a personal judgment can be rendered upon the fact of personal service of the party with process in this state. In other words, no process issued by the courts of this state and served upon the party defendant in another state can be the basis of a personal judgment. And this is true whether the party in fact is a citizen of this state or of another state. To be more explicit, when our process crosses the state line it loses its vitality as an instrument upon which a personal judgment can be entered. We are cited to the case of *Hamill v. Talbott*, 72 Mo. App. 22, and the same case, 81 Mo. App. 210, from the Kansas City court of appeals. There are some observations in these two opinions which are at variance with the views heretofore announced by this court and the ⁵⁰² St. Louis court of appeals: *Hedrix v. Hedrix*, 103 Mo. App. 40, 77 S. W. 495. To the extent that they announce a different view, they are and should be overruled. In the case at bar there is no sufficient evidence to show that Mills entered ap-

pearance or otherwise submitted to the jurisdiction of this court.

From this it follows that plaintiff's judgment for alimony and all proceedings thereafter as to the execution and sale were absolutely void, and she acquired no title to the land by reason thereof.

2. But it is urged that although the deed under the execution conveyed no title, yet plaintiff having been divorced for the fault of the husband, she had left her inchoate right of dower and that this status gave her the right to redeem. The trial court, without passing upon this particular question, held that plaintiff's right to redeem was not an issue under the pleadings. In this, we think the court was correct. The second paragraph of the replication attempted to state a cause of action to redeem from a mortgage. The petition was for the cancellation of two instruments on the ground of fraud, and the further ground that the mortgage had been fully paid. There were no allegations in the petition tending to indicate a purpose to redeem from a deed of trust sale. No such cause of action was stated therein.

Under the codes the nature of replies is thus stated in 18 Encyclopedia of Pleading and Practice, 690: "The office of a reply is to deny the facts alleged as defenses or to allege facts in avoidance of such defenses, and, while not abandoning the cause of action as originally pleaded, to fortify it by the new facts rendered necessary by the allegations of the answer." At page 707, the same authority says: "The plaintiff cannot introduce in his reply a cause of action different from that which he states in his complaint or petition; in other words, he cannot, after answer is made, abandon the cause of action set up in the complaint and make an ⁵⁰³ entirely new cause of action in the reply. Where the complaint is defective or does not contain facts sufficient to constitute a cause of action, a reply cannot cure it by supplying the necessary allegations, nor can it in any manner enlarge, in ordinary cases, the claim for relief alleged in the complaint."

And if the reply contain matter inconsistent with the complaint, it will be taken as surplusage. At page 708 of the same authority the rule is stated thus: "Where, in addition to new matter avoiding the answer and supporting the complaint, the reply contains surplus averments inconsistent with the complaint, the surplusage will be disregarded and is liable to be stricken out on motion."

These rules are supported by abundant authority.

In *Crawford v. Spencer*, 36 Mo. App. 78, Judge Thompson said: "A party must, under our system of pleading, recover upon the cause of action stated in his petition, and he cannot recover upon a cause of action stated in his reply. The provision of the statute above quoted was not, we think, intended to change the office of a reply, which is that of a denial or a confession and avoidance of matter set up in the answer."

Smith, P. J., in *Stepp v. Livingston*, 72 Mo. App. 175, said: "If it were disclosed by the record that the plaintiff recovered on a cause of action stated in his reply, but not in his petition, it would be our duty to reverse the judgment."

And to the same effect is the language of Johnson, J., in *Jackson v. Powell*, 110 Mo. App. 249, 84 S. W. 1132, wherein it is said: "We agree with appellant that a plaintiff must recover upon the allegations of his petition, not upon a cause of action pleaded for the first time in his reply."

This court, in *Hill v. Rich Hill C. Min. Co.*, 119 Mo. 9, 24 S. W. 223, uses this language: "But, further, as to the alleged ⁵⁰⁴ contract made in New York. Plaintiff based his right to relief upon it, but yet took a departure from it in his reply, set up an alleged estoppel, and was permitted, as shown by paragraph 9 of the decree, to recover thereon. But, of course, this was erroneous. The plaintiff had a right to relief, if at all, on his alleged contract in writing. Failing in that, he had no standing in court, because of the provisions of the statute of frauds: *Ringer v. Holtzelaw*, 112 Mo. 519, 20 S. W. 800. See, also, *Lanitz v. King*, 93 Mo. 513, 6 S. W. 263, and *Mohney v. Reed*, 40 Mo. App. 99, as to introducing matter in reply which belongs to the petition."

The trial court did not err in refusing to consider the question of redemption. It was a question raised for the first time in the reply, and is inconsistent with the allegations and prayer of the petition.

3. With these two questions eliminated from the record, but one question further need be mentioned, and that is the alleged fraud in the deed of trust and the foreclosure sale. The matter of the quitclaim deed can be entirely omitted, except in so far as it may have been a link in the circumstances leading up to the foreclosure sale. By this we mean that we need not discuss the validity of this deed on the ground urged that it cannot stand, because it conveyed with other lands the homestead, and the wife did not join therein. It would serve no good purpose to review all the testimony in detail as to this deed of trust. That there was no fraud in

the execution of the deed of trust stands practically admitted. That there was a right to foreclose is not denied. The evidence shows that Landis bought these notes for Lahrman, paying for them at the time himself, but shortly thereafter was repaid by Lahrman. Lahrman knew nothing of Mills and Ekin. It appears that Ekin held notes of Mills to the extent of fifteen hundred dollars, and was about to attach the Mills lands, when Mills made the quitclaim deed in question. Landis ⁵⁰⁵ bought the land in for Ekin, thinking that he would save his client some money. Ekin was a client of Landis. Without going further into the evidence, which we have examined thoroughly, we are satisfied that the finding of the court nisi upon this question is well sustained. It is the duty of a party alleging fraud to show it. These conclusions make it unnecessary to discuss other questions in the briefs.

It follows that the judgment should be and is affirmed.

All concur, except Valliant, P. J., absent.

As Against a Nonresident Who has not been Served with Process in the state, and who does not appear in the action, the court cannot decree payment of alimony. While a divorce ex parte may be obtained in constructive service, alimony cannot be decreed unless the defendant appears or has been served with process within the jurisdiction of the court: Smith v. Smith, 74 Vt. 20, 93 Am. St. Rep. 882, and cases cited in the cross-reference note thereto; Proctor v. Proctor, 215 Ill. 275, 106 Am. St. Rep. 168.

STATE v. ROSENBERGER.

[212 Mo. 648, 111 S. W. 509.]

SALE—Delivery of Goods to a Carrier.—The delivery of goods by a vendor to a carrier is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu. (p. 582.)

SALE of Goods Shipped C. O. D., Where Deemed to have been Made.—If one in the county of his residence, without solicitation, orders goods of a seller doing business in another county, and the latter, in response to the order, ships the goods C. O. D. to the purchaser, the sale takes place in the county whence the goods are so shipped. (p. 584.)

INTOXICATING LIQUORS—Local Option Law—Sale of Goods C. O. D.—If a person living in a county wherein the local option law is in force orders liquors shipped to him C. O. D. from another county, and they are shipped accordingly, the sale takes place in the county whence the shipment was made, and therefore the seller is not answerable to a prosecution for selling the goods in the county where they are received and paid for by the purchaser. (p. 588.)

Clyde Taylor, E. H. Gamble, J. E. Haymes and J. C. Rosenberger, for the appellant.

Herbert S. Hadley, attorney general, and N. T. Gentry, assistant attorney general, for the state.

652 BURGESS, J. At the September term, 1907, of the circuit court of Webster county, under an information filed by the prosecuting attorney of said county, charging the defendant with selling one gallon of whisky in said county, on the second day of February, 1907, to one Ira Morton, in violation of the local option law in full force and effect in said county at that time, the defendant was found guilty and his punishment assessed at a fine of three hundred dollars. Defendant **653** appealed in due course, after filing unsuccessful motion for new trial and in arrest of judgment.

The evidence tended to prove that the defendant was a wholesale and retail liquor dealer, with office and place of business in Kansas City, Jackson county, Missouri, and did business under the trade name of "Penwood Company." Ira Morton, a resident of Marshfield, in Webster county, Missouri, sometime in January, 1907, ordered a gallon of whisky from said Penwood Company, and on February 2, 1907, the whisky was received by him from the agent of the Wells-Fargo Express Company, at the office of said company in Marshfield. The whisky was sent in a package marked C. O. D., and Morton paid said express agent the price thereof, three dollars and fifty cents, at the time of delivery, and the express agent sent the money to defendant's office at Kansas City, where it was received. Morton testified that he mailed the order to defendant of his own motion, without any solicitation on the part of defendant, or anyone on his behalf, and solely because he wanted the liquor for his own use. The express company received the package containing the whisky from one of the defendant's employés at Kansas City, and shipped the same to Morton, at Marshfield. The evidence further tended to prove that the transaction was carried out by defendant's clerks, without his knowledge, while he was at Hot Springs, Arkansas; that while he had been making similar sales and shipments, on C. O. D. terms, to parties in other states, he had no knowledge that his clerks were making for him any such shipments to any local option county in Missouri; that he had never solicited any business of that kind in Missouri either by agent or through the mails, and that up until the time of his arrest he was unaware that

any such shipments had been made, nor had he authorized any.

The state introduced evidence tending to prove ⁶⁵⁴ that at the time of the alleged sale of liquor, and prior thereto, the local option law was in force in Webster county.

The important question presented by this appeal is whether the place of sale of the liquor which the defendant is charged with selling unlawfully was in Webster county or Jackson county, Missouri. Defendant insists that the sale was at Kansas City, Jackson county, where he was authorized by law to sell liquor, and that he was guilty of no offense in accepting and filling an order from a party in a local option county requesting the shipment to him, C. O. D., of a specified amount of liquor, to a point in said local option county of Webster.

As a general rule, the delivery of goods by the vendor to the carrier, when the goods are to be sent that way, is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu: 2 Kent's Commentaries, 490; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; *Kerwin v. Doran*, 29 Mo. App. 397; *Garbracht v. Commonwealth*, 96 Pa. 449, 42 Am. Rep. 550; *Dunn v. State*, 82 Ga. 27, 3 L. R. A. 199, 8 S. E. 806. And this is true although the purchase money is afterward collected by the vendor or agent at the place from which the goods are shipped: *State v. Hughes*, 22 W. Va. 743.

But when the goods are shipped upon order C. O. D., as in the case at bar, there is much conflict in the authorities as to where and when the title passes—that is, whether at the point of shipment or at the point of destination, upon payment of the purchase price. In *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. Rep. 182, 49 L. ed. 417, it is said: "True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding that under such a shipment the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier ⁶⁵⁵ for transportation; others, deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price and delivery to the consignee at the point of destination."

Among the authorities which hold that a sale C. O. D. is not complete until delivery, acceptance and payment of the purchase price by the person ordering the goods may be cited: *United States v. Shriver*, 23 Fed. 134; *United States v. Cline*,

26 Fed. 515; *State v. United States Express Co.*, 70 Iowa, 271, 30 N. W. 568; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586; *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706, 9 Atl. 829; *United States v. Chevallier*, 107 Fed. 434, 46 C. C. A. 402; *Baker v. Bourcicault*, 1 Daly (N. Y.), 23; *Crabb v. State*, 88 Ga. 584, 15 S. E. 455; *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; *State v. Intoxicating Liquor*, 58 Vt. 140, 2 Atl. 586; *Wagner v. Hallack*, 3 Colo. 176; *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. Rep. 693, 36 L. ed. 450; *Town of Canton v. McDaniel*, 188 Mo. 207, 86 S. W. 1092. But in 17 American and English Encyclopedia of Law, second edition, 301, it is said: "At least so far as cases dealing with intoxicating liquors are concerned, however, the weight of authority is against the foregoing view, and it is generally held that where intoxicating liquors are ordered to be shipped C. O. D., the sale is completed when the liquor is delivered to the carrier"; citing *Pilgreen v. State*, 71 Ala. 368; *Hunter v. State*, 55 Ark. 357, 18 S. W. 374; *Berger v. State*, 50 Ark. 20, 6 S. W. 15; *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437; *Commonwealth v. Russell*, 11 Ky. Law Rep. 576; *Commonwealth v. Kearns*, 15 Ky. Law Rep. 332; *Current v. Commonwealth*, 11 Ky. Law Rep. 764; *James v. Commonwealth*, 102 Ky. 108, 42 S. W. 1107; *State v. Intoxicating Liquor*, 73 Me. 278; *Commonwealth v. Fleming*, 130 Pa. 138, 17 Am. St. Rep. 763, 18 Atl. 622, 5 L. R. A. 470; *State v. Flanagan*, 38 W. Va. 53, 45 Am. St. Rep. 836, 17 S. E. 792, 22 L. R. A. 430; *State v. Hughes*, 22 W. Va. 743. The same doctrine is announced by the courts of Texas and other states.

In *Commonwealth v. Fleming*, 130 Pa. 138, 17 Am. St. Rep. 763, 18 Atl. 622, 5 L. R. A. 470, it is decided that the term "C. O. D.," placed upon an express package, means that the carrier is thereby directed to collect ⁶⁵⁶ the price of the goods at the time of delivering them to the consignee, and to withhold such delivery until payment is made, and is authorized, upon receipt of such payment, to discharge the purchaser of the goods from liability for their price; that "when, in pursuance of an order for goods, directed by the purchaser to be shipped to him C. O. D., the vendor has delivered them to a common carrier, with instructions to collect their prices from the consignee before delivering them to him, the transaction as a sale is complete so far as the vendor is concerned. In such case, while the title to the goods does not pass to the purchaser if they be not delivered to him by the carrier, that

circumstance does not affect the character of the transaction as a completed contract of sale; the seller's right to recover the price, if the purchaser refuses to take the goods, is as complete as if he had taken them without payment." In that case the facts were that a liquor dealer in a certain county of Pennsylvania received an order for liquor to be shipped to the purchaser in another county of said state, C. O. D., and in pursuance of the order the dealer delivered the liquor to a common carrier in the county where the dealer resided for shipment to the vendee, at the latter's expense, C. O. D. It was held that the delivery to the carrier was a delivery to the purchaser in such a sense as to complete the sale in the county from which the shipment was made. The same doctrine is announced and upheld by a long line of decisions of the courts of Texas; also in *State v. Flanagan*, 38 W. Va. 53, 45 Am. St. Rep. 836, 17 S. E. 792, 22 L. R. A. 430, *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. Rep. 182, 49 L. ed. 417, and *Adams Express Co. v. Kentucky*, 206 U. S. 138, 27 Sup. Ct. Rep. 608, 51 L. ed. 987.

What was said by this court upon this question in *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406, 22 S. W. 363, and in *Canton v. McDaniel*, 188 Mo. 207, 86 S. W. 1092, was unnecessary to a decision of either of those cases, because the shipments were not C. O. D., and therefore what was said respecting such shipments ⁶⁵⁷ in those cases may properly be regarded as obiter; and while the dicta are supported by many high authorities, we are satisfied that the weight of authority is contrary to what is announced in those cases as the law. The great mercantile interests of the country seem to demand that the law by which such interests are governed should be uniform, and we are of opinion that, so far as concerns the title to goods delivered to a carrier for shipment, the same rule applies to C. O. D. shipments as to those in ordinary cases, in the absence of any express contract to the contrary between the shipper and the consignee.

There is no question that Morton ordered the liquor in question for his own use, C. O. D., and when it was so shipped, the sale became complete at the place of shipment.

The defendant next insists that the transaction shown in evidence constituted interstate commerce within the meaning of section 8, article 1, of the constitution of the United States, for the reason that the route of the shipment was partly through the state of Kansas, and that it is and was beyond the power of the state to restrict, prohibit or interfere therewith. Upon the other hand, the state contends that the ship-

ment in question was not an interstate shipment—that is, a shipment from one state to another—and that whether it was so or not is immaterial in this case, which is a prosecution for the unlawful sale of liquor in a county which had theretofore adopted the local option law. The question was properly presented by instructions asked by the defendant, and refused by the court, to which action of the court the defendant saved an exception.

Conceding, for the sake of argument, that the shipment was interstate, as contended by defendant, we cannot see how or in what way such fact is available ⁶⁵⁸ to him as a defense in this case. This is simply a prosecution for the alleged unlawful sale of liquor in Webster county, Missouri, and whether its transportation into the county was a matter of interstate commerce or otherwise, as the liquor was sold in Jackson county, Missouri, is not material to any issue in the case.

Our conclusion is that the sale of the liquor was completed when shipped at Kansas City, Jackson county, Missouri, and not at Webster county, Missouri, as charged in the information.

The judgment should be reversed and the defendant discharged. It is so ordered.

All concur, except Woodson, J., who concurs in what is said with respect to the place of sale of the liquor, but dissents from the view expressed on the last proposition, and Valliant, J., who is absent.

The Place of an Unlawful Sale of Intoxicating Liquor which is sent C. O. D. is discussed in *Golightly v. State*, 49 Tex. Cr. 44, 122 Am. St. Rep. 779; *State v. Flanagan*, 38 W. Va. 53, 45 Am. St. Rep. 836; *State v. Wingfield*, 115 Mo. 428, 37 Am. St. Rep. 406; *Commonwealth v. Fleming*, 130 Pa. 138, 17 Am. St. Rep. 763. If whisky is sent by express from one state to another to a person who knows nothing of it until it arrives at its destination, when others desiring such liquor give him the money to pay the express charges, and he so uses the money and turns the whisky over to them, he is guilty of making a sale of intoxicating liquor in violation of a local option law: *Dunn v. State*, 48 Tex. Cr. 107, 122 Am. St. Rep. 734, and see cases cited in the cross-reference note thereto.

A Statute Making the Sale of Intoxicating Liquors Unlawful within a certain county and declaring that the place of the delivery of the liquors within such county shall be the place of sale is constitutional and valid as a police regulation: State v. Herring, 145 N. C. 418, 122 Am. St. Rep. 461.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

STATE v. WITHNELL.

[78 Neb. 33, 110 N. W. 680.]

MUNICIPAL CORPORATIONS—**Building Regulations.**—A municipal ordinance regulating the construction of buildings within the city, and providing that it shall not be lawful to erect a gas tank or holder within the city without the written consent of all of the property owners within a radius of one thousand feet from the site of such tank or reservoir is unconstitutional and void. (pp. 589, 590.)

G. E. Pritchett and J. C. Cowin, for the appellant.

H. E. Burnam and I. J. Dunn, for the appellee.

³³ AMES, C. The charter of the city of Omaha, besides conferring upon the mayor and council of the city the usual powers to abate nuisances and to provide, by ordinance, police regulations for the good government and the preservation of the general welfare, health, safety and security of the city and its inhabitants, contains the following specific grant of authority: The mayor and council may "regulate or prohibit the transportation and keeping of gunpowder, oils and other combustible and explosive articles." They are also given the usual powers to prescribe fire limits and to regulate the erection of all buildings within the corporate limits. In the supposed exercise, more particularly, of the last two mentioned powers, the mayor and council enacted an ordinance containing two sections numbered, respectively, 96 and 97, of which the following is a copy:

"Section ninety-six (96). It is hereby declared unlawful to erect any tanks, or to build any storage reservoirs, ³⁴ for the purpose of storing either illuminating or fuel gas, or to

remodel any existing tank, reservoir, building or structure for such purpose not actually in use for the same at the time of the passage of this ordinance at any place in the city of Omaha, except upon the conditions in section ninety-seven (97) of this chapter prescribed.

“Section ninety-seven (97). Before constructing any building or structure to be used for the manufacture of illuminating or fuel gas, and before erecting any tanks, storage reservoir or other receptacles for the purpose of storing either illuminating or fuel gas, and before remodeling or using any building, structure, tanks or reservoir for such purpose, the party or parties desiring such privilege shall first obtain the written consent of all the property owners within a radius of one thousand feet of the proposed building, structure, tank or reservoir to be used for such purpose, and file such permission with the building inspector of the city of Omaha and comply with all other ordinances, rules and regulations relating to buildings.”

The Omaha Gas Company is a corporation of this state having its principal place of business at Omaha, and authorized and required by law and by municipal ordinance to construct, maintain and operate gasworks in said city, and to manufacture and transmit and distribute, through mains and pipes in and under the streets and public grounds, illuminating and fuel gas for the use of the public and individuals, and for that purpose has erected, and for several years last past has maintained, a gas manufacturing plant upon grounds belonging to it in said city. In 1906 the gas company, for the purpose of increasing its capacity to a degree requisite to supply the needs of a rapidly growing community, it being the only institution of its kind in the city, applied to the building inspector for a permit to erect and maintain upon its grounds and in connection with its existing works a reservoir or “gas-holder” capable of storing one million two hundred thousand cubic feet of gas. The application complies with ³⁵ all municipal regulations with reference to the subject contained in the ordinance mentioned elsewhere, except the requirement of the above-mentioned section 97, of the written consent of all property owners within a radius of one thousand feet of the site of the proposed structure. Because of such omission, and for that reason alone, the inspector refused to honor the application. This is an application to the district court for a writ of mandamus compelling the issuance of the permit. The writ was denied, and the relator appeals. It thus appears that the sole question in contro-

versy is the validity of that provision of section 97 requiring a written consent of property owners.

The ordinance does not purport to be, and was not intended to be, prohibitory, but to be regulatory only; nor is it sought to declare the manufacture and distribution of gas, or the maintenance and operation of works therefor, or the storage of gas in connection therewith, within the city, by the relator or others, a nuisance *per se*; nor is it disputed that the conduct of such a business under proper regulations is a legitimate and, under existing conditions, a necessary enterprise, indispensable to the health, happiness and prosperity of the modern city and its inhabitants, or, as is said in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. Rep. 252, 29 L. ed. 516, "is a business of a public nature," and is "one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety." The ultimate inquiry is, therefore, whether the provision in question is a reasonable exercise of the regulatory powers of the mayor and council. Counsel for the relator contend that it is not such for two reasons: First, because it is, or in practical operation may readily become, prohibitory, on account of the difficulty or impossibility of procuring the unanimous consent of all the owners of property in any locality of the city; and, second, because it assumes to confer upon individual property owners within the prescribed ³⁶ radii absolute and arbitrary powers, whose exercise is dependent solely upon caprice, and which have no necessary connection with the public safety, health or morals, and are of such a nature that the governing body itself could not safely or lawfully be intrusted with them. These objections appear to us to have great force. As respects the former of them, the city attorney urges that, although it is true, as his adversary contends, that it may be impossible to procure the requisite consent of property owners within any assignable district in the city, and therefore the regulation may be in practical effect prohibitory, still that result would amount to no more than an indirect exercise of the power of prohibition which is expressly granted by the charter. But this reasoning seems to us to be fallacious, because in such a case the prohibition, if and when it should take effect in any particular case or cases, would do so, not in obedience to the will of the responsible governing body of the city, but at the instance or because of the inaction of an individual or of individuals who might be influenced by caprice or malice or

favoritism or ignorance, or access to whom on account of their absence or other cause might be impossible. And the grant would in any case be made or withheld, not by the mayor and council, but by some one or more of the property owners. But it is urged that whether or not the proposed work or any like structure would be a nuisance in any particular neighborhood or district of the city would be dependent upon its immediate surroundings and the purposes for which property in the vicinity should be in use, and that it would be reasonable to permit the property owners to determine whether, or to what extent, they would submit to annoyances and to danger to their health and persons, that is, whether they would waive objection to a public nuisance for the sake of promoting or permitting an enterprise otherwise beneficial and desirable. This argument we think proves too much. The whole theory of police regulation is that people in their individual or private capacities ³⁷ cannot be, and ought not to be, intrusted with the guardianship of their own health, safety and social well-being. Men, women or children are not permitted, even voluntarily, to expose themselves to needless perils, nor are property owners, merely because they are such, intrusted with the power to expose others to danger. It is clearly the duty of the mayor and the council to devise, and to prescribe by ordinance, general rules by which it may be determined, by inspection of a given district or neighborhood, whether it is one within which a proposed structure or business may lawfully be erected or maintained. Such rules are necessary, equally for the protection of those who are, or are contemplating becoming, inhabitants of a given locality, or are engaged in business therein, as for persons seeking to enter upon dangerous or annoying enterprises, and for women and children, lessees and employés, and other classes of the community, as for owners of real estate. Under the ordinance in question it, indeed, might well happen that the ultimate decision would be made by one residing at the antipodes, and not a citizen of the city or even of the nation. Whether or not it is competent for the mayor and council absolutely to prohibit the maintenance of gasworks within the city limits, it is not necessary and it is not intended now to decide; but what we do say is that they cannot shift their responsibility, either of prohibition or of regulation, upon any class or classes of the community, or, as it might happen, upon nonresidents, and it is this latter proposition that the argument of counsel controverts.

We are not without judicial precedent of the highest character for our conclusion, and it has been held not only that the governing body cannot commit the exercise of its legislative discretion to property owners or other private persons, but that it cannot intrust it to the caprice of any of the officers of the city, and even that it cannot reserve to itself, in its administrative rather than its legislative capacity, an absolute and despotic power to grant or refuse permits of the character in question, ³⁸ in particular cases and in the absence of, or without reference to, prescribed and duly enacted rules and regulations. Thus, in *Mayor and City Council of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, an ordinance which provided that no steam sawmill or machinery, or any steam engine for any purpose, should be erected in the city without first obtaining the consent of the mayor and council was for the reason stated void. And in *City of Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621, an attempted delegation of power to a building inspector to grant or refuse permits to erect, alter or repair buildings accordingly as he should be "satisfied" that the proposed structure would or would not be in compliance with the requirements of a certain regulatory ordinance was held to be void, the court saying that "the right of a person to use and improve his property as he may deem proper, consistent with law, is a constitutional right, of which he cannot be deprived at the mere will and pleasure of a city council, or of any officer appointed by it." In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, an ordinance purporting to make unlawful the "carrying on a laundry within the corporate limits of the city and county of San Francisco without first having obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," was held to be violative of the constitution of the United States and void. Mr. Justice Matthews, speaking for the court, in the opinion, said: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." And in *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, an ordinance providing that no livery-stable should be located in any block of ground in the city without the written consent of the owners of one-half the ground of said block was held to be void. In *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St.

Rep. 218, 31 Pac. 245, 24 L. R. A. 195, an ordinance providing that a license to carry on ³⁹ a laundry business in certain blocks should not be granted without the written permission of the village board of trustees, and permission should not be given without the written consent of the owners of certain property, was held to be void, the court saying: "It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in all civilized communities, cannot be thus made to rest upon the caprice of a majority, or any number, of those owning property surrounding that which he desires to use." A great number of other decisions of like import might be cited, but we forbear. The city attorney cites and quotes at length from a single authority to the contrary effect, to wit: *City of Chicago v. Stratton*, 162 Ill. 494, 52 Am. St. Rep. 325, 44 N. E. 853, 35 L. R. A. 84, in which an ordinance is upheld that prohibits the maintenance of a livery-stable in any block in which two-thirds of the buildings are devoted exclusively to residence purposes without the written consent of the owners of a majority of the lots in such block. We are unable to reconcile this decision with principle or with other decisions by the same court, or with *City of St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, which the opinion cites and approves. But the decision does not now call for careful criticism, because the distinction which it makes, whether valid or not, is fatal to the ordinance in controversy in this action. The latter is infected with the identical virus which the Illinois as well as the Missouri court found in the St. Louis ordinance, and it is immaterial whether the same or an equally fatal malady also afflicted the Chicago enactment.

We are of opinion that the ninety-seventh section of the Omaha ordinance, in so far as it requires the written consent of the property owners, is void, and recommend that the judgment of the district court be reversed.

Oldham and Epperson, CC., concur.

By the COURT. For the reasons stated in the foregoing ⁴⁰ opinion, it is ordered that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with this opinion.

Municipal Corporation has No Power to Make the Right of a Person to Follow His Business at any place he may select dependent upon the will of any number of citizens or property owners within its limits.

This doctrine has been applied in the case of a laundry business: *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218; and also in the case of a slaughter-house: *St. Louis v. Howard*, 119 Mo. 41, 41 Am. St. Rep. 630. In *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, however, it is held that an ordinance of a city, which has statutory power to regulate the location of livery-stables in its midst, making it unlawful to locate, build, or keep a livery-stable in any block in which two-thirds of the buildings are residences, unless the owners of a majority of the lots consent in writing, is not a delegation of legislative power to the property owners of such block, but is simply a prohibition against the location of such stables, which is avoided by the happening of the contingency provided for, to wit, the consent of a majority of the lot owners in the block: See to like effect, *Spokane v. Camp*, 50 Wash. 554, post, p. 913.

FIRST NATIONAL BANK v. PILGER.

[78 Neb. 168, 110 N. W. 704.]

REMAINDERMEN—Right to Maintain Action to Quiet Title.—An action to quiet title may be maintained by a remainderman during the continuance of the particular estate. (p. 594.)

REMAINDERMEN—Right to Maintain Action to Quiet Title—Limitations of Actions.—In an action to quiet title, by a remainderman during the continuance of the particular estate, the statute of limitations commences to run at the time the adverse claim arises and attaches. (p. 594.)

R. J. Nightingale, for the appellant.

J. C. Broady, Giddings & Winegar and T. S. Nightingale, for the appellee.

169 JACKSON, C. On July 17, 1889, Abel Gates died intestate in Sherman county, leaving a widow, Jane A. Gates, and five children, four of whom were adults. The widow and five children were his sole heirs. At the time of his death he owned and occupied with his wife, as a family homestead, one hundred and sixty acres of land. On February 8, 1890, letters of administration were issued by the county court of Sherman county for the purpose of administering the estate of the deceased, and on that day the county judge commissioned the county treasurer, county clerk, and another freeholder of the county to appraise the homestead. On the 14th of the same month the appraisers reported, finding the value of the homestead to be nine hundred dollars. The encumbrance consisted of a mortgage to the Lombard Investment Company of six hundred dollars. Jane A. Gates, the widow, on the day the report was made, filed a written acceptance of

the homestead, subject to the encumbrance. The estate appears to have been administered on the theory that the widow took absolute title to the homestead under the provisions of chapter 57, Laws of 1889. On September 5, 1891, the widow conveyed the premises by warranty deed to M. D. Green, and through mesne conveyances by warranty deed the title finally vested in John Horn on May 15, 1894, who gave a purchase price mortgage to his grantor. The conveyances were all recorded at about the date of their execution. The Lombard Investment Company mortgage was paid and released as a result of the transaction with Horn. On October 30, 1899, Horn and wife conveyed the premises by warranty deed to Theodore L. Pilger and John ¹⁷⁰ Kahl, subject to the Horn mortgage, which had been assigned to the plaintiff herein. On April 16, 1902, the Horn mortgage being unpaid, plaintiff proceeded in the district court to foreclose the same, and such proceedings were had as resulted in a decree and sale of the premises to the plaintiff under the decree, confirmation of the sale, and the execution and delivery of a sheriff's deed. Thereafter Augusta E. Pilger, wife of Theodore L. Pilger, procured from each of the five children of Abel Gates, all of whom were then of age, quitclaim deeds, paying each the sum of ten dollars as a consideration for the conveyance. These deeds were placed of record, and thereupon, on January 3, 1905, the plaintiff, being in possession, commenced this action in the district court to quiet its title as against these conveyances. The defendant filed a cross-bill asking similar relief. In the trial court the finding was for the plaintiff as to an undivided four-fifths interest in the land, and for the defendant as to the remainder; the finding being that the plaintiff had acquired title to four-fifths interest by adverse possession; that by reason of the fact that one of the heirs of Abel Gates was a minor the statute had not run as against his share, and the title to the four-fifths interest was quieted in the plaintiff, and the remainder in the defendant, Augusta Pilger. The defendant appeals.

The questions presented by the appeal are the rights of the plaintiff under the provisions of chapter 57, Laws of 1889, as affected by the legalizing act found in chapter 32, Laws of 1895; and, second, whether the statute of limitations has run against the cross-bill of the defendant. Jane A. Gates, the widow, died only a few months prior to the commencement of the foreclosure proceedings under which the plaintiff acquired title to the land, and the appellee, claiming title through the remaindermen, the children of Abel Gates, insists

that no action on behalf of the remaindermen or their grantees could be maintained to quiet their title in the real estate until after the death of the widow, who held the life estate. She bases this contention ¹⁷¹ upon the provisions of section 61, chapter 73, Compiled Statutes of 1905. Three sections of that chapter should be noticed in connection with this claim; they are sections 57, 59 and 61, as follows:

Section 57. "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in the actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate."

Section 59. "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act."

Section 61. "The provisions of this act shall not in any respect apply to the settlement, partition, or division of real estate among the heirs of a decedent, where the same is provided for by the intestate laws of this state."

On the last section appellant bases her contention. We do not think that section 61 has any application to the facts involved in this action; in fact, the question seems no longer to be an open one. In *Hall v. Hooper*, 47 Neb. 111, 66 N. W. 33, it was held that any person claiming title to property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting the title, citing *Foree v. Stubbs*, 41 Neb. 271, 59 N. W. 798; and, further, that such an action might be maintained by the remainderman during the continuance of the particular estate. The recording of the warranty deed from Jane A. Gates, the widow, was notice to the world that the grantee claimed an interest in the land such as the deed purported to convey: *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869. It is clear that an action to quiet the title might have been maintained by the children of Abel Gates immediately after the recording of the first warranty deed by the widow on September 5, 1891, and that the statute of limitations commenced to run against such an action from that date. The purpose ¹⁷² of the statute is well stated in *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869, where a similar statute is in force. It is there said: "Without such statutory authority, a reversioner out of possession, and with¹

no right thereto, could not maintain an action against one in possession as a life tenant, and it was undoubtedly the thought of the legislature that the welfare of those interested as well as of the public in general would be best subserved by providing a means whereby apprehended litigation affecting the use and enjoyment of real property might be at once settled." This form of action must, of course, be distinguished from one where the right of possession is involved, and is not affected by the rule that an action for possession cannot be maintained by the remainderman until the life estate is terminated by the death of the life tenant. It follows that the cause of action set out in the cross-bill of the appellant was barred by the statute of limitations at the time of the commencement of the action, at least to the extent that it was so held in the trial court, and that she has obtained all of the relief to which she is in equity entitled. This conclusion renders a discussion of the other question unnecessary.

It is recommended that the judgment of the district court be affirmed.

Duffie and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

Remaindermen Out of Possession, and While the Life Tenant is Alive, are authorized by the statutes of some states to bring an action to determine and quiet their title, but they must do so within the statutory period: *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276.

BELL v. ROCHEFORD.

[78 Neb. 304, 110 N. W. 646, 113 N. W. 157.]

MASTER AND SERVANT—Injury to Subordinate Through Negligence of Superior Servant.—If one servant is placed in a position of subordination, and subject to the orders and control of another servant of a common master, and the subordinate servant without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the injured servant against the master. (p. 599.)

MASTER AND SERVANT—Liability for Injury.—Defects in scaffolds, forms, and temporary structures, not forming part of the building, and serving only as aids in construction, are not defects of the structure due to its unfinished state. (p. 600.)

NEGLIGENCE—Proximate Cause.—The proximate cause is the dominant cause, not the one which is incidental to that cause or its mere instrument, though the latter may be nearest in time to the inquiry. (p. 601.)

Greene, Breckenridge, Matters & Kinsler, for the appellants.

Weaver & Giller and J. M. Macfarland, for the appellee.

305 JACKSON, C. The plaintiff had judgment for damages on account of an injury sustained while in the employ of the defendants. The defendants appeal.

The facts concerning the injury are not disputed. The defendants were independent contractors engaged in the erection of a power-house for the Omaha Street Railway Company, and were, at the time of the accident, putting in a concrete floor in the second story. That portion of the floor at the point where the accident occurred was above a room nine by forty feet, with a ten-foot ceiling. To support the concrete steel "I" beams were placed crosswise of the room at a distance of eight or nine feet apart. They rested at either end upon a concrete wall, in which openings were left for that purpose. The steel beams were from four to six inches wide at the base and top, ten inches deep, and weighed one hundred and fifty pounds. The pockets into which the ends were placed were about ten inches wide. For the purpose of holding the concrete in position until it hardened, wooden forms were built so that they might be removed after the concrete became self-supporting. These forms were constructed by placing a two by twelve inch plank lengthwise under each "I" beam, and were held in place by means of four by four inch pieces extending from the lower floor to the under side of the plank, leaving a margin of from three to four inches on either side of the steel. The space between two "I" beams was called a section. Other planks were then placed crosswise of the section, the ends resting upon the edge of the two by twelve inch pieces. The forms were being
306 constructed under the supervision of a carpenter, named Wooley, and by a carpenter, named Turner. The plaintiff was a common laborer engaged in wheeling concrete, handling lumber and other material. He assisted in knocking down the wooden forms after the concrete was hardened, and was subject to direction, both from Wooley and Turner, when his assistance was desired in bringing material and placing timbers in the construction of the forms. The first service performed by the masons in laying the concrete floor was to secure the "I" beams at either end by filling the pockets

around the steel with concrete. This had not been done at the time of the injury.

On the day of the accident the plaintiff was engaged, during the forenoon and that portion of the afternoon up to the time the accident occurred, in another part of the building. Turner was employed constructing the forms at the place described. He commenced at the west end and was working east. He had completed three or four forms and was working, perhaps, on the fifth. The two by twelve at the east side of this form had been placed in position, and was supported by a four by four placed in the center of each end of the plank, leaving a projection of four inches of plank on each side of the support. Other planks had been laid crosswise to complete the bed of the form, with the exception of a single plank, when Turner left his work and went to the tool-house for tobacco. Wooley called to the plaintiff to come and assist him in putting this last plank in place. Wooley was at the west side of the form and the plaintiff at the east. The plank selected was a little wide for the opening, and in order to crowd it into place one edge of this plank and the edge of an adjoining plank were raised, placed together in a V-shape, and the plaintiff, in a stooping position, was attempting to crowd it into place. His weight and the pressure caused the two by twelve on the side where he was at work to tip, the steel beam turned over, and the form of that entire section fell with the plaintiff into the basement ³⁰⁷ below, resulting in the injury on account of which damages are claimed. The appeal involves the sufficiency of the evidence to sustain the verdict and judgment, and the giving of an instruction by the court on its own motion.

It is said that the accident was the result of a danger incident to the employment and was voluntarily assumed by the plaintiff; that it resulted from the incomplete condition of the form, and, if the result of a negligent act, it was the negligence of a fellow-servant. It appears that when the forms were completed, ready to bear the weight of the concrete, the two by twelve planks forming the base of the bed were supported each by four or five four by four inch pieces, according to the weight to be carried, and that when the forms were all completed each extension of the plank beyond the base of the beam would carry an equal weight; that the dangerous condition of the form was open and obvious to all persons alike, and that the plaintiff, knowing of this condition, voluntarily assumed the risk of danger when he entered upon the form. It is true that to any person who knew the

condition of the substructure the danger was obvious. It required no unusual power of observation and skill to determine that fact; but the plaintiff did not know the condition of the substructure. He was at work on the floor then being laid. The bed of the form was all in place with the exception of a six-inch plank. The substructure was hidden from his view. When he entered upon the superstructure at the command of Wooley, he would be justified in believing that the substructure was completed so that the element of obvious danger did not exist. It cannot be said that the accident was the result of the negligence of a fellow-servant.

It is true that one of the defendants, the only witness called on behalf of the defense, testified that either he or his partner were present all the time during the construction of the building, and personally superintended the work, and that they had no foreman; that they sometimes ³⁰⁸ sent directions to laborers through other workmen. It appears, however, without contradiction, that when Turner went into the employ of the defendants he received his instructions from Wooley. The plaintiff and other laborers testified to having been directed and controlled in their work by Wooley.

Where one servant is placed in a position of subordination to, and subject to the orders and control of, another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant, while acting in the common service, an action lies in favor of the inferior servant so injured against the master. The relation does not arise out of the fact that Wooley was the higher grade workman, but because of the fact that he was vested with authority to and did control and direct the labor of the plaintiff. To a somewhat less extent this was also true of Turner, who disclosed by his own evidence that, when he desired the assistance of a common laborer, he called and directed him at his pleasure. The mischief of the case lies not alone in the incomplete condition of the form, but is rather due to the fact that the plaintiff was directed to enter upon it in its unsafe condition by his superior. The case is not to be tested by the rule that prevails where workmen are provided with material to erect a trestle upon which they are to work. Had the plaintiff himself constructed the form after being provided with suitable material for that purpose, or had he directed or controlled its construction, it may be conceded that he could not recover; but he was charged with no such duty. On the contrary, the defendants, through Wooley,

assumed the supervision and control of its construction, and were bound to exercise ordinary care and make it reasonably safe and secure for those who might be called upon to use it.

The instruction complained of is as follows: "You are instructed that it is the duty of the master to use ordinary care to provide his servant with a reasonably safe working ³⁰⁹ place and with reasonably safe appliances with which to work; but an employé assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objections as to the hazards. Where, however, the servant, in obedience to the requirements of his master, incurs the risk of appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident, provided such accident results directly from the negligence of the master." The objections to the instruction may, perhaps, be best stated in the language of counsel: "When we consider that the form or structure collapsed under the weight and pressure put upon it because of its unfinished condition; or, in other words, that because of the particular stage of the work it was too weak to sustain the weight, and not through any defect either in the material or the construction, it is obvious that an instruction which assumes that the master was furnishing the form or structure for the workmen to use, and therefore was bound to exercise reasonable care for their safety while using it, is not only inapplicable to the circumstances of the case, but is entirely misleading and confusing." We do not regard the instruction as being open to the criticism made, especially in view of the conclusion of fact already reached.

We find no error in the record, and recommend that the judgment be affirmed.

Duffie and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

³¹⁰ In response to a petition for a rehearing the following opinion was given by

CALKINS, C. This cause was submitted upon an oral argument of a motion for rehearing. The former opinion by

Jackson, C., ante, p. 596, contains a statement of facts, which is accepted by counsel for both parties as sufficient.

1. It is urged that the infirmity which made the section unsafe at the moment it fell was due solely to its unfinished state, and therefore, that it was an inevitable risk of construction which the plaintiff assumed. This argument was met in the former opinion, and we are satisfied with the reasons there given. It is, however, proper to say that the case of *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433, 28 L. ed. 440, cited by defendant in support of his argument, presents facts essentially different from those we are now considering. In that case, the timber which gave way was not a scaffolding or temporary structure intended to facilitate the execution of the work and then to be removed, but a component part of the building, insecure because incomplete, not intended to support the weight of the workman and upon which he was not instructed to go. In this case, the structure which gave way was a form designed to support the cement until it had hardened, and incidentally the weight of workmen during construction, after which it would, in the regular course of the work, be removed. Defects in scaffolds, forms and temporary structures, not forming part of the building, serving only as aids in construction, are not defects of the structure due to its unfinished state.

³¹¹ 2. The defendants insisted that the plaintiff knew, or should have known, the defects in the structure, and that he therefore assumed the risk in going upon the same. This contention is disposed of in the former opinion upon the ground that, when the plaintiff entered upon the superstructure at the command of Wooley, he was justified in believing that the substructure was completed so that the element of obvious danger did not exist, and this still seems to us to be the correct view. It is now urged that the pleadings are insufficient to sustain the verdict upon this theory of the case. The amended petition described the construction of the forms, set forth the particular facts which it was claimed made the structure insecure, and alleged that the plaintiff, in obedience to the direction of the defendant's foreman, went upon the structure, and, while engaged in his work thereon, was by the falling of the structure precipitated to the floor below, thereby suffering the injuries complained of. If we understand the contention of the defendant's counsel, it is that, since the petition does not state that the weight of the plaintiff and his efforts to crowd the plank in place caused the collapse of the section, it fails to allege the proximate cause

of the accident. The argument of the defendant proceeds upon the theory that placing the weight of the plaintiff upon the structure, and his effort to put the plank in place, was the proximate cause of the accident. It is the same as if, in a case where A, owing a duty to B to construct a bridge in a safe and secure manner, negligently leaves it unsafe and insecure, and B, relying upon its apparently safe condition, or, as in this case, upon the express direction of A, goes upon it and it falls, we should say that the proximate cause of the catastrophe was the weight of B, and not the negligence of A. Such is not the law. The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time to the injury: *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Aetna Fire Ins. Co. v. Boon*, 95 ³¹² U. S. 117, 24 L. ed. 395. The inquiry must be, says Mr. Justice Strong, "whether there was any intermediate cause, disconnected with the primary fault and self-operating, which produced the injury." It is clear that the weight of the plaintiff, and his efforts to place the plank, was not such intermediate cause, disconnected from the primary fault and self-operating, and was not, therefore, in the meaning of the term as applied in the law of negligence, the proximate cause of the injury, and it was neither necessary nor proper to plead it as such in the petition.

We are therefore of the opinion that the motion for a rehearing should be overruled, and we so recommend.

Jackson, C., concurs.

By the COURT.- For the reasons stated in the foregoing opinion, the motion for a rehearing is overruled.

The Right of an Employé to Recover for injuries received while performing hazardous duties is the subject of a note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 884.

Who is a Vice-principal for whose acts the employer is responsible to other employés is the subject of a note to *Mast v. Kern*, 75 Am. St. Rep. 584.

NEBRASKA HAY AND GRAIN COMPANY v. FIRST NATIONAL BANK.

[78 Neb. 334, 110 N. W. 1019.]

BANKS AND BANKING—Collections on Forged Bills of Lading.—If a bank, without notice or knowledge of any wrongdoing, receives a draft from the drawer for collection and collects it from the drawee, and in good faith pays the proceeds to the person engaged by it, it is not liable to the payor in case the latter makes payment without consideration in reliance upon a forged bill of lading which the drawee attaches to and causes to be forwarded with the draft. (p. 605.)

Reavis & Reavis and G. A. Magney, for the appellant.

P. B. Weaver and C. Gillespie, for the appellee.

334 AMES, C. The following is a brief statement of the facts alleged in the petition: On the second day of February, 1905, one J. C. Smith made and subscribed, apparently in his own name, a draft upon the plaintiffs, as drawees, for the sum of nine hundred dollars payable to the order of the defendant bank, an institution doing business in Falls City, in this state. To the draft he attached what purported to be a bill of lading, indorsed in blank by himself, and signed by a station **335** agent of the Missouri Pacific Railway Company at Reserve, Kansas, of a shipment of corn from the latter point to the plaintiffs at Omaha, Nebraska. The two documents he delivered to the bank, with instructions to forward them for collection to Omaha and to account to him for their proceeds. Reserve is about five miles distant from Falls City. Smith was an utter stranger to the bank officials, who knew nothing about the transaction except what was represented on the face of the papers, which indicated nothing irregular or out of the usual course. They accepted the documents, and indorsed the draft to the Omaha National Bank, or order, for collection, and forwarded them to their correspondent, the latter named bank, for collection and credit, according to the custom of banks in such matters. Under the same date, at Falls City, Smith wrote and sent to the plaintiffs, by mail, a letter, saying: "I ship you today car No. 20,332 Mo. P., loaded 62,300 pounds wheat. See what you can do for me. Have another small car later." On the following day the Omaha bank received the draft and bill of lading, delivered them to and received the amount of the former from the plaintiffs, credited the sum to the account of the defendant and notified the latter of the fact. Without further information

or notice, the defendant paid the amount over to Smith, who has not since been seen or heard from by any of the parties. After a delay of several days, the plaintiffs learned that the supposed bill of lading was a forgery and that no grain had been shipped to them as consideration for the draft. Having demanded, and being refused, repayment of the money by the defendant, they brought this action for its recovery. There was a judgment for the defendant upon a demurrer, and the plaintiffs appealed.

The petition alleges that the plaintiffs had never previously had any knowledge of or dealings with the man Smith, and that they accepted and paid the draft solely in reliance upon the known respectability and financial responsibility of the defendant, who was named as payee ³³⁶ of the draft, and appeared as if assignee of the purported bill of lading, and had presumably satisfied itself of their genuineness, and the plaintiffs regarded, and were justified in regarding, the transaction as being, in effect, a representation by the defendant that they were genuine. The contention of the plaintiffs is, therefore, that the payment was made through a mistake of facts occasioned solely by the fault or negligence of the defendant, and for which they are themselves in no way responsible. But it is alleged in the petition that the defendant had no interest in the papers or transaction, except as a mere agent of Smith for collection, a fact which the plaintiffs do not deny having known, and which they may well be inferred to have known, at the time of the payment, from the nature of the transaction. The letter written by Smith to the plaintiffs on the day the draft was drawn indicates that the amount of the latter was less than the value of such a quantity of wheat as was named in the bill of lading, and contains a request that the residue or balance be paid by the plaintiffs, by check, to Smith himself at Falls City. This circumstance, if the transaction had been genuine, would have given rise to two inferences: First, that the title to the shipment of corn had not passed to the bank by the indorsement of the bill of lading; and, second, that settlement was not to be made until the shipment had reached the consignees at Omaha, when the latter were requested to "see what you can do for me"—that is, we suppose, determine how large a sum they could pay him.

We adopt, without qualification, the contention of counsel for appellant that the principles of the law-merchant are without applicability to the case made by the petition, and that the latter is to be decided in accordance with the rules of law

governing the relation of principal and agent, and having adopted it there appears to us no doubtful problem for solution. The functions and obligations of a collecting agent, merely as such, do not differ essentially or characteristically from those of a messenger-boy. ³³⁷ What may be his moral or social standing or financial responsibility are, so long as he is free from knowledge or participation in any wrongdoing by his principal, matters of no importance. He performs his whole duty by delivering what he is charged with delivering and receiving what he is intrusted to receive, in exchange, and by disposing of the latter as his principal has directed. It is not only not his duty, but it would be an impertinence by him, to inquire into the value, genuineness or validity of either the one article or the other. The case of *First Nat. Bank v. State Bank*, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289, appears to us not to be in point. In that case the purported check—that is to say, the supposed order upon the Alma bank for the payment of the sum of money in question—was a forgery. In other words, no authority for the collection of the sum existed; and the principle involved is the familiar one that an assumed agent who acts without authority is himself liable as a principal. But in the case at bar the draft was genuine, and the defendant, in demanding and receiving the money and paying it over to the drawer, acted strictly within the scope and limits of its employment. The case of *La Fayette v. Merchants' Bank*, 73 Ark. 561, 108 Am. St. Rep. 71, 84 S. W. 700, 68 L. R. A. 231, recently decided by the supreme court of Arkansas, upon which counsel for appellants seem chiefly to rely, does not appear to us to differ in principle from that just cited. In that case the defendant bank had forwarded and collected a draft, negotiable in form, upon which a purported indorsement by the payee, as well as a purported signature by the payee to an accompanying bill of sale, had been forged, and the defendant was held liable to the drawee to whom it had presented the draft and who had paid it in reliance upon the supposed indorsement and signature. The court discusses at considerable length the facts that the draft purported to have been drawn pursuant to a previous arrangement between the drawer and drawee, according to which it was to have been accompanied by ³³⁸ a bill of sale of certain cattle purchased by the drawer from the payee, and that it was apparent upon the face of the papers that the draft was not drawn against funds of the drawer in the hands of the payee, but was to be paid upon the strength and credit of the supposed bill of sale, and decides that the

defendant was negligent in purchasing the documents and forwarding them for collection without first having assured itself of their genuineness. Admitting that this opinion is in all respects sound, of which we do not feel at all convinced, it does not appear to us to be decisive of this case, because the defendant was destitute of authority from the payee of the draft, to whose order alone it was payable.

In the case at bar the draft was, as has been already said, genuine. Whether it was signed by the real name of the drawer is not known and is immaterial. It was signed by him by such name as he chose to use, and that fact sufficed to establish his legal relations to it and to the parties with whom he dealt, whatever may have been his true name. The defendant bank was innocent of any notice or of any participation in any wrongful act. The plaintiffs assert and the defendant admits that the defendant assumed simply and solely the functions of a collecting agent. The obligations of such agency it performed promptly and with fidelity, and without guile or suspicion of evil, and by so doing it discharged its whole duty. The business of banking and of collection agencies could not be carried on safely, or at all, if such institutions were held to be liable for the frauds and forgeries of their principals with respect to collateral documents and transactions of which they were ignorant, or if their failure to inquire into and ascertain the genuineness and good faith of such matters was held to be actionable negligence. The plaintiffs were not bound to make payment until they received a satisfactory consideration, nor, even then, unless they had chosen so to do. If, as they allege, they paid a draft drawn by an entire stranger, with whom they had had no previous dealings, and in reliance upon ³³⁹ a spurious bill of sale, without ascertaining the genuineness of the documents and without an inspection and delivery of the grain, their loss is due to their own rashness and negligence, and not to that of the intermediate parties through whom they dealt.

We recommend, therefore, that the judgment of the district court be affirmed.

Oldham and Epperson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Drawee of a Forged Draft Who has Paid It to a Collecting Bank, both being ignorant of the forgery, may recover from the bank the amount thus paid as money paid by mistake, when a bill of sale on

the back of the draft, also forged, was notice to everyone taking it that the drawee was paying, or would pay, not upon the funds of the drawer in his hands, but out of his own funds, upon the belief that there was a valid bill of sale and a transfer of the property therein described: *La Fayette v. Merchants' Bank*, 73 Ark. 561, 108 Am. St. Rep. 71. See, also, in this connection, the recent case of *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, ante, p. 467.

MILLER v. FARMERS' MILLING AND ELEVATOR COMPANY.

[78 Neb. 441, 110 N. W. 995.]

CORPORATIONS—Stock Transfers—By-laws.—The regulation of stock transfers may be accomplished in the form of by-laws to enable the corporation to know who are stockholders, to whom dividends are to be paid, who are entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its own rights, but such by-laws will not be enforced beyond what is necessary to serve those purposes, where their enforcement would operate as an infringement on the property rights of others, or an unreasonable restraint upon the disposition of property in the stock of the corporation. (p. 607.)

CORPORATIONS—Transfers of Stock—By-laws.—The right of transfer is incidental to the ownership of shares of stock of joint stock companies and corporations, formed in pursuance of legislative authority, and a by-law which unreasonably interferes with the free exercise of this right is void as being in restraint of trade. (p. 608.)

CORPORATIONS—Transfer of Stock—By-laws.—A by-law of a corporation organized under the laws of the state which limits the number of shares of its stock a person may hold at one time, or prevents a transfer by a stockholder to a nonstockholder without the consent of the directors of the corporation, is void, as an unreasonable restriction upon the transfer of property or stock. (p. 609.)

CORPORATIONS—Transfers of Stock—Interpretation of Statute.—A statute purporting to give a corporation the power "to render the interest of the stockholders transferable" is not intended to make the transferability of stock dependent on some affirmative act of the corporation, but to impress the stock with that quality as a consequence of the act of incorporation. (p. 610.)

Allen & Reed, for the appellants.

Courtright & Sidner, for the appellee.

442 ALBERT, C. The Farmers' Milling and Elevator Company of Newman Grove is a corporation which was organized under the laws of this state early in December, 1900, for the purpose of manufacturing flour and dealing in grain, lumber and coal. Afterward the corporation adopted certain by-laws, among which are the following:

"Sec. 4. No person shall be allowed to hold more than five (5) shares at any one time.

"Sec. 5. The stock of this association shall be assignable by indorsement; upon presentation to the secretary of any assigned shares of stock he shall issue to the indorsed (sic) a new share of stock, making of ⁴⁴³ such transfer and issue a proper record upon the books of the company."

"Sec. 28. Stock of this corporation shall not be transferred by a stockholder to a nonstockholder only through the consent of the board of directors."

After these by-laws had been adopted, Charles A. Miller, who was not one of the original stockholders, bought some sixty-four shares of the stock from the holders thereof, without the consent of the board of directors of the corporation. Some of this stock was registered and some not, but as the case does not turn on that distinction, further reference to it is unnecessary. The officers and directors of the corporation, acting upon the provisions of the by-laws against any person holding more than five shares of stock at one time, and the transfer of stock to a nonstockholder, denied Miller the rights of a stockholder, his right to have his stock registered, or to transfer any portion thereof without consent of the directors. Miller took the position that those provisions of the by-laws were void, and brought this suit against the corporation, its officers and directors, to enforce his rights as a stockholder. The trial court granted the relief prayed, and the defendants appeal.

The question presented by the appeal is whether a corporation organized under the laws of this state can, by its by-laws, limit the number of shares of its stock a person may hold at one time, and prevent a transfer of stock by a stockholder to a nonstockholder without the consent of the directors of the corporation. If it can, the decree of the district court is wrong and should be reversed; otherwise it should be affirmed. The power to make by-laws not inconsistent with the law of the land is one of the common-law incidents to a corporate existence (Angell and Ames on Corporations, 11th ed., sec. 325), and is expressly conferred by statute: Comp. Stats. 1905, c. 16, sec. 124. The transfer of stock has been uniformly regarded as a legitimate subject of corporate legislation, to enable the company to know who are stockholders, to whom dividends are to be paid, who are ⁴⁴⁴ entitled to vote, and where the company has a lien on the stock for debts due to it from the stockholders, to enable it to prevent a transfer in derogation of its own rights. But such legislation

will not be enforced beyond what is necessary to serve those purposes, where its enforcement would operate as an infringement on the property rights of others, or as an unreasonable restraint upon the disposition of property in the stock of the corporation: *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa, 336, 30 Am. Rep. 398. As is said in *Boone on Corporations*, section 122: "The right of transfer is incidental to the ownership of shares in the stock of joint-stock companies and corporations, formed in pursuance of legislative authority; and a by-law which unreasonably interferes with the free exercise of this right is void, as being in restraint of trade": See, also, 2 *Thompson's Commentaries on the Law of Corporations*, sec. 2300; *Angell and Ames on Corporations*, 11th ed., secs. 353, 354; 1 *Cook on Stock and Stockholders*, secs. 331, 332; 2 *Cook on Corporations*, sec. 621a. The correlative right to purchase rests on similar grounds: 2 *Thompson's Commentaries on the Law of Corporations*, sec. 2300.

In *Re Klaus*, 67 Wis. 401, 29 N. W. 582, the court said: "A by-law of a corporation which prohibits the transfer of stock by a stockholder without the consent of all the stockholders is against public policy and void. No exception can be made in the application of this rule on the ground that the stockholders of the corporation are few, and were originally copartners, and the one against whom the by-law is invoked consented to and voted for it." In *Herring v. Ruskin C. Assn. (Tenn. Ch.)*, 52 S. W. 327, the court held that a by-law prohibiting the transfer of stock except to the corporation, though indorsed on the certificate of stock, was void. In *Chouteau Spring Co. v. Harris*, 20 Mo. 382, the court held that the power to regulate the transfer of stock did not include the power to restrain transfers or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them, and that the company could not ⁴⁴⁵ prevent a party from selling his stock, even to an insolvent person. In *Bloede Co. v. Bloede*, 84 Md. 129, 57 Am. St. Rep. 373, 34 Atl. 1127, 33 L. R. A. 107, the court held that a by-law, requiring a stockholder to give notice of his intention to sell, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, was an invalid restraint of alienation. In *Ireland v. Globe Milling Co.*, 21 R. I. 9, 41 Atl. 258, the court held that a statute authorizing corporations to make by-laws consistent with the laws of the state did not authorize a by-law requiring stockholders, before selling their stock, to first offer it to the corporation, and that the assignee of shares was not

bound by a corporate by-law passed without authority of statute, even though his assignor had assented thereto: See, also, *Morgan v. Struthers*, 131 U. S. 246, 9 Sup. Ct. Rep. 726, 33 L. ed. 132; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; *Moore v. Bank of Commerce*, 52 Mo. 377. The by-laws under consideration, tested by the authorities cited, operate as an unreasonable restriction upon the transfer of stock, and are void as an unlawful restraint upon the transfer of property.

The defendants cite authorities to the effect that a charter provision or a by-law giving the corporation a lien on the shares of a stockholder for any indebtedness due from him to the corporation, and making a transfer of stock contingent upon the satisfaction of such debt, is valid. Without going into those authorities at length, or expressing approval or disapproval of the doctrine there announced, it will suffice to say that we do not consider them in point. The nominal interest of a stockholder in a corporation is evidenced by his certificates of shares. His actual interest is the difference between his nominal interest and his indebtedness to the corporation. A charter provision or by-law which restricts his right of transfer to a transfer of his actual, instead of his nominal, interest in the corporation is radically different in principle from a provision limiting the number of ⁴⁴⁶ shares a person may hold, or which forbids a transfer without the consent of the corporation.

But the proposition is advanced that stock issued by a corporation organized under the laws of this state does not possess the quality of transferability independently of affirmative action on the part of the corporation giving it that quality, and, consequently, when such affirmative action is taken by the adoption of by-laws, the transferability of the stock is to be measured by such by-laws. The argument in support of this proposition is based on the fifth clause of section 124, chapter 16, Compiled Statutes of 1905. The entire section is as follows: "Every corporation, as such, has power: First—To have succession by its corporate name. Second—To sue and be sued, to complain and defend in courts of law and equity. Third—To make and use a common seal, and alter the same at pleasure. Fourth—To hold personal estate, and all such real estate as may be necessary for the legitimate business of the corporation. Fifth—To render the interest of the stockholders transferable. Sixth—To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compen-

sation therefor. Seventh—To make by-laws, not inconsistent with any existing law, for the management of its affairs." Counsel's position is that the fifth clause impliedly negatives the right of a stockholder to transfer his stock in the absence of affirmative action on the part of the corporation to render it transferable. We do not think the clause will bear that construction. Generally speaking, stock was transferable at common law and at the time the statute in question was enacted. So radical a departure from that doctrine could not have been made without attracting wide attention, and it would have been followed by prompt action on the part of corporations and the holders of stock to adjust themselves to the change. No such result followed. On the contrary, although that section has stood on the books for almost half a century, corporate stock has been bought and sold, ⁴⁴⁷ during all that time, on the theory that its transferability is not dependent upon affirmative action authorizing its transfer. This amounts to a practical or contemporaneous construction of the statute, which is not to be lightly set aside. Besides, if the legislature had contemplated an innovation of that character, it seems to us it would have expressed itself in more apt and unambiguous language. A careful reading of the entire section leads us to the conclusion that the legislature thereby undertook, not only to define the general powers of a corporation, but also to enumerate certain qualities or properties which it should possess, or certain consequences which should follow the act of incorporation. It is clear that the first clause, the clause relating to succession, is to be taken as expressive of a corporate quality or property, rather than grant of power. It attaches to a corporation the instant it comes into being, and, of necessity, antedates the first corporate act. The fifth clause is complementary to the first, because, unless there could be a change in the ownership of stock, the perpetual succession of the corporation, under its corporate name, would be impossible. The latter clause was intended, we think, not to make the transferability of corporate stock dependent on some affirmative act of the corporation, but to impress the stock with that quality as a consequence of the act of incorporation. We see no escape from the conclusion that the by-laws in question are void as an unreasonable restraint on the transfer of property in the stock of the corporation.

It is therefore recommended that the decree of the district court be affirmed.

Duffie and Jackson, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

A By-law of a Corporation Imposing Restrictions Upon Transfers of Stock which are not specifically authorized by statute, or which are not reasonably necessary to the business of the corporation, is not valid: *Ireland v. Globe Milling Co.*, 21 R. I. 9, 79 Am. St. Rep. 769; *Ireland v. Globe Milling & Reduction Co.*, 19 R. I. 180, 61 Am. St. Rep. 756; *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 57 Am. St. Rep. 373; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203; *Bank of Atehison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396; *Rice v. Rockefeller*, 134 N. Y. 174, 30 Am. St. Rep. 658.

RHOADES v. RHOADES.

[78 Neb. 495, 111 N. W. 122.]

HUSBAND AND WIFE—Maintenance—Equity Jurisdiction.—

A court of equity will entertain a suit brought for alimony and grant it, although no divorce or other relief is sought, where the wife is separated from her husband without her fault. (p. 613.)

HUSBAND AND WIFE—Maintenance—Equity Jurisdiction of District Courts.—The district courts of Nebraska are courts of general equity jurisdiction, and may grant alimony to the wife, although no divorce or other relief is sought, where she is separated from her husband without her fault. (p. 613.)

HUSBAND AND WIFE—Maintenance—Nonresident Husband—Service of Process.—Service by publication may be made in an action by a wife for maintenance of herself and child against her husband who has deserted her without her fault, and become a non-resident, and the only relief sought is the appropriation of his real estate situated in the county where the action is brought to the payment of such maintenance. (p. 615.)

HUSBAND AND WIFE—Maintenance—Nonresident Husband—Jurisdiction on Service of Process by Publication—Receiver.—A wife may maintain an equitable action, on service by publication, to subject the property interests of her nonresident husband within the jurisdiction of the court, if he has deserted her without cause, to her support and maintenance, and after the completion of such service judgment may be entered and the property placed in the hands of a receiver. It is immaterial that her residence is not in the county where the property is situated. (p. 617.)

J. C. Stevens, for the appellant.

N. P. McDonald, for the appellee.

⁴⁹⁵ EPPERSON, C. The question presented by this appeal is one of some importance, and has not heretofore been passed upon by this court. The facts are substantially as follows: July ⁴⁹⁶ 1, 1884, the plaintiff, Alice M. Rhoades, and the defendant George M. Rhoades, were married in Adams

county, Nebraska, where they then resided. One child, born June 4, 1885, is the issue of their marriage. The parties moved to Hall county, this state, in 1886, and continued to live together as husband and wife until June, 1887, when Mrs. Rhoades left her husband because of his extreme cruelty, and has since justifiably lived apart from him. Shortly after the separation, defendant moved from Nebraska, and at all times since has been a nonresident of the state, and his whereabouts are unknown to plaintiff. Defendant is the owner of an undivided one-half interest in a certain quarter section of land in Hall county. In 1901 plaintiff instituted this action in the district court for that county upon notice by publication, alleging the above facts, and others, which would entitle her to a divorce, and prayed that the court determine a reasonable sum due from defendant for her maintenance and support without divorce, and that the interests of defendant in the Hall county land be subjected to the payment of such sum; that a receiver be appointed to take charge of the interests of the defendant in said premises and collect the rents and profits arising therefrom; and that plaintiff have such other and further relief as may be just and equitable. Defendant filed a special appearance, and objected to the jurisdiction of the court. His objections were overruled, and, upon his refusal to plead further, trial was had and a judgment entered for plaintiff. The court found the facts substantially as above stated, and, further, that plaintiff and her child were entitled to maintenance and support out of the rentals of defendant's said property in the sum of five hundred dollars a year; that the temporary receiver appointed at the commencement of the action had taken possession of the interests of defendant in said real estate, and the tenant in possession had attorned to said receiver and paid to him the share of defendant in the rents and profits therefrom. It was adjudged and decreed by the court that the undivided interest of defendant in the Hall ⁴⁹⁷ county land be impounded and the rents and profits devoted to the maintenance and support of the plaintiff; that N. S. Taylor be appointed receiver to take possession of said property and manage the same and collect the rents and profits arising therefrom, together with the rents and profits which have come into the hands of the temporary receiver from said premises, and that he distribute the same: (1) To the payment of the costs that may be adjudged against the plaintiff in this suit; (2) to the payment of such reasonable fees as the court may determine for his services as such receiver, and one-half of the taxes levied and

assessed against said premises, and one-half of the necessary repairs and improvements thereon; (3) that the remainder be paid, as collected, to the plaintiff herein. Defendant appeals.

The sole question for determination is, Did the district court have jurisdiction, upon service by publication, to subject the interests of the nonresident husband in the Hall county land to the maintenance and support of his wife and child?

1. It has been held that a court of equity will entertain an action brought for alimony, and will grant the same, although no divorce or other relief is sought, where the wife is separated from her husband without her fault: *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667, 43 N. W. 118; *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942; *Price v. Price*, 75 Neb. 552, 106 N. W. 657. And it is clear that the district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute: *Cochran v. Cochran*, 42 Neb. 612, 60 N. W. 942. However, the question presented by this record was not involved in the cases above cited. It is here sought, under the general equity powers of the court, to appropriate property of a nonresident, which is situated within the jurisdiction of the court, to the maintenance of his wife and child.

2. It is urged that service by publication is not authorized by statute in cases of this kind. Section 77 of the code provides that service may be made by publication "in ⁴⁹⁸ actions brought against a nonresident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way." It is apparent that the legislature intended the clause, "to be appropriated in any way," to apply to actions similar to the case at bar. It cannot be claimed that the clause is limited to actions where an appropriation of property is sought by provisional remedies. The preceding language includes all cases where property is sought to be thus taken, and hence the expression, "to be appropriated in any way," could serve no useful purpose in the statute if construed to refer only to actions where an appropriation of property is sought to be taken by provisional remedies.

3. Neither can it be successfully contended that there was no "appropriation," or that the property was not brought within the control of the court. "Control of the property by the court before the rendition of the judgment is essential to the jurisdiction to render it; and if rendered without such

jurisdiction, it cannot be made valid by the subsequent seizure of property of the defendant. But we do not understand it is necessary, in order to bring the property under the control of the court, that it shall be actually taken on attachment or other writ. Any authorized act by which the court takes charge of property, or asserts its control over it, is sufficient within the meaning of the rule, for the purpose of jurisdiction": *Benner v. Benner*, 63 Ohio St. 220, 58 N. E. 569. In *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, 37 L. R. A. 626, it was said: "According to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. To accomplish this object the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment, and it is common practice to apply property which has been attached in the course of an action ⁴⁹⁹ in personam against a nonresident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding in rem." *Benner v. Benner*, 63 Ohio St. 220, 58 N. E. 569, and *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, 37 L. R. A. 626, are cases similar to the one at bar. See authorities cited in those decisions. A temporary receiver was appointed at the commencement of this action, who took possession of the land in controversy and collected the rents and profits therefrom. We are therefore of opinion that there was a sufficient seizure of the property to bring it within the control of the court when the judgment was rendered.

4. This court has held that service by publication is sufficient in proceedings substantially in rem: *Fowler v. Brown*, 51 Neb. 414, 71 N. W. 54; *Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897, 60 N. W. 373. But it is urged that this action is one in personam, and the court acquired no jurisdiction by constructive service. It is fairly well settled in this state that an action for alimony, in the strict sense of the term, is a proceeding in personam, and personal service must be had, or an appearance made, to authorize a personal judgment against the defendant: *Dillon v. Starin*, 44 Neb. 881, 63 N. W. 12, and cases cited. We concede the force of the rule above stated, but it is inapplicable to the facts of this

case. Williams, J., answering a similar contention in *Benner v. Benner*, 63 Ohio St. 220, 58 N. E. 569, said: "Cases are cited to sustain this contention which held that, although ex parte divorce may be obtained on constructive service, alimony cannot be decreed unless the defendant appear, or has been served with process within the jurisdiction of the court. So far as we have examined them, these do not appear to be cases where the defendant had property within the jurisdiction of the court, which it was sought to reach, and have appropriated to the support of the wife, but those only where a general personal judgment for \$500 alimony was rendered or sought." No case has been called to our attention holding that an action cannot be maintained, on service by publication, by a wife against her nonresident husband to appropriate property, situated within the county where the action was brought, to the payment of the amount that should be allowed for alimony and support. Such action is substantially one in rem, and jurisdiction to subject property within the territorial jurisdiction of the court to its judgment may be acquired by due service of process by publication and the placing of the property in the hands of a receiver.

The supreme court of the United States, speaking through Mr. Justice Field, in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, said: "So the state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresidents situated within its limits that its tribunals can inquire into the nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate."

Benner v. Benner, 63 Ohio St. 220, 58 N. E. 569, is a case in point. The facts in that case are quite similar to those in the case at bar, and the supreme court of Ohio use expressions therein which thoroughly fit the facts of the case in hand: "Service by publication is authorized by section 5048 of the Revised Statutes, in an action by a wife for alimony and

support of her child against the husband who deserted his family and became a nonresident of the state, where ⁵⁰¹ the only relief sought is the appropriation of real property of the husband situated in the county where the action is brought to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one in rem; and the court has jurisdiction at its commencement to grant a preliminary injunction preventing the disposition of the property by the defendant pending the suit, and on completion of the service by publication to decree the relief sought." The statute construed contains provisions similar to section 77 of the Code, *supra*. In the opinion it was further said: "In suits for divorce, it is conceded, the court acquires jurisdiction by constructive service on a nonresident defendant, to inquire into the residence of the plaintiff, and the existence of the marriage relation, as well as the grounds of divorce, before proceeding to decree; and this is necessarily so, for residence of the plaintiff within the jurisdiction of the court is an essential fact, and the existence of marriage must be established before there can be a judgment for its dissolution. The jurisdiction in such cases is supposed to rest upon the ground that the proceeding relates to and determines the personal status of the parties. But that is equally so in cases like the one before us, and we can discover no sufficient reason why, in such a case, jurisdiction may not be conferred by a like mode of service to inquire into and determine the same facts. The plaintiff, in her action below, did not seek nor obtain a personal judgment against the defendant. She and her child were residents of the county in which her suit was brought. The specific property which she asked to have subjected to her support was situated in that county, and she sought no other relief than its appropriation, or such part of it as might be necessary, for that purpose, in fulfilment of the defendant's obligation to her in that behalf. The action and judgment were substantially in rem, in the sense that their direct object was to reach and dispose of property within the jurisdiction of the court."

⁵⁰² Another decision in point is *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97, 47 Pac. 37, 37 L. R. A. 626, wherein it was held: "A receiver may be appointed at the beginning of an action by a deserted wife to set aside a transfer by her husband of his property to defeat her rights to maintenance under the general equity power of the court under the same circumstances that the appointment would be made in a suit by a creditor to set aside a transfer fraud-

ulent as to him. Jurisdiction to subject property within the territorial jurisdiction of the court to its judgment may be acquired by due service of process by publication and the placing of the property in the hands of a receiver."

Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885, holds to the same doctrine. This language is used in the opinion: "The plaintiff seeks to charge her husband's property with her alimony, and to set aside conveyances made in fraud of her rights. The suit is, therefore, a proceeding in rem, within the meaning of the statute; and the principal defendant being beyond the jurisdiction of the court, so that personal service of its process could not be had, it was proper to cause publication of the summons to be made, and by virtue of such publication the court became invested with jurisdiction to render such judgment against the property as the facts proved might warrant": See, also, *Osgood v. Osgood*, 153 Mass. 38, 26 N. E. 413; *Blackinton v. Blackinton*, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830.

It must be borne in mind that the object of the proceeding is to enforce a duty which the husband owes to his family, not by seeking a personal judgment to be enforced by execution, but by proceeding against his property after the defendant puts it beyond the power of the plaintiff to procure a personal judgment against him. It is not the judgment for alimony which creates the husband's liability. The judgment is but an adjudication determining the liability which arose by reason of the marital relation. In actions for divorce, jurisdiction upon a nonresident husband may be had by publication to determine the personal status of the parties and the right to ⁵⁰³ a divorce. This is also required in the case at bar, and no reason exists why jurisdiction might not likewise be had to inquire into the same facts, and, if found favorable to plaintiff, to grant her the relief sought. There is no remedy at law, and, were we to hold that jurisdiction could not be acquired by publication, a husband with an abundance of property within the jurisdiction of the court could, by absconding, avoid his duty to support his family. This duty exists independently of statute, and should be enforced by the courts against his property within its jurisdiction. In *Eldred v. Eldred*, 62 Neb. 613, 87 N. W. 340, wherein the wife after divorce sought to subject the husband's property to her support, it was said, in reference to a judgment for alimony obtained by her in an Illinois court: "But the Illinois decree having been rendered upon constructive service and without any appearance on behalf of the defendant,

the portion of the decree relating to alimony, perhaps, is of no validity save as to the property within the jurisdiction of the court pronouncing it." No authority has been cited to the effect that a wife cannot maintain an equitable action, on service by publication, to subject the property interests of a nonresident husband to her support and maintenance. As was said by the supreme court of Ohio in *Benner v. Benner*, 63 Ohio St. 220, 58 N. E. 569: "There is a strong tendency on the part of the courts to uphold their jurisdiction in cases of this kind."

5. Defendant's final argument is that, at the time this action was commenced, plaintiff resided in Adams county, and was not a resident of Hall county, where the real estate of her husband is situated, and hence *Benner v. Benner*, 63 Ohio St. 220, 58 N. E. 569 (a case where the wife resided in and brought suit in the county where the property was located), is inapplicable. Were this an action for divorce, defendant's contention would be sound. The action being in equity and seeking to impound the defendant's property, jurisdiction does not depend upon the domicile of the plaintiff, but upon the location of the property within the jurisdiction of the court. We see no reason for holding ⁵⁰⁴ that residence of the plaintiff is required in the county where the suit is brought in actions of this nature more than in other actions wherein general equitable relief is sought. No other court had original jurisdiction. Section 51 of the Code provides, in part: "All actions for the following causes must be brought in the county in which the subject of the action is situated. . . . First: For the recovery of real property or of an estate or interest therein." Section 59 provides that actions against a nonresident may be brought in any county in which there may be property or debts owing to the defendant. Under the provisions of our statute, *supra*, the only court having jurisdiction of this case was the court wherein the action was instituted, and defendant's contention is devoid of merit.

We are convinced that the district court did not err in overruling the special appearance, and recommend that the judgment be affirmed.

Ames and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Jurisdiction of a Court to Decree Maintenance in favor of a wife against her nonresident husband is discussed in Murray v. Murray, 115 Cal. 266, 56 Am. St. Rep. 97; and jurisdiction to award alimony

against a nonresident husband who has not been served with process in the state and does not appear in the action is discussed in *Moss v. Fitch*, 212 Mo. 484, ante, p. 568, and cases cited in the cross-reference note thereto.

WARDROBE v. LEONARD.

[78 Neb. 531, 111 N. W. 134.]

JUDGMENTS—Entry of Decree After Death of Plaintiff—Collateral Attack.—If an action has proceeded to decree without objection after the death of plaintiff and after the jurisdiction of the court has attached, it is a mere irregularity, and the decree is not open to collateral attack. (p. 620.)

JUDGMENTS—Entry After Death of Party.—If a decree is entered in favor of a party to an action after his death and after the jurisdiction of the court has attached, the failure of the other party to have the decree vacated within three years after notice of the decree renders it as valid and binding as any other judgment. (p. 620.)

MORTGAGES—Foreclosure—Action to Redeem.—If the assignee of record of a decree of foreclosure procures the property to be sold thereunder after the death of the plaintiff and without any revivor of the action, the confirmation of the sale cures any irregularity in the decree as against an action to redeem. (p. 621.)

H. M. Sullivan, for the appellant.

A. Morgan and R. Pound, for the appellee.

532 JACKSON, C. Fannie A. Turner, assignee of a mortgage on real estate in Custer county, instituted an action for the purpose of foreclosing the mortgage. Personal service was had on the defendants and decree entered by default on the thirtieth day of November, 1897. The defendants filed a request for, and procured a stay of, order of sale. On January 18, 1904, an assignment of the decree to James Leonard was filed in the office of the clerk of the court. It was executed by the executor of the estate of Fannie A. Turner, deceased. Thereafter Leonard, without revivor proceedings, procured an order of sale to issue on the decree, pursuant to which the land was sold and bid in by him, the sale was confirmed and sheriff's deed issued. The order of confirmation was entered on the eighteenth day of November, 1904. The amount of Leonard's bid was sixty dollars and thirty cents in excess of the decree and costs. That sum he paid into the hands of the sheriff, who, after confirmation, paid the same to the mortgagor as owner of the title. On March 13, 1905,

this action was instituted by the mortgagor to be permitted to redeem the property from the decree of foreclosure, on the ground that the procedure after the death of Fannie A. Turner, which it is charged in the petition occurred prior to the decree, was void. The defendant tenders the issue that the plaintiff is estopped from questioning the regularity and validity of the proceedings by reason of his request for a stay of execution and the acceptance of the surplus after the sale and confirmation, and that the proceedings, at most, were voidable only, and not open to collateral attack. The decree was for the defendant, from which the plaintiff appeals.

533 The date of the death of Fannie A. Turner is not disclosed by the evidence, but for the purpose of the discussion it will be assumed, as charged, that it was prior to the date of the decree. Where the cause of action survives, an action, under our Code, does not abate by the death of a party, but the court may allow the action to continue by or against his representative or successor in interest: Code, sec. 45. The legislature has made ample provision for the revivor of actions in such cases, and the suggestion of the death of a party to an action will operate to stay further proceedings until the action is revived in the name of the proper party. A failure to take that course would render the proceedings open to direct attack, but the authorities seem to be quite uniform that in actions which do not abate by the death of a party, and where the action has proceeded to decree without objections after the death of the plaintiff and after the jurisdiction of the court has attached, it is a mere irregularity, and the decree is not open to collateral attack.

It is unnecessary, however, to rest our conclusion upon that ground alone. It is provided by our Code that the district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made for the death of one of the parties before the judgment in the action. The procedure to vacate a judgment for that reason is by petition, duly verified, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant, and on such petition a summons shall issue and be served as in the commencement of an action. Such proceedings, however, must be instituted within three years after the defendant has notice of the judgment. The remedy having been provided, it must be exercised within the time limited by statute, otherwise the judgment becomes as valid and binding as any other judgment: *Gilman v. Donovan*, 53 Iowa, 362,

5 N. W. 560. Furthermore, the stay of execution which the mortgagor obtained after decree was a waiver of all errors ⁵³⁴ prior to the obtaining of such stay: *Ecklund v. Willis*, 42 Neb. 737, 60 N. W. 1026; *Banks v. Hitchcock*, 20 Neb. 315, 30 N. W. 56.

It remains, then, to be determined whether the sale on an order issued after assignment of the decree to Leonard, and without revivor, is so far void as to be open to the character of attack here made. In *Vogt v. Daily*, 70 Neb. 812, 98 N. W. 31, it was held that, if the plaintiff in an action died after judgment but before satisfaction thereof, no valid execution can be had upon the property of the judgment defendant until the judgment has been revived in the manner provided for in the Code. The ruling was put upon the ground that actions should be prosecuted in the name of the real party in interest, and that this party should be a living, breathing entity, a person of legal responsibility. The case of *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314, 59 Pac. 631, is cited in support of that conclusion. In the opinion in the Kansas case it is said: "A defendant whose property is levied upon under an order of sale or general execution ought to be able to ascertain from an inspection of the record in the case to whom payment of the debt may be made, and when the death of the owner of the judgment occurs, all proceedings for its enforcement ought to be held in abeyance until some person in being is substituted with whom the debtor may treat regarding the satisfaction of the judgment." In an earlier case, *Harris v. Frank*, 29 Kan. 200, where the reason for the rule did not obtain because of an assignment of record on the margin of the journal of the court where the judgment was recorded, it was held that no revivor was necessary, and that notwithstanding the death of the plaintiff in the proceedings where the judgment was obtained, his assignee might proceed by execution as though the plaintiff were still living. In *Vogt v. Daily*, 70 Neb. 812, 98 N. W. 31, it appears that one Fritz claimed to be the assignee of the judgments upon which execution had issued, but from the language employed in the opinion it is evident that the assignments were not of record, otherwise the reasoning would have failed. In *Street v. Smith*, 75 Neb. 434, 106 N. W. 472, we held that, ⁵³⁵ where the sole plaintiff in an action dies, the effect is to suspend further proceedings until the action has been revived in the name of the legal representative of the deceased. In that case, like the present one, the procedure was for the foreclosure of a mortgage. The plaintiff died after decree, but

before sale of the premises. There was no assignment of the decree. The order of sale was issued and the property sold as though the plaintiff were still living. The appeal to this court was from the confirmation of the sale. It was a direct attack, and not decisive of the question here involved—a question that is not free from doubt. We think, however, under the facts and circumstances as they are shown to exist, the sale and confirmation were not void to the extent that they may be assailed by the means employed. We do not determine that the court should not have ordered a revivor had the death of the plaintiff been suggested before the sale or the confirmation. That question is not involved.

What we do hold is that the sale was not void, and we recommend that the decree of the district court be affirmed.

Duffie and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the decree of the district court is affirmed.

VALIDITY AND EFFECT OF JUDGMENT FOR OR AGAINST A DECEASED PERSON.

- I. Scope of Note, 622.
- II. Rule at the Common Law, 622.
- III. General Rule as to Whether Such Judgments are Void or Merely Erroneous, 625.
- IV. Rule Where One of the Parties was Dead When the Suit was Commenced, 631.
- V. Rule Where the Party Died on the Same Day that the Judgment was Rendered, 636.
- VI. Rule Where the Fact of the Death Appears on the Record or was Known by the Opposing Party, 637.
- VII. Rule Where the Deceased Party was Merely a Nominal Party, 637.
- VIII. Rule Where One of Several Parties Plaintiff or Defendant Dies Before Entry of Judgment, 637.

I. Scope of Note.

In our consideration of this subject we shall exclude those cases where the judgment was rendered after the death of one of the parties but entered nunc pro tunc as of a date prior to such death; also cases relating to the revivor of judgments after the death of a party; and also the effect of death pending an appeal. In connection with this note consult also the notes attached to *Evans v. Spurgin*, 52 Am. Dec. 107, and *Watt v. Brookover*, 29 Am. St. Rep. 816.

II. Rule at the Common Law.

At the common law the early rule was that the death of any party to the action before final judgment abated the action: *Weston v. James*, 1 Salk. 42; *Hildreth v. Thompson*, 16 Mass. 191; *Blaisdell v.*

Harris, 52 N. H. 191; *Holmes v. Houie*, 8 How. Pr. 383. The injustice which this rule sometimes worked was, however, relieved by resorting to the fiction of making all judgments bear date of the first day of the term: *Broas v. Mersereau*, 18 Wend. 653. The court acted upon the theory that the entire term of court was in contemplation of law but one day: *Life Assn. v. Fassett*, 102 Ill. 315. Though the question whether a judgment rendered against a deceased person is void or merely voidable does not appear to have been often raised in the English courts, in view of the rule above set forth, still the question was directly passed upon in *Randall's Case*, 2 Mod. 308, the court holding such a judgment to be void.

The following quotation from *Life Assn. v. Fassett*, 102 Ill. 315, though repudiated as dictum by the court in *Clafin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834, shows the origin of the English rule which forms the basis of authority for those courts which hold judgments entered for or against deceased parties to be void, regardless of whether the deceased party was served with process during his lifetime or not. The court observed: "Much of the confusion and uncertainty which prevail in the authorities on this subject is attributable, doubtless, to the fact that courts, in jurisdictions where the common-law system obtains, in attempting to follow the adjudications of other courts, have failed to distinguish the cases resting on purely common-law grounds from those resting, in whole or in part, upon statutes modifying the common law. A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead person, either natural or artificial, is absolutely void, and the fact that service may have been obtained, or the suit commenced, before the death of the party, makes no difference in this respect; and this was unquestionably the rule from the earliest period of the common law down to the seventeenth year of the reign of Charles II, when the British parliament passed the first act somewhat modifying the common law on the subject: *Randal's Case*, 2 Mod. 308, 1 Salk. 8, 2 Sand. 72, note. The rule of the civil law was the same: 7 Rob. Pr. 157.

"By statute (17 Car. II, c. 8, sec. 1) it was enacted, in substance, that the death of neither plaintiff nor defendant, between verdict and judgment, should be assigned for error, provided the judgment should be entered up within two terms after such verdict. The courts of Westminster, in giving a construction to this act, held that where a party—and there was no difference between plaintiff and defendant in this respect—died in term time, though before verdict, the cause might nevertheless proceed to trial and judgment, upon the theory the entire term was in contemplation of law but one day: 2 Sand. 72, note m. The judgments in these cases were entered precisely in the same manner as if the death of the party had not occurred, and the statute applied as well where the right of action did not survive to or against the legal representatives of the deceased party as where it did: 2 Sand. 72, note m. The next legislation on the subject was

the statute of 8 and 9 W. III. Section 6, chapter 11, of that act, provided, in substance, that in all actions to be commenced in any court of record, if the plaintiff or defendant should happen to die after interlocutory and before final judgment, the action should not, by reason thereof abate, if such action could be originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff in such case, or, in the event of his death after such interlocutory judgment, his executors or administrators, might have a scire facias against the defendant, or, if he should die after such interlocutory judgment, then against his executors or administrators, to show cause why damages should not be assessed or recovered in such action, etc. It will be perceived that this act is in some of its main features much like our own statute on this subject, and is doubtless the original from which our own was modeled, though ours is unquestionably a great improvement on the English model. This act, it will be further observed, extends only to cases where the death of either party occurs after an interlocutory judgment.

"This brief reference to the earlier decisions founded on the common law, and subsequent legislation on the subject, clearly shows that the idea that a judgment against a dead person is voidable only had its origin in the construction given to the act of 17 Car. II above mentioned, and any extension of the doctrine to cases not falling within that act, or other acts of a similar character, would, on principle, be a clear misapplication of it. It is also to be observed that these statutes, having both been passed since the fourth year of the reign of James I, are not of any binding force in this country, and it is clear the decisions of the English courts construing them are likewise, on principle, of no authority here, and so far as they have been acted upon by the courts of this country in deducing the common law as to the effect of a judgment for or against a dead person, they have led, as already remarked, to much misapprehension and confusion on the subject. Such a judgment, when tested by the common law alone, as we have already seen, is absolutely void. Prior to the legislation above referred to, there was no difference, as respects the validity of a judgment, whether it was rendered against or in favor of a dead party. It was equally void in either case. The very wording of these acts shows such was understood to be the rule at the time of their adoption. The law, however, in course of time became settled in England the other way, so far as it relates to judgments in favor of dead plaintiffs, and the rule became firmly established that the death of the plaintiff must be taken advantage of by plea in abatement, otherwise the judgment would be binding. And such is the general doctrine on the subject at this time: *Stoetzell v. Fullerton*, 44 Ill. 108. And many respectable courts and authors in this country apply the same rule to judgments against deceased defendants, where they die after having been regularly served with process. According to these authorities, such judgments are voidable only, and hence cannot be

successfully assailed in a mere collateral proceeding: *Freeman on Judgments*, secs. 140, 153."

III. General Rule as to Whether Such Judgments are Void or Merely Erroneous.

The rendition of judgment for or against a dead person is an error in fact only, which ordinarily can be corrected by a writ of error *coram vobis*: *Stoetzell v. Fullerton*, 44 Ill. 108; *Case v. Rebelin*, 1 J. J. Marsh. 29; *Burke v. Stokely*, 65 N. C. 569. But there are, of course, circumstances where it may be regarded as a mere clerical error, such as where a judgment dissolving an injunction, with damages, was rendered against a dead man, although previous to the judgment his legal representatives had become parties to the proceeding: *Stackhouse v. Zuntz*, 41 La. Ann. 415, 6 South. 666.

The decisions upon the question whether a judgment rendered for or against a deceased person is void or only voidable and not subject to a collateral attack are not in entire accord, but the great weight of authority sustains the proposition that where a court has obtained jurisdiction of the parties and of the subject matter during the lifetime of the parties to the suit, such a judgment, although it may be erroneous and liable to be set aside by direct proceedings, is simply voidable, and not void nor subject to collateral attack: *Monographic notes to Evans v. Spurgin*, 52 Am. Dec. 109, and *Watt v. Brookover*, 29 Am. St. Rep. 816; *Claffin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; *Davies v. Coryell*, 37 Ill. App. 505.

In *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713, the court, in discussing this subject, said: "It is true that some courts hold that such a judgment is absolutely void, while expressions of others afford ground upon which to predicate this view. We think the better rule to be that when a court has acquired jurisdiction of the subject matter and the person during his lifetime, and a hearing is had and judgment rendered, and the judgment-roll does not disclose the death of either party to the controversy, then such a judgment is not void because one of the parties may have died prior to its rendition. Such judgment, while erroneous, is not void, and 'While the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so does not render such a judgment void; it is voidable when properly assailed.' Mr. Freeman announces the rule in these words: 'If jurisdiction is obtained over the defendant in his lifetime, a judgment rendered against him subsequently to his death is not void': 1 *Freeman on Judgments*, sec. 140. A different rule, we think, would be mischievous and fraught with evil results. A judgment free upon its face from every infirmity ought to possess some degree of sanctity. Especially should this be the rule in those jurisdictions where the statute limits the time within which applications can be made to the court to vacate and set aside judgments rendered therein. We think the weight of authority clearly supports the view herein expressed:

Black on Judgments, sec. 200, and cases cited in note; *Hayes v. Shaw*, 20 Minn. (Gil. 355) 405; *Stocking v. Hanson*, 22 Minn. 542; *Yaple v. Titus*, 41 Pa. 203, 80 Am. Dec. 604; *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; *Jennings v. Simpson*, 12 Neb. 558, 11 N. W. 880; *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602; *Reid v. Holmes*, 127 Mass. 326; *Tapley v. Martin*, 116 Mass. 275; *New Orleans v. Gaines' Admr.*, 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34 L. ed. 1102. And this view is strengthened by the statute of this territory which provides that the death or disability of a party to any action or proceeding does not result in its abatement: 2 Comp. Laws, sec. 3187." The death of a party pending the suit does not oust the jurisdiction of the court, and judgment may be rendered nominally for or against such party as represented by his heirs. Such a judgment is not void but merely voidable: *Todhunter v. Klemmer*, 134 Cal. 60, 66 Pac. 75. Neither will the death of a party pending an appeal render the judgment of the appellate court void although there was no substitution of his representatives as parties: *Phelan v. Tyler*, 64 Cal. 80, 28 Pac. 114.

The courts are not uniform in their characterizations of judgments rendered for or against deceased persons, but they doubtless, when holding such judgments not to be void, are agreed that such judgments are not subject to collateral attack. Thus the courts frequently state that such judgments are erroneous or that it is error to enter such a judgment: *Jacobson v. Campbell* (Ark.), 12 S. W. 784; *McReynolds v. Brown*, 121 Ill. App. 261; *Young v. Davidson*, 129 Ill. App. 657; *Nelson v. Gray*, 2 G. Greene, 397; *Case v. Ribelin*, 1 J. J. Marsh. 29; *Wittenburgh's Admr. v. Wittenburgh*, 1 Mo. 226; or that such judgments may be erroneous, but until reversed by some appropriate proceeding they are valid: *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; or that they are not absolutely void: *Reid v. Holmes*, 127 Mass. 326; or that the death of a party before the entry of judgment does not make the judgment subject to collateral attack: *Collins v. Mitchell*, 5 Fla. 364; *Clafin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Holt v. Thacher*, 52 Vt. 592; *Evans v. Spurgin*, 6 Gratt. 107, 52 Am. Dec. 105; *Hotchkiss v. Bussell*, 46 Wash. 7, 89 Pac. 183. Such judgments are not void: *Pfirshing v. Heitner*, 91 Ill. App. 407; *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541. Although they are not void, they are generally declared to be voidable: *Clafin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; *Hayes v. Shaw*, 20 Minn. (Gil. 355) 405; *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336; *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687; *Watt v. Brookover*, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007; monographic note to *Watt v. Brookover*, 29 Am. St. Rep. 816.

"Some cases cited by authors as holding that judgments against dead persons are null do not so hold. The word 'void' may be used in them, but in the sense of 'erroneous.' They were in cases where, by proper proceedings, they were sought to be reversed, not attacked collaterally. Such are the cases of *Colson's Exrs. v. Wade's Exrs.*, 1 *Murph.* 43; *Burke v. Stokely*, 65 *N. C.* 569; *Moore v. Easley*, 18 *Ala.* 619. There is a wide difference between a judgment null and void and one erroneous and voidable; the one is no lien, the other is until reversed": *Watt v. Brookover*, 35 *W. Va.* 323, 29 *Am. St. Rep.* 811, 13 *S. E.* 1007.

But in some jurisdictions the courts have followed the rule which obtained at the common law to the effect that an action abated by the death of the plaintiff or defendant, and hence that a judgment rendered after such death was void: *Hunt's Heirs v. Ellison's Heirs*, 32 *Ala.* 173; *Bauer v. Wood*, 135 *Ala.* 430, 33 *South.* 538; *Ex parte Massie*, 131 *Ala.* 62, 90 *Am. St. Rep.* 20, 31 *South.* 483, 56 *L. R. A.* 671; *Lynch's Exr. v. Tunnell*, 4 *Harr.* 284; *Watson v. Adams*, 103 *Ga.* 733, 30 *S. E.* 577; *Kager v. Vickery*, 61 *Kan.* 342, 78 *Am. St. Rep.* 318, 59 *Pac.* 628, 49 *L. R. A.* 153; *Edwards v. Whited*, 29 *La. Ann.* 647; *Pickett v. Pickett*, 41 *La. Ann.* 882, 6 *South.* 655; *West v. Jordan*, 62 *Me.* 484; *Young v. Pickens*, 45 *Miss.* 553; *Parker v. Horne*, 38 *Miss.* 215; *Weis v. Aaron*, 75 *Miss.* 138, 65 *Am. St. Rep.* 594, 21 *South.* 763; *Bragg v. Thompson*, 19 *S. C.* 572; *Carter v. Carriger's Admsrs.*, 3 *Yerg.* 411, 24 *Am. Dec.* 585; *Morrison v. Deaderick*, 10 *Humph.* 342.

It is not material in applying the rule existing in any jurisdiction whether the deceased party be the plaintiff or defendant. "If the death of the defendant will not render a judgment void, no reason is perceived why the death of the plaintiff should have that effect": *Coleman v. McAnulty*, 16 *Mo.* 173, 57 *Am. Dec.* 229. In actions which do not abate by the death of a party, and where the action has proceeded to decree without objections after the death of the plaintiff and after the jurisdiction of the court has attached, it is a mere irregularity, and the decree is not open to collateral attack: *Wardrobe v. Leonard*, 78 *Neb.* 531, ante, p. 619, 111 *N. W.* 134. The judgment of a court of general jurisdiction, rendered after the death of the plaintiff and in his favor, is merely voidable, where the court had, prior to such death, acquired jurisdiction of the parties: *Hayes v. Shaw*, 20 *Minn.* (Gil. 355) 405. And where a cause was tried, submitted and judgment rendered in favor of the plaintiff after her death, but while her counsel and the counsel of the defendant were ignorant of her death, the judgment is voidable only: *Gilman v. Donovan*, 53 *Iowa*, 362, 5 *N. W.* 560. The fact that, pending a petition for certiorari, one of the petitioners dies, does not render a judgment entered subsequently void: *Holman v. G. A. Stowers Furniture Co.* (*Tex. Civ. App.*), 30 *S. W.* 1120. And where plaintiff dies before judgment was rendered in his favor, the court in which the judgment was rendered may set it aside at a subsequent term and reinstate the cause on the docket: *Moore v. Easley*, 18 *Ala.* 619. Where plaintiff died and an

executor was appointed, but the case was continued in the name of the deceased plaintiff instead of that of his executor, the judgment is not void, since the error is merely one of form: *Gregory v. Haynes*, 21 Cal. 443.

A decree signed and filed after the death of a necessary defendant without a revivor of the suit against his heirs or representatives is reversible on appeal, even though the decree was written out before his death and bore date of the term when the defendant was still alive: *Powe v. McLeod*, 76 Ala. 418. But judgment may be entered in the name of a party who dies after verdict but before the signing of the minutes of the court: *Fowler v. Burdett*, 20 Tex. 34. The representatives of a defendant who dies after verdict need not be made parties in order to entitle the plaintiff to a valid judgment: *Beard v. Hall*, 79 N. C. 506. And after jurisdiction has been acquired the court may proceed to judgment and sell property attached notwithstanding the death of the judgment debtor before the entry of the judgment: *Cochran's Heirs' Lessee v. Loring*, 17 Ohio, 409.

The mere fact that jurisdiction is obtained over a person by service of the summons by publication will not render the judgment entered against such defendant after his death void: *McCormick v. Paddock*, 20 Neb. 486, 30 N. W. 602.

In *Finney v. Ferguson*, 3 Watts & S. 413, a judgment by confession rendered after the death of the plaintiff and before the substitution of his representatives was held void as to such representatives and all persons who were collaterally interested in the payment of the judgment, but the element of fraudulent entry entered in the case. In South Carolina a judgment by confession entered after the death of the defendant was sustained. The judgment was confessed during vacation. After the next term the contingency happened on which the plaintiff was to have the right to enter it up. A short time thereafter the defendant died and plaintiff then entered up the judgment: *Keep v. Leckie*, 8 Rich. 164. In another case the fact that a judgment was entered on a warrant of attorney after the defendant's death was held not a good defense to a scire facias to revive the judgment: *Carr v. Townsend's Exr.*, 63 Pa. 202. And where a judgment in ejectment was based on an agreement signed by the attorney for one of the parties after his death, it was held that it could not be collaterally attacked: *Buck v. Williams*, 10 Heisk. 264. But in Delaware a judgment entered by warrant of attorney in the name of the obligee in a judgment bond, several terms after his death, was declared null and void, but the right to thereafter enter it again on the warrant of the attorney but in the name of the administrator was affirmed: *Guyer's Admr. v. Guyer*, 6 Houst. 430.

Default judgment in favor of the commonwealth against the principal and sureties in the bond of the clerk of court was not void as to the sureties, even though the principal was dead at the time that judgment was rendered, since the court would have had jurisdiction against the sureties alone: *Asher v. Commonwealth*, 23 Ky.

Law Rep. 1976, 66 S. W. 759. And a judgment entered after the death of a party but without knowledge of his death, upon a default taken against him in his lifetime, is valid: *Reid v. Holmes*, 127 Mass. 326. In New York, in an old case, a default judgment entered after the death of the defendant was held void. The court said: "It was a judgment by default, not by confession or verdict, and, therefore, not within the statute of 17 Car. II, chapter 8 (Tidd, 847, 1 R. L. 144, sec. 5), which provides that the death of either party between verdict and judgment shall not be alleged for error, so as the judgment be entered within two terms after the verdict; nor within the act of April 15, 1814 (Sess. 37, c. 200, s. 40), which has a provision similar to the last in relation to judgments entered by confession, after the death of the defendant; so that they be entered in two terms after the signing a plea of confession in actions pending during the defendant's lifetime; nor is it within the tenth section of the act concerning executors and administrators (1 R. L. 312), which provides that judgment shall not abate by the death of either party, after interlocutory judgment (8 and 9 W. 3, c. 11; Tidd, 847); for the representatives of the deceased were not brought in and made parties by *scire facias*, which was necessary by that statute": *Griswold v. Stewart*, 4 Cow. 457. An action on the common counts of assumpsit is still considered as pending after the entry of a default until the assessment of damages and if defendant dies before the assessment of damages, the case will be discontinued under the statute: *Sheldon v. Sheldon*, 37 Vt. 152. But where a defendant died during the term, after the damages had been assessed, but before judgment was entered on the last day of the term, it is not necessary to issue *scire facias* to the executors or administrators: *Miller v. Jones*, 2 Speers, 315. Where defendant's death was not suggested, and the suit was defended by defendant's brother and agent, who is also his universal legatee, a judgment rendered after defendant's death is good as against collateral attack: *New Orleans v. Gaines' Admr.*, 138 U. S. 595, 11 Sup. Ct. Rep. 428, 34 L. ed. 1102. And where an absent defendant was represented by a curator ad hoc, a judgment against him after his death cannot be collaterally impeached: *Mills v. Alexander*, 21 Tex. 154. But where it was agreed in the court below that other cases should follow the judgment in a test case, such judgment may be shown in Tennessee to be invalid by evidence that the defendant in that case was dead at the time the judgment was rendered: *Nolan v. Cameron*, 77 Tenn. 234. In a libel for collision, where the master of the vessel libeled appeared and made claim with a certain person as stipulator, but the stipulator died before the decree, which was rendered against him in ignorance of his death, the court, regarding the decree as void, set it aside on motion to that effect: *The Clara Davidson*, Fed. Cas. No. 2791. Under the Revised Statutes of New York, it was held that a judgment could be entered for the defendant on the report of a referee in his favor,

although the sole plaintiff died after the report and before the entry of the judgment: *Seranton v. Baxter*, 3 Sand. 660.

A judgment in partition acquiesced in by the interested parties cannot be collaterally impeached by one having no interest under the partition on the ground that one of the parties in interest was dead when the judgment was rendered: *Howard v. McKenzie*, 54 Tex. 171. In Tennessee a judgment in ejectment in favor of several plaintiffs, some of whom are dead and no revivor having been instituted, is held void as to such deceased parties and their heirs but valid as to the living parties: *Rhodes v. Crutchfield*, 75 Tenn. 518. A decree in a foreclosure proceeding entered after the death of the plaintiff but subsequent to the time when the jurisdiction of the court had attached is a mere irregularity, and does not render the decree subject to collateral attack: *Wardrobe v. Leonard*, 73 Neb. 531, ante, p. 619, 111 N. W. 134.

Under a code provision providing that where defendant dies after an interlocutory judgment but before final judgment is entered, judgment shall be entered in the names of the original parties, where an interlocutory judgment against defendant is entered on demurrer, giving him leave to answer within twenty days or final judgment will be entered, and he dies within the twenty days without answering, the final judgment against him has the same force and effect with respect to priority of payment as if the defendant had died after its entry: *In re Clark*, 5 Dem. Sur. 377. And under a code provision providing that no entry of judgment shall be made against a party who dies before a verdict, report or decision is actually rendered against him, and that in those cases the verdict, report or decision is absolutely void, where a party dies before the decision is actually signed or rendered against him in a cause tried before the court, the decision and judgment entered thereon are void, even though an opinion in duplicate directing the finding of facts and conclusions of law and giving the reasons therefor was signed and delivered by the judge to the attorneys in the case while the party was still living: *Adams v. Nellis*, 59 How. Pr. 385.

"Formerly a judgment rendered after the death of one of the parties to the action was assailed by a writ of *coram nobis* or *coram vobis*: *Tidd's Practice*, 1136; 3 *Blackstone's Commentaries*, 407; *Freeman on Judgments*, secs. 93, 94. But we agree with appellants' counsel that these writs have fallen into desuetude in most of the states, and that the proper way to call the court's attention to a party's death, and to have an erroneous and voidable judgment vacated, is by motion supported by affidavits or otherwise: *Park v. Higbe*, 6 Utah, 414, 24 Pac. 524; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797. We have no doubt of the power of the court to vacate and set aside an erroneous and voidable judgment such as was rendered in this case and of the correctness of the procedure adopted by appellants to accomplish this result, but the important question

is, Was the application made in time?" *Elliott v. Bastian*, 11 Utah, 452, 40 Pac. 713.

Where a judgment has been rendered for or against a deceased party, the error is one of fact, and where the fact of the death is not apparent on the record, the usual method of correction has been by writ of error coram nobis: *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 681; *Neilson v. Holmes*, 1 Miss. 261; *Dugan v. Scott*, 37 Mo. App. 663; *Dows v. Harper*, 6 Ohio, 518, 27 Am. Dec. 270; *Yaple v. Titus*, 41 Pa. 195, 80 Am. Dec. 604; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336. But some of the more recent cases do not acknowledge an absolute right to have a judgment vacated because of the death of a party prior to its rendition, and motions for that purpose have been refused where the moving party does not represent the deceased party and is not injured by the judgment, or where the party is guilty of laches in not calling the attention of the court to such death before the judgment was entered: *Rogers v. McMillan*, 6 Colo. App. 14, 39 Pac. 891; *State v. Tate*, 109 Mo. 265, 32 Am. St. Rep. 664, 18 S. W. 1088; *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541. The more common practice, however, where the entry of a judgment has been delayed until after the death of one of the parties is to allow the judgment to be entered nunc pro tunc as of a date when the deceased party was living if the party recovering the judgment was then entitled to a judgment: *Powe v. McLeod*, 76 Ala. 418; *Seymour v. O. S. Richardson Fueling Co.*, 205 Ill. 77, 68 N. E. 716; *Snow v. Carpenter*, 54 Vt. 17; *Richardson v. Green*, 130 U. S. 104, 9 Sup. Ct. Rep. 443, 32 L. ed. 872.

IV. Rule Where One of the Parties was Dead When the Suit was Commenced.

"As to the validity of judgments in favor of or against persons rendered after their death, there is great contrariety of opinion. One class of authorities holds that all such judgments are absolutely void. Another class holds that those which are rendered in suits commenced after the death of the party are void, but that, where the parties are alive when the suits are commenced and the court once acquires jurisdiction over their persons, judgments therein rendered are not void, though the parties be dead before their rendition. Other cases take the broad position that the judgments are not void in either of the cases stated, but that they are only voidable by direct proceeding. Speaking of the cases mentioned in the first and third classes, Mr. Freeman says: 'We apprehend that neither position is correct. That there should, at some time during its progress, be living parties to both sides of an action we think indispensable; and that no sort of jurisdiction can be obtained against one who was dead when the suit was commenced against him as defendant, or in his name as plaintiff; and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun; and that a judgment for or against

him must necessarily be void'; Freeman on Judgments, sec. 153. To the same effect is Black on Judgments, sec. 203. Van Fleet, in his work on Collateral Attack, holds that the judgment is valid until set aside by direct attack, whether the party died before or after the commencement of the action. (Sections 587, 602, and 603.) The decisions upon all of the phases of the question will be found cited by these authors at the places in their works above indicated, and in the note by Freeman to the case of Watt v. Brookover, 35 W. Va. 323, 29 Am. St. Rep. 816-819, 13 S. E. 1007. There are also decisions holding judgments against corporations, obtained in suits commenced after their dissolution, to be void: See note just referred to. Some of the cases cited to the different propositions cannot, we think, be considered fairly decisive of them, but it is unnecessary to undertake an analysis of them, as each of the propositions stated is undoubtedly supported by weighty authority. In most of the authorities holding that a judgment is not void when obtained in a proceeding commenced after the death of a party, it is assumed that there is no difference in principle between such a case and those in which the party was living when the suit was brought, and was brought within the jurisdiction of the court, but died before judgment. The fundamental proposition on which such decisions rest, and which they hold applicable to both classes of cases, is that the record is conclusive evidence of the jurisdiction of the court, and cannot be impeached by proof of the death of the party before judgment. We think these assumptions are not consistent with sound principle; that there is a clear distinction between the two cases stated, which renders the rule of evidence as to the conclusiveness of the record applicable to one, and inapplicable to the other. . . . The living party is the only one who is or can be brought within the jurisdiction of the court. The judgment, in the nature of things, cannot conclusively determine the fact that the party was living when in fact he was dead. The conclusive presumption of jurisdiction, depending alone on service, is wholly inapplicable to such a question. That presumption is of the procedure had in the case only, and exists because the action of the court is considered better and safer evidence of the procedure taken than parol evidence could be. But the fact of death is one outside of and beyond the procedure of the court. It is a fact which makes it impossible for the court to put itself in a position to adjudicate anything. If the court makes inquiry as to and determines the fact, it determines it with only one party within its power. Such a determination can bind no one, because made nominally against a party who does not exist. It cannot bind the estate of a decedent because the estate is not even nominally represented. The dead man cannot represent it, and no one else does so, because no one else is party to the record, or is called upon to appear. The case differs from those in which the party dies after suit, in that the court never has but one party to the proceeding, and hence has no power to make a record which is con-

clusive of anything": *Jones Lumber Co. v. Rhodes*, 17 Tex. Civ. 665, 41 S. W. 102.

The weight of authority sustains the rule that where a judgment is rendered for or against a party who was dead at the time when the suit was commenced, the judgment is void: *Greenstreet v. Thornton*, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; *Loring v. Folger*, 7 Gray, 505; *Weller Mfg. Co. v. Eaton*, 81 Mo. App. 657; *Childers v. Schautz*, 120 Mo. 305, 25 S. W. 209; *Hinkle v. Kerr*, 148 Mo. 43, 49 S. W. 864; *Shea v. Shea*, 154 Mo. 599, 77 Am. St. Rep. 779, 55 S. W. 869; *Winship v. Conner*, 42 N. H. 341; *Jones Lumber Co. v. Rhoades*, 17 Tex. Civ. 665, 41 S. W. 102. And there are also strong dicta to the effect: *Clafin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834; *Reid v. Holmes*, 127 Mass. 326. But other courts have asserted that where the plaintiff is dead at the time of commencing the suit, the judgment rendered therein is merely erroneous and not void: *Baragwanath v. Wilson*, 4 Ill. App. 80 (but see *Clafin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, 21 N. E. 834, for a very strong dictum to the contrary); *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227; *Watt v. Brookover*, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007. In an early Texas case it was said that the death of the plaintiff before suit does not necessarily avoid this judgment, but that it goes to show such fraud in obtaining the judgment as will vitiate it: *Thouvenin v. Rodrigues*, 24 Tex. 468.

The distinction in the rule respecting judgments for or against deceased persons based on the fact whether the party was dead at the time when the suit was commenced, or died after the suit had been commenced and jurisdiction of the court had attached, was strongly set forth in the case of *Hinkle v. Kerr*, 148 Mo. 43, 49 S. W. 864. In that case the court, in discussing the subject, said: "The defendant contends that although the said Susan Hinkle was a married woman at the time the suit in which the aforesaid judgment was rendered was instituted, and remained covert during the pendency thereof until she died, and was dead when the judgment was rendered, yet the judgment against her was not void, and her title to an undivided tenth of the said W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 32 passed by the sale and deed aforesaid thereunder, and the judgment as to the same ought to have been in his favor. 'As to the validity of a judgment rendered for or against a party after his death, the authorities seem to be hopelessly irreconcilable. Thus, according to numerous decisions, such judgments are utterly void, and may be collaterally attacked. The decided weight of authority, however, seems to be that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after his death, the judgment is not for that reason void. Such a judgment, while erroneous and voidable, when properly assailed in a direct proceeding for that purpose, is valid until reversed by some appropriate proceeding, and may not be collaterally attacked': 11 Ency. of Pl. & Pr. 843 et seq.;

1 Black on Judgments, sec. 200; 1 Freeman on Judgments, sec. 153; Van Fleet on Collateral Attack, sec. 602. In the section cited, Mr. Freeman says: 'The discussions respecting the effect of judgments for or against persons who were not living at the time of their rendition are conflicting and unreasonable. Some of them apparently affirm that a judgment so rendered is void under all circumstances, and others that it is valid under all circumstances, because its rendition implies that the parties for or against whom it was given were then living, and to show that either was then dead is to dispute the verity of the record, and therefore not permissible. We apprehend that neither position is correct. That there should, at some time during its progress, be living parties to both sides of an action, we think indispensable, and that no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as a defendant, or in his name as plaintiff, and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun, and that a judgment for or against him must necessarily be void. . . . On the other hand, if an action is begun by and against living parties, over whom the court obtains jurisdiction, and some of them subsequently die, it is not thereby deprived of its jurisdiction; and while it ought not to proceed to judgment without making the representatives or successors in interest of the deceased party parties to the action, yet, if it does so proceed, its action is irregular merely, and its judgment is not void. The first proposition thus laid down by the learned author is supported by the rulings of this court in the following cases, in which it was held that a judgment in a suit begun and prosecuted against a dead man is void as to him and those claiming under him: *Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971; *Crosley v. Hutton*, 98 Mo. 196, 11 S. W. 613; *Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261; *Bollinger v. Chouteau*, 20 Mo. 89; and his second proposition by the following cases, in which it was held that a judgment in favor of a plaintiff who had died before its rendition is not void: *Coleman v. McAnulty*, 16 Mo. 173, 57 Am. Dec. 229; *Union Bank v. McWharters*, 52 Mo. 34; and impugned by *Sargent v. Rowsey*, 89 Mo. 617, 1 S. W. 823, in which it was held that "when a defendant, in an action to foreclose a mortgage upon land, dies, during the pendency of the action, and a decree of foreclosure is obtained, and a sale had under it, without suggesting the death of the defendant, or reviving the suit against his heirs, the sale is a nullity"; and by *Voorhis v. Gamble*, 6 Mo. App. 1, in which it was held that a decree against a defendant who was dead at the time it was rendered was a nullity as to his rights.'

"The only ground for the distinction in these cases, and for holding that a judgment against a dead person is valid in any case, is that, the judgment having been rendered by a court having full jurisdiction to render the judgment in question, it cannot be impeached by showing that the party was dead at the time the judgment was

rendered. Both classes of judgments are afflicted with the same infirmity. The only difference is that in one case it can be shown to defeat the judgment, and in the other it cannot."

In *Shea v. Shea*, 154 Mo. 599, 77 Am. St. Rep. 779, 55 S. W. 869, the question arose whether a judgment rendered against a person who died while process was being served upon him by publication but before the service was complete, was void or not, regardless of the fact that property of the deceased had been attached. The court said: "The action by attachment by Louisa Shea against Patrick Shea only sought to subject his lands and property in Polk county to the satisfaction of any judgment she might receive. For all practical purposes it was a proceeding in rem. Jurisdiction over the res having been fully acquired by the seizure under a regular writ in the lifetime of Patrick Shea, does the fact that he subsequently died before the order of publication was or by law could have been executed under the judgment obtained thereon in ignorance of his death void? Our answer is that in this court in all collateral attacks it is held that in attachment causes the jurisdiction over any given subject matter is obtained by the levy thereon of a writ properly issued; and no matter what nor how great errors or irregularities may subsequently occur, the res remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error, appeal or set aside in a direct and appropriate proceeding for that purpose: *Hardin v. Lee*, 51 Mo. 241; *Freeman v. Thompson*, 53 Mo. 183. The completion of the publication after Patrick Shea's death was irregular, and no doubt the court would have proceeded no further had that fact been brought to its attention; but it was not, or it would doubtless have set aside the judgment had application been made within the time permitted by statute; but it must be held that the judgment obtained in that suit was not void, and hence is not open to this collateral attack."

A somewhat similar question arose in *Greenstreet v. Thornton*, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735, which was a proceeding to foreclose a tax assessment. The owner of the property sought to be affected was dead at the time the service of process, which was by publication, was made. The decree ordering the sale of the property was held void, the court saying: "There is only one contingency in which a general notice is authorized by the statute in proceedings of this kind, and that is when the owner of the property is unknown. That fact must be alleged in the complaint, and the suit proceeds, so says the statute, 'as an action in rem against the property.' Summons issues against the unknown owner of the particular property, and service is had by affixing a copy of the same to the property and by publication. In such a case, the notice is general to the unknown owner, whoever he may be, and if the summons is served in the manner required, all parties must take notice, for it includes all who have an interest in the property. But, as before stated, this general notice is only allowed where the owner

of the property is unknown, and that fact alleged in the complaint: Sandel & Hill's Digest, secs. 5344-5346. Where it is not alleged that the owner is unknown, and the proceeding is against a certain person named as defendant and alleged to be the owner of the property, then, whether there be actual service upon him or only constructive service in the manner designated by the statute, it is a notice to him only, and the decree affects only his interest in the land, whatever it may be, and no one else is bound by it. The defendant named in this proceeding was dead, and the decree based on a summons against him, it matters not how it was posted or published, was of no validity whatever: *Crosley v. Hutton*, 98 Mo. 196, 11 S. W. 613; *Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261. The contention of appellant that the decree in question cannot be made the subject of a collateral attack is not well taken, for the decree is void."

V. Rule Where the Party Died on the Same Day that the Judgment was Rendered.

For the purpose of defeating a judgment rendered by a court of general jurisdiction, the legal representatives of a deceased party will not be allowed to allege that he died on the same day of the rendition of the judgment but an hour previous to its rendition: *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867. But in *Ex parte Massie*, 131 Ala. 62, 90 Am. St. Rep. 20, 31 South. 483, 56 L. R. A. 671, a judgment rendered upon the same day on which one of the parties had died, but previous to the death, was vacated. The petitioner sought to maintain that no account should be taken of fractions of a day, but the court observed: "It is contended by petitioner that the doctrine laid down by this court in *Powe v. McLeod*, 76 Ala. 418, is wrong in principle, and should be overruled; and it is further insisted that there should be no distinction in the rule as applied to judgments of the supreme court in such cases and to decrees of the chancery court. We cannot agree to this contention, and we adhere to the doctrine as laid down in *Powe v. McLeod*, 76 Ala. 418. It is a general rule that in judicial proceedings fractions of a day are not regarded, but such proceedings take effect in law from the earliest period of the day upon which they originated and came into force; but this general rule is not absolute, and where from the nature of the case justice requires it, fractions of a day are reckoned: 8 Am. & Eng. Ency. of Law, 2d ed., pp. 739-742. The unity of a day and its indivisibility as a period or point of time is a fiction of the law, and is regarded only in the promotion of the ends of justice, and never when justice and right will thereby be defeated. This fiction of the law had its origin in the common law, and, while the courts of England have generally adhered to it, still in those courts the rule has not been universal in its observance. The courts of this country, however, have been disposed to depart from the rule, and fractions of a day are reckoned where justice requires it."

The same rule was applied in Patterson's Appeal, 96 Pa. 93. Under a code provision providing that judgment by confession shall not be entered after defendant's death, it has been held that an entry of judgment on warrant of attorney on the same day of defendant's death but subsequent to his death was in plain violation of the statute: Maddock v. Stevens, 3 N. Y. Supp. 528.

VI. Rule Where the Fact of the Death Appears on the Record or was Known by the Opposing Party.

A judgment rendered for or against a person after his death is reversible if the fact and time of his death appear on the record, or in writ of error coram nobis if the fact must be shown aliunde: Davis v. Coryell, 37 Ill. App. 505; Jennings v. Simpson, 12 Met. 558, 11 N. W. 880; Yaple v. Titus, 41 Pa. 195, 80 Am. Dec. 604; Grossman's Appeal, 102 Pa. 137; Giddings v. Steele, 28 Tex. 732, 91 Am. Dec. 336; Evans v. Spurgin, 6 Gratt. 107, 52 Am. Dec. 105; Watt v. Brookover, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007. In Alabama a judgment for costs against one interposing a claim to property levied on under an execution against another has been declared to be void where it was rendered after the death of the claimant and that fact appears on the record: Bauer v. Wood, 135 Ala. 430, 33 South. 538. And where it is shown to the court that defendant has been absent from his home and family for more than seven years before the suit was brought without having been heard from, judgment should not be rendered in the case unless the presumption of death is rebutted: Winship v. Conner, 42 N. H. 341. The decision in Watson v. Adams, 103 Ga. 733, 30 S. E. 577, was also to the same effect. And in another case a judgment was declared invalid because it was shown that the plaintiff had embarked on a voyage which ordinarily took eighteen days to make and neither he nor the vessel had been heard of for fifty-eight days at the time that judgment was entered in his favor: Gerry v. Post, 13 How. Pr. 118.

VII. Rule Where the Deceased Party was Merely a Nominal Party.

Where a suit is instituted by one who has the beneficial interest in a note, in the name of the payee, who is dead, and the defendant appears and suffers a judgment nil dicit to be rendered against him, he is estopped from afterward seeking to vacate the judgment on account of the death of the nominal plaintiff: Powell v. Washington, 15 Ala. 803.

VIII. Rule Where One of Several Parties Plaintiff or Defendant Dies Before Entry of Judgment.

The effect of the death of a coplaintiff or codefendant is determined generally by the nature of the suit and not by the mere effect of the death.

It has been held that the fact that one of several plaintiffs was dead at the time of the institution of the suit will not render the judgment void: *Baragwanath v. Wilson*, 4 Ill. App. 80; *Watt v. Brookover*, 35 W. Va. 323, 29 Am. St. Rep. 811, 13 S. E. 1007. "Where a decree is rendered on a bill filed by two complainants, one of whom was dead at and before the filing of that bill or rendition of the decree, the fact only vacates the decree as to the deceased complainant": *Grace v. Rowell*, 30 Ga. 764. In Mississippi, where the common-law rule seems to prevail, it has been held that a judgment rendered in favor of coplaintiffs, one of whom is dead when the judgment is rendered, is void: *Young v. Pickens*, 45 Miss. 553. But a contrary rule was announced in Illinois: *Stoetzell v. Fullerton*, 44 Ill. 108. And in several cases where a suit was commenced by a partnership and one of the partners died before the entry of judgment against both of them, it has been declared that the judgment was not void but merely voidable: *Bowen v. Troy Portable Mill Co.*, 31 Iowa, 460; *Fuqua v. Mullen*, 76 Ky. 467; *Billingslea v. Smith*, 77 Md. 504, 26 Atl. 1077; *Holt v. Thacher*, 52 Vt. 592; contra, *McCloskey v. Wingfield*, 29 La. Ann. 141.

And where an action is against several defendants, and one dies before the entry of judgment against all, the death not being suggested, the judgment is generally regarded as merely voidable and not void: *Ferguson v. Sutphen*, 8 Ill. 547; *Burke v. Stokely*, 65 N. C. 569; *Pullen v. Baker*, 41 Tex. 419; *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687. See, also, monographic note to *Watt v. Brookover*, 29 Am. St. Rep. 817. And a judgment against several joint defendants, entered after the decease of one of them, will be reversed for error as to all: *Tedlie v. Dill*, 3 Ga. 104. Although one of several joint defendants dies before entry of judgment against all, an execution against all is good, and may be levied on the property of the survivors if no motion is made to vacate the judgment as against the deceased party: *Fabel v. Boykin*, 55 Ala. 383. A judgment which passes by operation of law upon the return of a forfeited forthcoming bond is not vitiated by the fact that one of the obligors is dead, and the judgment is valid as to the surviving obligors: *Moody v. Harper*, 38 Miss. 599. And in Missouri, the court refused to set aside a judgment rendered on a joint and several bond against all of the obligors, although one of them was dead at the time that the action was commenced: *State v. Tate*, 109 Mo. 265, 32 Am. St. Rep. 664, 18 S. W. 1088.

FLINT v. CHALOUPKA.

[78 Neb. 594, 111 N. W. 465.]

CREDITOR'S SUIT—Burden of Proof in Case of Transfer to Relative.—If a transfer of land is made by a debtor to a near relative in consideration of a past due indebtedness, the burden of proof in a creditor's suit is upon the grantee to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. (p. 641.)

BANKRUPTCY—Creditors' Suits—Defenses—Jurisdiction.—A fraudulent grantee cannot plead the subsequent discharge in bankruptcy of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceedings, if the property involved has never been brought within the jurisdiction of the bankruptcy court. (pp. 645, 646.)

Grimm & Son and A. R. Scott, for the appellant.

Foss & Brown and A. S. Sands, for the appellee.

594 EPPERSON, C. The plaintiff, Charlotte S. Flint, as administratrix of the estate of James Flint, deceased, brought this action, a creditor's suit, against the defendants to set aside several **595** conveyances of land. All conveyances assailed in the petition were abandoned by plaintiff, except those hereinafter referred to.

On the eleventh day of August, 1896, Frank J. Chaloupka, Sr., transferred to his son, Frank J. Chaloupka, Jr., three hundred and eighty-five acres of land in Saline county, Nebraska, for the expressed consideration of \$17,050. No cash was paid, but a mortgage indebtedness of \$7,050 was assumed by the grantee. On the same day (August 11, 1896) Frank J. Chaloupka, Jr., executed and delivered to his mother a note for \$10,000, and a mortgage on the land securing the same. A short time thereafter there was indorsed on the note \$3,600, which represented an alleged indebtedness owing to Frank J. Chaloupka, Jr., by his father and Joseph Chaloupka, another son. The reason this sum was later indorsed on the note is explained by defendants, who say that at the time of the transfer the actual amount of this indebtedness was not known, and could not be ascertained until Joseph Chaloupka, who was absent, should return to Wilber, the home of the defendants. In January, 1897, Frank J. Chaloupka, Jr., transferred one hundred and sixty acres of the same land to his mother in consideration of her releasing the \$10,000 mortgage. A year later the mother sold the one hundred and sixty acres to a stranger, whose title is not assailed herein.

At the time of the transfer plaintiff was urging the payment of her note and threatening suit thereon. Afterward she obtained judgment for \$1,451.40, and alleges that the several transfers of land were made to defraud the creditors of Frank J. Chaloupka, Sr.

It is contended by defendants that, at the time of the transfer of the land by the father to the son, the father was indebted to his wife, Anna Chaloupka, in the sum of \$6,400, and to settle this indebtedness the father caused the son to execute the \$10,000 note, payable to the wife, as above set out. Plaintiff claims that this transaction did not amount to a bona fide transfer between husband and wife. The indebtedness claimed by the wife represented ⁵⁹⁶ alleged advancements to her by her father between 1862 and 1874, and an inheritance from her father, which, it is alleged, was loaned by her to her husband. The total amount of the indebtedness between the husband and wife in 1891, with interest, was \$5,400, for which a note was given by the husband to the wife. The principal and interest due on this note in 1896 was \$6,400. The evidence, however, is not clear that such advancements were made to the wife. From the testimony of the husband it appears that the money was given to him by his father in law for the purpose of buying land and paying debts, and was intended for him and his wife. We cannot say, as a matter of law, that the relationship of debtor and creditor existed between husband and wife when the note was executed and delivered to her. This fact, however, does not have the importance claimed for it by the plaintiff, for this indebtedness was extinguished by a transfer to the wife of one hundred and sixty acres of land, which was in turn sold to a stranger whose title is not assailed. When this suit was commenced, the two hundred and twenty-five acres in controversy had been mortgaged by Frank J. Chaloupka, Jr., to his mother for \$2,600 to indemnify her against a mortgage for that amount on the one hundred and sixty acres deeded to her, the intention being to give her a clear title to the one hundred and sixty acres for the release of the \$10,000 mortgage. The \$2,600 mortgage is not questioned in this case, and the money or property realized by the wife, Anna Chaloupka, through these transactions with her son cannot be assailed under the pleading herein. The only bearing which these transactions have upon the case is their value as evidence tending to show fraud in the transfer of the land to the son. For this purpose it is not, standing alone, very convincing. The son could reasonably have believed that the

father was indebted to his mother in the sum of \$6,400, which he (the son) was willing to assume as a part of the purchase price of the land. We must, therefore, look to other facts in the case in determining the good faith of the transfer assailed.

Frank J. Chaloupka paid no cash consideration for the ⁵⁹⁷ land deeded to him. The sum and substance of the entire transaction relative to the farm land was the cancellation by him of the indebtedness of \$3,600 held against his father and brother, Joseph Chaloupka, which was the consideration given by him for his father's equity in two hundred and twenty-five acres of land. Upon the bona fides of this consideration the result of this suit depends.

It is a well-established rule that, where a transfer of land is made by a debtor to a near relative in consideration of a past due indebtedness, the burden rests upon the grantee in a creditor's suit to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. Such transactions are looked upon with suspicion, and the suspicion continues until the grantee shows the good faith of the transfer by clear and satisfactory evidence. Generally, when the transaction is in fraud of creditors, knowledge thereof rests only with the near relatives, or others in privity with the debtor. When the testimony relied upon to show good faith is given by interested relatives only, the reasonableness or unreasonableness of their evidence has considerable weight in arriving at a just conclusion.

In the case at bar, the consideration in the first instance was represented by the \$10,000 note and mortgage given to the grantor's wife, whose note only called for \$6,400. The alleged indebtedness, which, it is claimed, was due to the son (the grantee), was represented by a note of \$1,000 against his father and brother Joseph, an item of \$125, which he had paid for his father, and the remainder was for wheat sold to the father and brother at different times from 1893 to 1896. The only evidence of this indebtedness was the testimony of the father and his two sons. From 1893 to 1896 the father and Joseph were engaged in the milling business in Wilber. The amount and value of the wheat delivered cannot be ascertained from the evidence of the parties. We are required to consider only their statements as to the gross amount due upon all these claims. They expect the court to find that Frank ⁵⁹⁸ J. Chaloupka, Jr., delivered to his father and brother wheat raised in 1892 and 1893 for which he received

no consideration until the deed in controversy was executed, and that credit was extended to them on an open account, no agreement or contract for credit being shown. When the wheat was sold, the mill was a going concern, and, for aught that appears in the record, they could have paid cash for grain bought. In 1894 and 1895 the crops of Frank J. Chaloupka, Jr., were not good, and in all reason it would seem that he would collect money due him on crops of previous years. The defense may be true, but it is not shown by clear and satisfactory evidence. The evidence disclosed that a bookkeeper was employed in the mill, yet no books were introduced showing the indebtedness to the grantee, nor is the absence of such record proof accounted for. There were introduced in evidence certain figures made by the bookkeeper at the mill in a memorandum-book belonging to Frank J. Chaloupka, Jr., purporting to show a delivery of part of the wheat delivered to the mill. This, however, does not prove a sale of the wheat on credit. At the time of the transfer, the only writing or memorandum referred to in the evidence showing the indebtedness owing to Frank, Jr., was in his possession, yet the parties found it necessary to await the return of Joseph to ascertain the amount of that indebtedness. Upon his return, the amount thereof was estimated and indorsed upon the \$10,000 note to Anna Chaloupka, apparently without asking her consent. The transfer of the one hundred and sixty acres to the debtor's wife so soon after the conveyance to the son raises a strong suspicion that it was contemplated at the time of the first transfer for the purpose of securing at least one hundred and sixty acres from creditors. This suspicion is not removed by the testimony of the Chaloupkas, who said that on account of the two years' crop failure the son considered that he could not raise the funds to pay the remainder of the \$10,000 mortgage, and for this reason conveyed the one hundred and sixty acres in satisfaction thereof. The two years' crop failure was known ⁵⁹⁹ when the mortgage was given. These are circumstances which the law of evidence requires the defendants to explain by clear and satisfactory proof showing them consistent with good faith. If the record contained any written evidence, or testimony of disinterested witnesses corroborating the testimony of the Chaloupkas, we would not hesitate in affirming the judgment. As it is, the bona fides of the transaction remains in doubt, and we are required to resolve that doubt against the parties upon whom the law has placed the burden of proof. We cannot say that the defendants successfully

carried the burden of proving the good faith of the conveyance to Frank J. Chaloupka, Jr.

Another transfer assailed was the conveyance of certain city property used in the livery-stable business. The title to this property never stood in the name of the father, and the evidence fails to show that it was purchased with his money. As to this, the judgment of the district court was for defendants, and we think rightly so. The lower court found for plaintiff as to certain lots in the city of Wilber, but they were not of sufficient value to afford full relief.

Plaintiff's judgment was obtained May 12, 1897, upon a promissory note dated November 27, 1894. On September 2, 1897, plaintiff caused an execution to be issued upon said judgment, which was on the same day returned nulla bona. This action was instituted on September 7, 1898. In September, 1899, Frank J. Chaloupa, Sr., upon his voluntary petition, was declared a bankrupt under the federal bankruptcy act of 1898. Plaintiff herein filed proof of her claim with the referee in bankruptcy and participated in the election of a trustee. She did not disclose to the court of bankruptcy that she had or claimed a lien upon the land here in controversy by virtue of the institution of this suit. Defendants contend that, by the filing of the claim with the bankruptcy court without reference to the security claimed, plaintiff abandoned such security, and the subsequent discharge of the elder ⁶⁰⁰ Chaloupka operates as a bar to this suit. Had plaintiff remained out of the bankruptcy court, no doubt would arise as to her right to prosecute her creditor's bill. Had the bankrupt listed with the trustee the land in controversy, and a disposition thereof been made by the trustee, no doubt would exist but that the plaintiff, not having disclosed nor claimed under her lien, would have been estopped from the prosecution of this suit. And, further, in an action properly brought by the trustee in bankruptcy against the plaintiff herein, we think that under the existing facts the trustee would have prevailed, and the land in controversy would have been subjected to the payment of all claims against the bankrupt. But none of these propositions exist here. Can the bankrupt, or his fraudulent grantee of the land which was never in the jurisdiction of the bankruptcy court, plead a discharge in bankruptcy as a bar to a creditor's suit against a creditor who wrongfully failed to disclose his security to the bankruptcy court? In *White v. Crawford*, 3 *McCrary*, 412, 9 *Fed.* 371, cited by defendants,

it was held: "A creditor waives any lien he may have upon the property of his debtor, by proving up his debt as an unsecured claim." The rule was therein applied in favor of a grantee in a deed containing an erroneous description which was corrected after the creditor obtained a judgment. In *Shorten v. Booth*, 32 La. Ann. 397, it was held: "A creditor who proves his whole debt, as one without security, against a bankrupt's estate, thereby releases any mortgage he may have." The land there involved was within the jurisdiction of the bankruptcy court, and was sold free from encumbrance by order of that court upon notice to creditors. The contesting creditor had previously filed his claim, with an affirmative representation that he had no security. In *Heard v. Jones*, 56 Ga. 271, it appears that the bankrupt, after turning over to the trustee the property there in controversy, which was in fact exempt from the claims of general creditors, sold the same. His grantee successfully pleaded the bankrupt's discharge. Other cases cited ⁶⁰¹ by defendants support the general rule that the filing of a secured debt as a general claim is a waiver of the security: *Hoadley v. Caywood*, 40 Ind. 239; *Spilman v. Johnson*, 27 Gratt. (Va.) 33 (where creditor sought to reach property sold by trustee); *Bowley v. Bowley*, 41 Me. 542; *Haxtun v. Corse*, 4 Edw. Ch. (N. Y.) 600.

On the other hand, we find authorities supporting the plaintiff's right to maintain this action. In *Taylor v. Taylor*, 59 N. J. Eq. 86, 45 Atl. 440, it is held: "The bankruptcy act of 1898, section 67, paragraph b, providing that whenever a creditor is prevented from enforcing his rights as against a lien created by the debtor, who afterward becomes a bankrupt, the trustee shall be subrogated to and may enforce such rights for the benefit of the estate, does not transfer to the trustee the right of a judgment creditor to enforce an equitable lien acquired by the filing of a creditor's bill before bankruptcy proceedings were begun, or abate such creditor's right to prosecute such suit." To the same effect are *Storm v. Waddell*, 2 Sand. Ch. (N. Y.) 544; *Macy v. Jordan*, 2 Denio (N. Y.), 570. In *Lowry v. Morrison*, 11 Paige Ch. (N. Y.) 327, it is held: "Where a judgment creditor's suit is commenced before a decree in bankruptcy against the defendant therein, so as to obtain a lien upon his property, and the defendant subsequently obtains his discharge under the bankruptcy act, he cannot plead such discharge in bar of the suit generally; as the discharge is only a bar to a personal decree against the bankrupt." In

Cook v. Farrington, 104 Mass. 212, a case wherein a subsequent mortgagee pleaded the discharge in bankruptcy of the mortgagor of personal property, it is said: "A mortgagee of personal property who has proved his debt against the estate of the mortgagor in bankruptcy without disclosing his security, is not thereby estopped to claim the property against a subsequent mortgagee who has not proved his debt. The proof by Willard (the first mortgagee) without such relief or conveyance was contrary to law; but it did not of itself operate to discharge the mortgage. It might prevent his setting up the mortgage ⁶⁰² against the assignee claiming to hold the property as a part of the assets of the estate. Equity might hold the creditor to do what he ought to have done, and subrogate the assignee to his rights if the security of a release or discharge would not work the same advantage to the estate. But only the assignee can avail himself of the rights which these provisions of the bankrupt law are intended to secure. The plaintiff can derive no right or advantage therefrom. Neither can the plaintiff set up those proceedings as an estoppel. There is want of mutuality as well as of privity. He has acquired no title from the assignee; he is not interested in the estate as a creditor having proved his debt in bankruptcy; he is no way affected by the bankruptcy proceedings either in his relations to the defendant or to the property." In *Bassett v. Baird*, 85 Pa. 384, the holder of a mechanic's lien, who had previously proved the secured debt against the bankrupt, his debtor, without disclosing the fact of his lien, was permitted to foreclose after the discharge of his debtor, the land then belonging to the debtor's grantee who purchased prior to the bankruptcy proceedings. In *Moyer v. Dewey*, 103 U. S. 301, 26 L. ed. 394, a case wherein a creditor, after the discharge in bankruptcy of his debtor, sought to reach property fraudulently conveyed before, it was held that, so far as the discharge was concerned, its only effect was personal to the bankrupt, and did not avail to release the fraudulent grantees from liability for the fraud committed by them. In reference to that decision the same court, in *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. Rep. 313, 34 L. ed. 931, said: "It is manifest that the discharge would not have availed the bankrupt if he had pleaded it, and that it could not avail his fraudulent grantees." Cases directly in point are few, but the weight of authority we believe, and the rule more in harmony with justice, will not permit a fraudulent grantee to plead the subsequent discharge of his grantor as a defense in a creditor's suit brought

more than four months prior to the institution of the bankruptcy proceeding, and which ⁶⁰³ pertains to land which was never brought within the jurisdiction of the bankruptcy court.

Defendants with great confidence cite *Kohout v. Chaloupka*, 69 Neb. 677, 96 N. W. 173, a case where the bankruptcy proceeding here considered was before the court, and wherein the trustee attempted to intervene in this litigation. That case was disposed of upon a demurrer to the petition for intervention which was held insufficient. It appears from that case that the plaintiff herein did not resist the attempted intervention of the trustee, at least she was not a party to the appeal, and the only question there determined was that the petition was insufficient, in that it failed to allege that the plaintiff herein waived her security. In the opinion it is said: "For all that appears from the trustee's petition she may have appeared in the bankruptcy proceedings, as she had a right to do, only for the purpose of participating to the extent that her claim was greater than her security. The allegation that by filing her claim she waived her security was a material one, and the only presumption that may be indulged from its absence is that she did not waive her security." Had the trustee alleged the facts as the evidence herein discloses them, there can be no doubt but that he would have been permitted to intervene. However, the case is now here upon an issue between the creditor and the bankrupt's alleged fraudulent grantee, who in no way succeeded to the rights of the trustee. Neither may the defendants invoke the rule, which the trustee by proper pleading and showing could have invoked, namely, "that a creditor of a bankrupt may either directly or indirectly waive his security and prove his claim as unsecured; as where a creditor, by judgment, execution, attachment, or creditor's suit, proves his claim without disclosing his lien, in which event he will not subsequently be permitted to enforce it, but will be deemed to have waived it."

We therefore recommend that the judgment of the district court be reversed and the cause remanded to the ⁶⁰⁴ district court, with instructions to modify the judgment by an order setting aside the conveyance of the farm land from Frank J. Chaloupka, Sr., and wife to Frank J. Chaloupka, Jr., and subject the same to the payment of the plaintiff's judgment.

Ames and Oldham, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded to the district court, with instructions to modify the judgment by an order setting aside the conveyance of the farm land from Frank J. Chaloupka, Sr., and wife to Frank J. Chaloupka, Jr., and subjecting the same to the payment of plaintiff's judgment.

In the Case of *Gage Bros. & Co. v. Burns*, 78 Neb. 737, 111 N. W. 791, it was decided that while it is true that the court will carefully scrutinize a transfer of property between near relatives which has the ultimate effect of hindering and delaying the creditors of the grantor, yet if, on an examination of all the evidence in the record, it appears to have been taken by the grantee for a valuable consideration and without participating in any intent of the grantor to cheat or defraud creditors, it will be upheld.

A Discharge in Bankruptcy is but a personal release, and does not exonerate the effects of the debtor to which a lien has attached and which is not expressly annulled by the bankruptcy statute: *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233. If a judgment is recovered and operates as a lien on the real property transferred by a judgment debtor in fraud of his creditors, such lien is not displaced by proceedings under a petition in bankruptcy filed more than four months after the judgment is entered, and the judgment creditor is entitled, notwithstanding such proceedings, to maintain an action to subject such property to his judgment. The right to assail the transfer is not vested in the trustee in bankruptcy: *Hillyer v. Le Roy*, 179 N. Y. 369, 103 Am. St. Rep. 919.

The Burden of Proof Where a Conveyance Between Relatives is attacked by creditors of the grantor as fraudulent is discussed in *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664; *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 Am. St. Rep. 484; *Glass v. Zutavern*, 43 Neb. 334, 47 Am. St. Rep. 763; *Reel v. Livingston*, 34 Fla. 377, 43 Am. St. Rep. 202.

DAVID BRADLEY & COMPANY v. BROWN.

[78 Neb. 836, 112 N. W. 331.]

INSURANCE—Principal and Agent.—If an agent in the possession of goods has agreed to become absolutely and unconditionally liable to his principal to the extent of their value for their loss or damage by fire, and he procures insurance upon them in his own name, such insurance is for his own benefit and advantage, to the exclusion of his principal. (p. 649.)

INSURANCE—Principal and Agent—Disposition of Proceeds of Insurance.—If an agent in the possession of goods has agreed to become unconditionally liable to his principal for their value, and he procures insurance upon them in his own name, money due from the

insurance company on account of a loss under the policy is not a trust fund for the benefit of the principal, but an indebtedness to such agent, subject to his disposition, and liable for his debts in like manner as other property of his estate. (p. 649.)

Flickinger Bros. and Needham & Doten, for the appellant.

H. C. Vail, C. E. Spear and F. D. Williams, for the appellee.

⁸³⁶ AMES, C. Fred E. Brown was a retail dealer in farm implements and machinery at Albion, Nebraska, where he owned and conducted a general store of such goods. In August, 1904, he received into his store building from the plaintiffs, David Bradley & Company, and as a part of his stock in trade, and to be disposed of and accounted for pursuant to a written contract between the parties, a considerable number or quantity of implements. The contract stipulated, in effect, that the goods should remain the property of Bradley & Company, and that Brown should sell them as their agent, retaining a specified compensation for his services, and contained the following paragraph: "In consideration of party of the first part (Bradley & Company) carrying said stock of goods subject to sale, and at ⁸³⁷ the expense of interest for value and special terms given, party of the second part agrees to be fully responsible for all damage or loss by fire, or otherwise, to any and all goods shipped under this contract." Brown procured policies of fire upon the goods, which were destroyed by fire a short time afterward, and later he was adjudged a bankrupt, and the defendant Spear was appointed trustee of his estate. This is a suit begun by Bradley & Company against Brown and the insurance companies to recover the amount of the loss. Spear, after the adjudication in bankruptcy, was substituted for Brown. The insurance companies do not resist payment, but have filed an answer in the nature of an interpleader, praying that the court determine to whom the money is owing. There is no dispute in regard to the facts which were settled by stipulation. The district court awarded the fund to the trustee, and the plaintiffs have appealed.

Each of the policies recited that it should protect property belonging to the insured, and that "held in trust by him, or on commission, for which he may be legally liable." It is not disputed that the property in question falls under this description, and counsel for plaintiffs contends for the application of the rule that, where an agent in the posses-

sion of personal property insures it against fire, the money due upon the policy after the loss belongs to his principal, who may recover it directly from the insurance company, and that if it is paid to the agent, the latter holds it in trust, merely, for the benefit of the party ultimately entitled. Authorities to this effect are not wanting, and in our opinion are sound: *Snow v. Carr*, 61 Ala. 363, 32 Am. Rep. 3; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. ed. 868; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 33 L. ed. 730; *Johnston v. Abresch*, 123 Wis. 130, 107 Am. St. Rep. 995, 101 N. W. 395, 68 L. R. A. 934; *Stillwell v. Staples*, 19 N. Y. 401; 1 *Wood on Fire Insurance*, 2d ed., sec. 293; *Hyde v. Hartford Fire Ins. Co.*, 70 Neb. 503, 113 Am. St. Rep. 796, 97 N. W. 629.

With the foregoing general proposition of law we understand counsel for the trustee to be also satisfied, but he contends that it is inapplicable to this case, for the reason ^{s38} that, by the above-quoted stipulation in the contract, Brown became himself an insurer of the goods against loss or damage by fire, and became instantly indebted for their value, upon the happening of the loss, irrespective of whether he had procured insurance upon them or not, and that the case is not like one where a debtor agrees to insure for the benefit of a mortgagee, or a factor for the benefit of his principal. The argument appears to us to be sound. The parties cannot be supposed to have contracted with a view to future insolvency. They had seen fit to fix their rights and obligations in event of a loss or damage by fire. Brown was bound to respond absolutely and unconditionally, and it follows, as it seems to us, that the insurance he procured upon the goods was for his own benefit and advantage exclusively. The moment the goods were destroyed by fire, the relation of principal and agent ceased, and that of debtor and creditor supervened. If he had not become bankrupt, and the insurance money had been paid to him, such payment would neither have created a trust fund in favor of the plaintiffs nor have affected the liability he had already incurred under the terms of the contract by the happening of the loss. The money would have been his, subject to his disposition, or to seizure for his debts, in like manner as other moneys and property of his estate, and he would have been liable to the plaintiffs upon his common-law obligation of contract, as in other like cases. It is not doubted that the trustee stands in the shoes of Brown, or that his rights are measured by

those of the latter, and we therefore recommend that the judgment of the district court be affirmed.

Oldham and Epperson, CC., concur.

By the COURT. The judgment of the district court is affirmed.

LETTON, J., Concurring Separately. The contract between the plaintiff and the defendant Brown was, in effect, a contract of insurance. By its ⁸³⁰ terms Brown became absolutely liable upon the happening of a loss by fire to pay David Bradley & Company the value of the goods destroyed. When he insured these goods with the several insurance companies, he became, in effect, a reinsurer. He stood in the same relation to the owner of the goods and to the insurance company that the original insurer, if it reinsures, stands to the insured and to the reinsuring company. The principles of law governing this relation are well settled, and it is held by a majority of the courts passing upon the question that the liability of a reinsurer to pay the whole amount of the loss to the reinsured is not affected by the insolvency of the latter or his inability to fulfil his own contract with the original policy holder. It is said in Goodrich & Hick's Appeal, 109 Pa. 523: "Reinsurance is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected, the insurer may have the subject of insurance reinsured to him by some other. There is in such case, however, no privity between the original insured and the reinsurer; the latter is in no respect liable to the former, as a surety or otherwise, the contract of insurance and of reinsurance being totally distinct and disconnected. . . . Even if the insurer fail, or become insolvent, so that his insured receives only a dividend, however small, the reinsurer can gain nothing by this, but must pay the amount of the loss to the first insurer." Where an insurance company has written a policy and afterward causes itself to be reinsured, and after the loss of the property insured such company becomes insolvent, the person originally insured has no equitable lien upon the sum of money due on the part of the reinsurer, but the fund belongs to all the creditors of the insolvent company ratably: *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63. See, also, *Blackstone v. Alemannia Fire Ins. Co.*, 56 N. Y. 104; *Consolidated etc. Ins. Co. v.*

Cashow, 41 Md. 59; Eagle ⁸⁴⁰ Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant Cas. (Pa.) 71; Strong v. American Central Ins. Co., 4 Mo. App. 7.

These decisions seem to be supported by sound reason. The original insurer has an insurable interest in the property because, in case of its loss by fire, he is liable to pay the loss to the extent to which he has insured it. When a loss occurs, the relation between him and the insured is that of debtor and creditor. There is no privity between the insured and the reinsurer, and any sum recoverable by the insurer from the reinsurer is an asset of his estate, liable to the claims of his general creditors, and not subject to any specific lien or charge in favor of the insured.

If a Policy of Fire Insurance Issued to a Carrier insures it and "other owners as interest may appear" against loss on merchandise in its custody as a warehouseman, and stipulates that the carrier, although it may or may not be liable for any loss, shall, after a loss, give notice to said assurer who was insured thereby, and said notice shall be conclusive upon the assurer as to who, in addition to said carrier, was so insured, this gives the carrier no right to cut off, by electing not to include, designated owners of property covered by the policy: Kellner v. Fire Ins. Assn. of Philadelphia, 128 Wis. 233, 116 Am. St. Rep. 45.

If a Bailee, Holding the Property of Another, Insures It Against loss or damage by fire, for the protection of his special interest therein and that of the owner, the fact that the owner was not a party to the contract of insurance at its inception does not, after he has adopted and ratified it, and after loss and notice, permit the parties and those claiming under them to contradict, vary or modify the contract by showing that it does not embody the agreement actually made: Johnston v. Charles Abresch Co., 123 Wis. 130, 107 Am. St. Rep. 996.

PETERSON v. STATE.

[79 Neb. 132, 112 N. W. 306.]

FORMER JEOPARDY.—The Judgment of a Court Having No Jurisdiction of the offense charged constitutes no bar to a second prosecution of the same charge. (p. 653.)

INTERSTATE COMMERCE.—An Ordinance Limiting the Speed of Trains on an interstate railway which carries United States mail to ten miles an hour within the city limits is not invalid as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail. (p. 658.)

MUNICIPAL ORDINANCE.—Determination of Reasonableness. The determination of whether an ordinance is reasonably necessary for the protection of life and property is committed in the first instance to the municipal authorities. When they have acted and passed

an ordinance, it is presumptively valid, and before a court will hold otherwise the unreasonableness or want of necessity of the measure should be made clearly to appear; it should be manifest that the discretion imposed on the municipal authorities has been abused by acting in arbitrary manner. (p. 658.)

MUNICIPAL ORDINANCE.—A Prosecution for the Violation of a city ordinance which embraces no offense made criminal by the laws of the state, though in form a criminal prosecution, is in fact a civil proceeding, so that clear and satisfactory evidence is sufficient to sustain a conviction, proof beyond a reasonable doubt not being required. (p. 659.)

FINES.—Imprisonment for Debt.—A Fine Imposed for a Violation of a municipal ordinance is not a debt within the meaning of the constitutional prohibition against imprisonment for debt. (p. 660.)

Edson Rich and Phelps & Peterson, for the plaintiffs in error.

W. T. Thompson, attorney general, Grant G. Martin, T. F. A. Williams, W. I. Allen, I. H. Hatfield, C. M. Johnson and F. B. Churchill, contra.

¹³³ DUFFIE, C. Schuyler is a city of the second class, having more than fifteen hundred and less than five thousand inhabitants. An ordinance of the city, approved August 16, 1904, designed to regulate the speed of railroad trains passing through the city, provided that it should be unlawful for any person, or railroad company, or any employé managing, operating or controlling any locomotive engine, car or train of cars, to run or permit to be run or propelled or operated any locomotive engine, car or train of cars within the limits of the city at a rate of speed greater than ten miles an hour, provided that the rate of speed of any such engine, car or train of cars shall not be restricted on any railroad in said city where competent watchmen for the purpose of signaling the approach of any engine, car or train of cars are stationed at all public crossings of such railroad, which are thoroughfares, which watchmen shall so signal the approach of every such engine, car or train of cars, nor on any railroad in said city which has or shall have erected or placed at all public street crossings of said railroad, which are thoroughfares, ¹³⁴ gates or bars, so constructed as to be quickly lowered and raised across any such street so crossing such railroad, and to remain closed during the entire time of the arrival and departure of any train running at a higher rate of speed than ten miles an hour, and which gates or bars shall be so situated as to cut off traffic across such railway at such street crossings while said gates or bars are closed. A penalty of not less than twenty-five

dollars nor more than one hundred dollars was provided for a violation of the ordinance. Section 8733, Annotated Statutes, authorizes cities of the second class to regulate the running of railway trains and to govern the speed thereon within the limits of the city.

December 6, 1905, plaintiffs in error were arrested under a warrant issued upon the complaint of the city attorney charging them with the violation of the ordinance. The defendants, prior to this proceeding, and on November 4, 1905, had been arrested upon the same charge. They were tried and convicted before one V. W. Sutherland, a justice of the peace, claiming to act as a specially appointed police judge for the city of Schuyler. The district court released them on habeas corpus, on the ground that "in said alleged proceedings said Sutherland was without jurisdiction and said proceedings and judgment were and are void." It is elementary that the judgment of a court having no jurisdiction of the subject matter is absolutely void, and constitutes no bar to further proceedings on the same charge: *Thompson v. State*, 6 Neb. 102; *Arnold v. State*, 38 Neb. 752, 57 N. W. 378. The defendants, after having procured their discharge on the ground that the court before which they were tried had no jurisdiction of the offense charged against them, and that the judgment under which they were held was absolutely void, cannot now interpose that judgment as a bar to another trial before a court having jurisdiction of the offense with which they stand charged. This is conclusive of the first point raised by the defendants that they were twice placed in jeopardy.

It is next insisted that a municipal corporation, in the ¹³⁵ exercise of its police power, cannot impose such restriction as will interfere with the governmental agency of the United States to unreasonably impede interstate commerce and retard and delay the speedy transportation of the United States mail. It is urged that the Union Pacific Railroad Company sustains relations to the federal government different from that of any other railroad in the state, because of the conditions under which it was built and the obligations imposed by the charter of the company. It is said that those roads which the government did not aid in building perform a voluntary service in carrying the United States mails, while those aided by the government rest under an obligation by the terms of their charter to do so, and that their service in that respect is obligatory. It is further urged that commerce between the states has been confided exclusively to Congress

by the constitution, and is not within the jurisdiction of the police power of the state, and that, while the state may make reasonable regulations to secure the safety of passengers and of the people of the state, it can do nothing which will directly burden or impede the traffic of railway companies engaged in interstate commerce, or which will impair the usefulness and facilities of such traffic. On these grounds it is argued that the ordinance under which the defendants were convicted on their second trial is unreasonable and void.

This question in various forms has been before the supreme court of the United States on several occasions. In *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 16 Sup. Ct. Rep. 1096, 41 L. ed. 107, the court had before it a statute of the state of Illinois which provided that "every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety; provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers ¹³⁶ with safety." It appears from a statement of the facts that the line of railroad communication crossing the Ohio river at Cairo, of which the Illinois Central Railroad Company forms part, has been established by Congress as a national highway for the accommodation of interstate commerce and of the mails of the United States; that the station of the Illinois Central Railroad Company at the southern terminus of its road in the city of Cairo was at a point three and a half miles distant from so much of its main track as formed part of the through communication by railroad from the state of Illinois across the Ohio river into the state of Kentucky and other states on the through connecting lines, and it was the contention of the railroad company that the particular train in question, a fast mail train, was not compelled to leave the direct and through route of travel and switch down to the depot in Cairo three and a half miles from the through line, the people of that city being sufficiently accommodated by other trains operated by the company. The court held that a fast mail train carrying interstate passengers and the United States mail from Chicago to places south of the Ohio river, over an interstate highway established by authority of Congress, need not turn aside from the direct interstate route and run to the station in Cairo three and a half miles away from that route and back again, in order to receive and dis-

patch passengers at that station for the interstate travel to and from which the railroad company furnished other and ample accommodations, and that the statute, in so far as it required this to be done, was an unconstitutional obstruction of interstate commerce and of the passage of the United States mails. In the same case it was said, however, "that the arrangements made by the company with the postoffice department of the United States cannot have the effect of abrogating a reasonable police regulation of the state."

In *Cleveland etc. R. Co. v. Illinois*, 177 U. S. 514, 20 Sup. Ct. Rep. 722, 44 L. ed. 868, that part of the Illinois statute above quoted which required all passenger trains to stop at county seats ¹³⁷ was before the court on petition of the state's attorney to require the defendant company to stop a train known as the "Knickerbocker Special" at the city of Hillsboro, the county seat of Montgomery county. In that case it was shown that the "Knickerbocker Special" was a train especially devoted to carrying interstate transportation between the city of St. Louis and the city of New York; that the travel between these cities had grown to such an extent that it had become necessary to put on a through fast train which connected with other similar trains on the Lake Shore and New York Central roads, and that it was necessary to put on this train, because the trains theretofore run (none of which had been taken off) could not, by reason of stopping at Hillsboro and other smaller stations, make the time necessary for eastern connections or carry passengers from St. Louis to New York within the time which the demands of business and interstate traffic required, that the train was not a regular passenger train for carrying passengers from one point to another in the state of Illinois, such traffic being amply provided for by four other trains, and that the "Knickerbocker Special" was used exclusively for interstate traffic from and to points without the state of Illinois. In that case it was held that the requirement that all regular passenger trains must stop at county seats, which is made by the Illinois act of March 21, 1874, constitutes a direct burden upon interstate commerce in violation of the United States constitution, so far, at least, as that statute requires through interstate passenger trains to stop at such stations when adequate through service has been provided for local traffic. In that case it was said: "Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists

and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we ¹³⁸ have sustained the validity of local laws designed to secure the safety and comfort of passengers, employés, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." The court further said: "The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time-tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons, is too obvious to require discussion."

In *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 29 L. ed. 636, it was held that, in case of a railroad whose construction had been aided by Congress so as to establish a route of travel through several states, a state had the power to make all needful regulations of a police character for the government of the company operating the road within the jurisdiction of the state. It was there said: "By the settled rule of decisions in this court . . . it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state, to stop its trains at railroad crossings, to slacken speed while running in a crowded thoroughfare, to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others."

In *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851, 35 L. ed. 649, Mr. Justice Bradley, speaking for the court, said: "It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in ¹³⁹ the neighborhood of cities and towns, with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves, and, generally, with regard to all operations in which the lives and health of people may be endangered, even though

such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

Here is a distinct recognition of the rights of the state to enact all reasonable police regulations necessary to protect the people of the state in the enjoyment of their property, and to guard them from injury by the operation of trains through thickly populated communities. It will be observed that in the two cases first above referred to, no question of the protection of life or of the person from bodily injury was drawn in question. The only feature presented by the cases was the right of the state to require, in one case, a fast mail train to depart from its usual route for the accommodation of the citizens of a city for whose benefit other ample accommodations had been provided, and, in the other case, to require a train specially devoted to interstate commerce to stop at a county seat for the accommodation of its citizens, who were amply provided with accommodations by four other daily trains. The difference between those cases and the one we are considering is manifest. The ordinance in question is designed, not for the mere accommodation of the residents of Schuyler in the use of the trains of the company, but it is to protect them against loss of life or bodily injury from the operation of trains running through its limits. In such case, unless the ordinance is wholly unreasonable, it ought to receive the support of the courts. In *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190, 65 N. E. 730, 60 L. R. A. 391, it was held that an ordinance limiting the speed to ten miles an hour within the corporate limits is not unreasonable, where the road lies for a mile and a ¹⁴⁰ quarter within limits, and crosses four streets, two of which are main thoroughfares, and buildings located near the road obstruct to a considerable extent a view of the tracks and approaching trains, although the principal part of the buildings of the municipality are located on one side of the road; and it was further said that an ordinance limiting the speed of trains on an interstate railway which carries the United States mail to ten miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail.

It is a general rule that the determination of the question whether or not an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities thereof by the legislature. When they have acted and passed an ordinance, it is presumptively valid, and, before a court will be justified in holding their action invalid, the unreasonableness or want of necessity of such measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed on the municipal authorities has been abused by the exercise of the power conferred by acting in an arbitrary manner: *Knobloch v. Chicago etc. R. Co.*, 31 Minn. 402, 18 N. W. 106; *Evison v. Chicago etc. R. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434. So far as we have observed, there is nothing in the record showing that the ordinance in question is unreasonable or unnecessary. That the municipal authorities had in view the rights of the company, as well as the protection of its own citizens, is manifest from the proviso allowing unlimited speed of trains where watchmen are provided or where gates or bars are erected to guard the tracks. That this might impose some additional burden upon the company cannot, we think, be urged as an objection to the ordinance.

¹⁴¹ The district court instructed the jury that the burden of proof was upon the state to establish each and all of the material facts charged in the complaint by clear and satisfactory evidence; that the prosecution, while criminal in form, was in fact civil; that it was not necessary for the state to establish the facts charged beyond a reasonable doubt; that the material facts should, however, be clearly and satisfactorily established by a preponderance of the evidence before finding the defendants guilty. Exceptions to the instructions were taken by the defendants, and are now assigned as error, it being insisted that the proceeding was criminal in its nature, and that evidence beyond a reasonable doubt was necessary to convict. At common law, and independent of statutory enactments, punishments for the violation of municipal ordinances were treated in the light of civil actions; imprisonment for noncompliance with the order of the court imposing the payment of a fine being looked upon, not in the light of punishment, but as a means of compelling a compliance with the orders of the court and enforcing payment. The general doctrine appears to be that, where an act is not criminal under the laws of the state, a municipal ordinance

will not make it so, and that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action: *City of Huron v. Carter*, 5 S. D. 4, 57 N. W. 947. McQuillan on Municipal Ordinances, section 190, asserts that the weight of judicial authority holds that the prosecution for the violation of a municipal ordinance is in the nature of a civil action for the recovery of a debt. Sometimes the action is regarded as criminal where the offense constitutes a misdemeanor under the laws of the state; but ordinances of the character of the one in question, forbidding the doing of an act that is not per se criminal or immoral, that is not made a crime or misdemeanor by any law of the state, is a mere rule or regulation for the government of the community within the municipal limits,¹⁴² and does not come within the category of acts considered criminal under our constitution or statutes. In *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 114, the supreme court of Wisconsin, in answer to the argument that a prosecution for the violation of a city ordinance was a criminal prosecution, said: "We think it is not. No law in force when that prosecution was instituted made it a criminal offense to use wanton or obscene language within the corporate limits of the city of Columbus. The use of such language there gave the city a right of action against the offender to recover a prescribed penalty therefor. Under the charter of the city an action to recover such a penalty may be commenced either by summons or warrant. But whether commenced by the one process or the other, the pleadings and judgment are the same. In either case it is nothing more than a civil action to recover a penalty. Hence, it was competent for the magistrate, as in other civil actions, to act upon the stipulation of the parties, and to determine the action and render final judgment therein."

Section 8751, Annotated Statutes, found in the chapter relating to cities and villages, is in the following language: "Fines may in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the state. And in any such suit or action where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing as near as may be the facts of the alleged violation." From this it will be seen

that the legislature contemplated a civil action for the recovery of a fine imposed for the violation of an ordinance, and in such case clear and satisfactory proof of the violation would certainly be sufficient to warrant a recovery. In Toledo etc. R. Co. v. Foster, 43 Ill. 480, brought to recover a penalty of fifty dollars imposed upon railways for a failure to sound a whistle or ring a ¹⁴³ bell for eighty rods before arriving at a crossing, the court said: "While the law does not require the same completeness of proof in cases of this character that is required in criminal prosecutions where life or liberty is in jeopardy, yet the evidence must be of such a character as to bring home to the jury a reasonable and well-founded belief of the guilt of the defendant. Neither a railway company nor a private individual should be subjected to a fine, whereby their property is to be divested, merely because there is a little more evidence that they did not perform some required act than there is that they did." The instruction here under consideration required something more than a preponderance of the evidence. It required that the charge against the defendant should be established by clear and satisfactory evidence, and this is in full accord with the Illinois rule.

It is further urged that if the action is civil in its nature the fine imposed is in the nature of a debt due from the defendants, and that to imprison them for its nonpayment, as required by the ordinance, would violate our constitutional provision prohibiting imprisonment for debt. It is well settled that a direction in a sentence imposing a fine that defendant shall stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court: 19 Cyc. 553, and authorities cited. A fine is not a debt within the meaning of the constitutional provision referred to: In re Beall, 26 Ohio St. 195.

After a careful examination of the record and the questions presented we are unable to discover any reversible error, and recommend an affirmance of the judgment.

Epperson and Good, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

A State may Interfere With Interstate Commerce, to a reasonable extent, in the exercise of its police power for the protection and security of its people: State v. Southern Ry. Co., 119 N. C. 814, 56 Am. St. Rep.

689; *Norfolk & Western Ry. Co. v. Commonwealth*, 93 Va. 749, 57 Am. St. Rep. 827; *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703; *Lowe v. Seaboard Air Line Ry.*, 63 S. C. 248, 90 Am. St. Rep. 678.

The Constitutional Provision Against Imprisonment for debt does not apply to commitments for a failure to pay fines imposed for an infraction of penal laws: See the note to *State v. Brewer*, 37 Am. St. Rep. 761. The words "imprisonment for debt" do not apply to criminal proceedings: *Ex parte Mann*, 39 Tex. Cr. 491, 73 Am. St. Rep. 961. The constitutional provision relates only to liabilities arising upon contract: *Colby v. Backus*, 19 Wash. 347, 67 Am. St. Rep. 732.

BANNARD v. DUNCAN.

[79 Neb. 189, 112 N. W. 353.]

MORTGAGE FORECLOSURE—Rights of Purchaser.—The purchaser of real estate under a mortgage foreclosure buys at his peril, but acquires all of the interest of the mortgagor and mortgagee in the premises as effectually as he would have done by deed from them. (pp. 662, 663.)

QUITCLAIM DEED.—A Bona Fide Purchaser Under a Quitclaim Deed is protected against an outstanding unrecorded conveyance. (p. 663.)

QUITCLAIM DEED.—The Words "Remise," "Release" and "Quitclaim" are interchangeable, and when used in an instrument purporting to be a deed are sufficient to convey the grantor's title. (p. 664.)

CORPORATIONS.—The Laws of a Sister State in reference to the creation of a corporation are presumed the same as those of this state. (p. 664.)

LIS PENDENS—Purchaser Pendente Lite.—Where, pending an action of foreclosure, a third person brings ejectment against the mortgagor and has judgment for possession, the purchaser at foreclosure is not bound or affected by that judgment. (pp. 665, 666.)

QUIETING TITLE—Action by Person Out of Possession.—A person claiming title to real estate may maintain an action to quiet title, whether he is in or out of possession. (p. 666.)

W. E. Gantt, for the appellants.

Milchrist & Scott and William P. Warner, for the appellee.

¹⁹⁰ JACKSON, C. The plaintiff had a decree quieting his title in certain real estate. The defendants appeal.

The plaintiff's chain of title is based on a patent issued August 20, 1869, to David Brendlinger, a quitclaim deed from David Brendlinger to J. M. Morse and John Comstock, dated August 12, 1885, recorded August 15, 1885, for a consideration of forty dollars, a tax deed issued by the county treasurer June 26, 1880, to Thomas L. Griffey, a quitclaim

deed from Thomas L. Griffey to John Comstock under date of October 1, 1885, for the consideration of two hundred and sixty-nine dollars, recorded October 9, 1885, and a warranty deed from John Comstock and wife and James M. Morse and wife, dated December 5, 1891, to Stephen Cain, recorded December 14, 1891, for the consideration of twelve hundred dollars. The latter deed appears to have been made pursuant to a contract of sale between the parties in 1888. Cain borrowed the money to make the payment from the Fidelity Loan and Trust Company, and gave a mortgage for twelve hundred dollars to that company under date of December 2, 1891, recorded December 12, 1891. This mortgage, by a series of assignments, came into the possession of the Fidelity Securities Company, and, default having been made in the performance ¹⁹¹ of the conditions of the mortgage, the latter company instituted foreclosure proceedings and had a decree of foreclosure in June, 1897. The property was sold in December, 1898, to the plaintiff herein, the sale confirmed, deed issued, and recorded January 13, 1899. The defendants claim under a warranty deed from David Brendlinger executed September 24, 1870, recorded January 11, 1898.

The first contention of the appellants is that the plaintiff's petition fails to state a cause of action, for the reason that it is not charged that the plaintiff is a bona fide purchaser of the land in controversy. The plaintiff's petition recites the several conveyances upon which the title is based, and alleges that Stephen Cain, for a consideration of twelve hundred dollars, purchased the land from John Comstock and James M. Morse, and received a conveyance with covenants of warranty, which he caused to be recorded; that the transaction was in good faith, without knowledge, either actual or constructive, of any adverse claim by the defendants or any other person or persons; relying upon the deed and the title as it appeared of record, that Cain immediately went into possession, and that such possession continued for more than ten years; that the Fidelity Loan and Trust Company took its mortgage from Cain and wife in good faith, and without notice of any adverse conveyance or claim of equity existing in favor of the defendants, relying upon the title of Cain. The petition does not charge in express terms that the plaintiff purchased the property at the sheriff's sale in good faith, nor do we think it important that it should do so. The purchaser of real estate at judicial sale under the foreclosure of a mortgage buys at his peril, but he acquires all of the interest of the mortgagor and the mortgagee in the

mortgaged premises. He acquires that interest as effectually as he would have done by deed from the parties, and he may protect himself under their rights: *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661; *Byron Reed Co. v. Klabunde*, 76 Neb. 801, 108 N. W. 133. The bona fides of the interest in the property acquired ¹⁹² by Cain and the trust company appears from the petition, and the pleading is sufficient to meet that contention.

The next complaint is that the evidence is insufficient to sustain the decree. One feature of this contention arises out of the quitclaim deed from Brendlinger to Morse and Comstock, and the contention that such a conveyance is subject to all existing equities against the grantor. That rule, however, does not go to the extent claimed for it by the appellant. We have never gone to the extent of holding that a good faith purchaser might not acquire title to real estate by quitclaim as against an unrecorded, outstanding conveyance, of which the purchaser had no knowledge. In *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661, it is said that a quitclaim deed, while affording cause of suspicion, where it appears in a chain of title in the proper records of the county, is sufficient to justify a bona fide purchaser for a valuable consideration in relying upon it as a valid defense. It is the bona fide purchaser who is protected. To the same effect is *Schott v. Dosh*, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 346. It appears from the testimony of Cain that before he purchased the property from Morse and Comstock he procured an abstract of the title to be made by the county clerk of the county where the land is situate, found no conveyance of record affecting the title of his grantors, and that he bought the property (so far as the record discloses) for a full consideration, relying upon the record title. The outstanding tax lien at the time of the purchase by Morse and Comstock would furnish a sufficient reason why Brendlinger would not care to give a warranty deed. It is also disclosed that, before advancing the money upon the loan made to Cain, the Fidelity Loan and Trust Company procured the title to be examined by an attorney, who, finding no conveyances of record affecting Cain's title, advised that company that their mortgage constituted a first lien on the premises. This evidence is not disputed, and is sufficient to justify the trial court in concluding that Cain was a bona fide purchaser, and that the rights of the ¹⁹³ mortgagee could not be affected by the unrecorded conveyance under which the defendants claim title.

The conveyance from Brendlinger to Morse and Comstock is in the following form: "Know all men by these presents, that I, David Brendlinger (single man), of the county of Indiana, and state of Pennsylvania, for the consideration of forty dollars, hereby quitclaim to James M. Morse and John Comstock," etc. This, it is urged, is not a conveyance; that the word "quitclaim" is not sufficient to convey title. It is said in the brief on behalf of appellant that the operative words of a conveyance in a quitclaim deed are "remise, release and quitclaim." "Quitclaim" is defined by Webster as meaning in law "to release a claim to by deed, without covenants of warranty against adverse and paramount titles." Remise is defined by the same authority, "to release a claim to, remise or surrender by deed." It would appear that remise, release and quitclaim are interchangeable, and that the words of the instrument are sufficient to constitute a conveyance.

The petition charges an assignment of the mortgage to the Fidelity Loan and Trust Company, a corporation, to the Metropolitan Trust Company, a corporation organized and existing under and by virtue of the laws of New York, and an assignment by the latter company to the Fidelity Securities Company, a corporation organized and existing under and by virtue of the laws of the state of Iowa. The corporate capacity of all of these societies is denied by answer. To meet this issue the plaintiff put in evidence copies of the articles of incorporation of the Fidelity Loan and Trust Company and the Fidelity Securities Company, certified by the Secretary of State of the state of Iowa, under the seal of his office. It is said that this is not sufficient, in the absence of proof of the laws of the state of Iowa under which these corporations came into existence. It is a sufficient answer to this claim that, in the absence of proof to the contrary, the laws of Iowa on this subject will be presumed to be the same as those in Nebraska, and ¹⁹⁴ that the companies were incorporated under a general statute similar to our own. Our statute provides that "duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed": Code, sec. 408. Furthermore, there is some evidence in the record of the exercise of corporate functions by these organizations. The court, therefore, violated no rule of evidence in the admission of these documents.

A stipulation in the record in effect admits the corporate capacity of the Fidelity Loan and Trust Company, the language of the stipulation being: "It is hereby stipulated and agreed between the plaintiff and the defendants in this case that on or about December 9, 1891, the Fidelity Loan and Trust Company, a corporation, loaned to Stephen Cain twelve hundred dollars, and that said Cain executed and delivered to the Fidelity Loan and Trust Company his mortgage on the premises in controversy in this suit." The introduction of this stipulation in evidence was sufficient to avoid the necessity of further proof of the corporate capacity of that company. As to the Metropolitan Trust Company, proof of its corporate capacity and of an assignment from that company was immaterial. The production of the papers in court by the Fidelity Securities Company in the proceeding to foreclose its mortgage was prima facie evidence of ownership: *Michigan M. L. Ins. Co. v. Klatt*, 2 Neb. (Unof.) 870, 90 N. W. 754; *First Nat. Bank v. Sprout*, 78 Neb. 187, 110 N. W. 713.

Complaint is made of the introduction of the written opinion procured by the Fidelity Loan and Trust Company at the time they accepted the mortgage. If the court erred in that respect, it was without prejudice, because the written stipulation referred to contained an admission that the company did not in fact examine the records, but did inspect and examine an abstract of the records and submitted the abstract to their attorney at Sioux City, Iowa, and procured his opinion upon the state of the title. The ¹⁹⁵ purpose of introducing the certificate was to show good faith on the part of the company, and it was made entirely unnecessary by the stipulation of facts.

This brings us to some of the features of the defense which it seems necessary to notice before final disposition of the case. At the time the defendants filed the deed for record, under which their claim of title is made, the foreclosure of the mortgage given by Cain to the Fidelity Loan and Trust Company was pending. Cain was in possession of the premises. The defendants herein instituted an ejectment proceeding against Cain for the recovery of the possession of the property. The plaintiff herein bought the property at judicial sale while that action was pending. In the ejectment proceeding the plaintiffs ultimately had judgment by default against Cain under an agreement to protect him in the possession of the premises for another year. It is urged that the purchaser at the judicial sale then took the title with

constructive knowledge of the defendant's claim to the land; that, having bought pending the ejectment proceedings, he is bound by the doctrine of *res judicata*. The doctrine of *res judicata*, however, does not operate against the mortgagee whose rights were acquired long prior to the institution of the ejectment proceedings and who was not a party to that action, and the purchaser at the judicial sale would be protected to the same extent as the mortgagee, notwithstanding the pendency of the possessory action.

A further contention of the defendants is that they were in possession of the premises at the time of the commencement of this action, and that the plaintiff, being out of possession, cannot maintain an action to quiet his title. The right to maintain an action to quiet title to real estate in this state by the person claiming title thereto, whether in or out of possession, is no longer an open question: *Forre v. Stubbs*, 41 Neb. 271, 59 N. W. 798.

The plaintiff, in our judgment, has made a case sufficient to support the decree in his favor, and there is no ¹⁹⁶ equity in the case presented by the defendants, who for almost twenty-eight years neglected to assert title under an unrecorded deed. Courts of equity will apply the doctrine of laches against inexcusable delay in the enforcement of stale claims: *Hawley v. Von Lanken*, 75 Neb. 597, 106 N. W. 456.

From a consideration of the whole case, it is recommended that the judgment of the district court be affirmed.

Duffie and Albert, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Law of Lis Pendens is the subject of a note to *Stout v. Phillippi Mfg. Co.*, 56 Am. St. Rep. 853. A *lis pendens*, prosecuted in good faith is notice to any and all purchasers so as to affect and bind by the decree any interest in the property which they may acquire by reason of their purchase: *Turner v. Edmonston*, 210 Mo. 411, 124 Am. St. Rep. 739, and see cases cited in the cross-reference note thereto.

The Operation and Effect of Quitclaim Deeds are discussed in the note to *Babcock v. Wells*, 105 Am. St. Rep. 854. Such deeds carry all the interest of the grantor: *Babcock v. Wells*, 25 R. I. 23, 105 Am. St. Rep. 848; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400; *McAdams v. Bailey*, 169 Ind. 518, 124 Am. St. Rep. 240.

CAMPION v. GILLAN.

[79 Neb. 364, 112 N. W. 585.]

PARDON.—Person Committed in Bastardy Proceeding.—The governor has no authority to direct a sheriff to release a prisoner who has been adjudged the father of an illegitimate child, ordered to pay a specified amount for its maintenance, and committed to jail for default, in making payment. (p. 670.)

PARDON.—Bastardy is not an "Offense" within the meaning of that term in a constitutional provision giving the governor power to pardon "offenses"; the words "crime" and "offense" are used interchangeably, and bastardy is not a "crime." (p. 673.)

PARDON.—Unless There has been a Crime and a Conviction, the governor cannot pardon. (p. 673.)

PARDON.—The Governor can Pardon Only After Conviction by the judgment of a court. (p. 674.)

Burr & Marlay, for the relator.

J. J. Thomas, M. D. Carey and C. E. Holland, contra.

364 SEDGWICK, C. J. The relator, William M. Campion, was tried in the district court for Seward county upon a charge of bastardy preferred against him by one Nellie M. Lattimer. The jury returned a verdict of guilty, and thereupon on the sixth day of December, 1902, the court adjudged him to be the reputed father of the complainant's bastard child, and ordered that he stand charged with the maintenance of the child in the sum of one thousand dollars, and adjudged the costs of the prosecution against him. It was adjudged that the said sum of one thousand dollars should be paid in installments, two hundred dollars in the following January, and one hundred dollars on the first day of January each year thereafter, with interest at seven per cent on deferred payments after maturity; and it was further ordered that the defendant give security for payment in accordance with the decree, and that, in default of payment **365** and of giving security, he "stand committed to the jail of Seward county according to law." The defendant failed to comply with the decree, and an order of commitment was duly issued committing him to the jail of Seward county in accordance with the decree. On the twenty-fourth day of October, 1906, the governor made an order in these words:

"In the Matter of the Application for Pardon of William M. Campion, Confined in the Jail of Seward County, Nebraska:

"To John Gillan, Sheriff of Seward County, Nebraska, Seward, Nebraska.

"Sir: Upon receipt of this order you will release from confinement William M. Campion, now serving an indefinite sentence in your county jail, and this order is your authority for such release.

"(Seal.) (Signed) JOHN H. MICKEY, Governor."

This document having been delivered to the sheriff of Seward county, he thereupon discharged the relator from jail, and afterward, upon complaint being made to the district court of that county, an order was made directing the sheriff to retake the relator and again commit him to jail. Pursuant to this order the relator was again committed to jail. In November, 1906, the defendant having been charged in the district court for Seward county with the crime of abandoning his infant child under section 212a of the Criminal Code, he was placed upon trial in that court before a jury, and on the twenty-ninth day of that month the jury returned a verdict of guilty against him. Thereupon a motion for new trial was filed in the case, and, while the same was pending, the governor issued a pardon in the following words:

"The State of Nebraska, ss.:

"Executive Office, Lincoln.

"In the Name and by the Authority of the State of Nebraska, John H. Mickey, Governor of Said State, in the Matter of the Application of William M. Campion, for a Pardon, to All to Whom These Presents Shall Come, Sends Greeting:

"Whereas, in the month of December, A. D. 1902, in an action pending in the district court for Seward county, Nebraska, wherein one Nellie M. Lattimer was the complaining witness and said William M. Campion was defendant, said Campion ³⁶⁶ was convicted in a trial to the jury of the crime and offense of bastardy, and whereas on October 24th, '06, in the manner provided by law on application for pardon, said William M. Campion was pardoned by the governor of this state for said offense and of said conviction, and the sheriff of said county duly released and discharged said Campion on account of and because of said pardon; whereas, on the twenty-eighth day of November, 1906, not-

withstanding said pardon, by an order of the judge of said district court for Seward county, said William M. Campion was again arrested of said offense and again confined in the county jail of Seward county; whereas, on the twenty-eighth day of November, 1906, in an action pending in said district court for Seward county, Nebraska, wherein the state of Nebraska was plaintiff and said William M. Campion was defendant, he was convicted of the crime of abandonment and refusal and neglect to support without good cause the said child named in said proceedings as the reputed father of said illegitimate child and is now confined in the county jail of Seward county: Therefore, (1) know ye, that in consideration of the premises I hereby pardon the said William M. Campion, and he is hereby fully pardoned of each one of said offenses and convictions and orders of court, and the sheriff of Seward county is hereby ordered to release from confinement said William M. Campion. (2) All fines and forfeitures in connection therewith are hereby remitted. Given under my hand and the seal of the state of Nebraska this twenty-second day of December, A. D. 1906.

“(Seal.)

JOHN H. MICKEY,

“Governor of the State of Nebraska.

“By the Governor: A. GALUSHA,

“Secretary of State.”

This document being presented to the sheriff of Seward county, he refused to recognize it, and thereupon this application was made to this court for a writ of habeas corpus.

1. It is contended in the brief that, after the relator had been discharged from confinement in the jail under the governor's order of October 24th, above set forth, the district court had no jurisdiction in an ex parte proceeding ³⁶⁷ to order the sheriff to recommit the relator to jail. Our constitution and laws do not authorize the governor to order the sheriffs of the respective counties to discharge prisoners in their custody, and the sheriff should have entirely disregarded this order. After having without authority discharged the relator from jail, it was the duty of the sheriff on his own motion to have retaken the relator under the original order of commitment, and no formal proceedings in the district court were necessary for that purpose. The legality of the detention of the relator by the sheriff depends, then, entirely upon the force and effect of the governor's pardon issued on the twenty-second day of December, 1906.

2. Did the governor's pardon authorize the release of the relator from imprisonment under the commitment in the bastardy proceedings? The source of the pardoning power reposed in the governor is to be found in section 13, article 5 of the constitution, which is as follows: "The governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall communicate to the legislature, at every regular session, each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the reprieve, commutation or pardon." Was the relator convicted of an offense in these bastardy proceedings within the meaning of this constitutional provision? It is strenuously contended in his behalf that in determining this question great consideration ³⁶⁸ must be given to the nature and character of the imprisonment. It is said that the law requires that he be imprisoned until he complies with the order of the court, and that cases will frequently arise in which, through financial inability to comply with the order of the court, the imprisonment must be perpetual; that such a remedy must be in the nature of punishment, and if he is imprisoned as a punishment it must be upon conviction of an offense, and so the conclusion is derived that these conditions rendered applicable the constitutional provisions clothing the governor with the pardoning power. It is not entirely clear to our minds that this premise is sound, or that, if it is, the conclusion must necessarily follow. Great reliance is placed upon the opinion of this court in *Ex parte Donahoe*, 24 Neb. 66, 38 N. W. 28, as establishing the law to be that there is no remedy for a defendant in bastardy proceedings upon conviction and being ordered to make payment to the complaining witness, except to comply with the order of the court, and that, in case of inability to comply with the order of the court, no alternative remains but to remain perpetually in jail. In the opinion in that case the language

of the statute "there to remain until he shall comply with the requirements of the court" is printed with emphasis, and the opinion also contains this language: "This proceeding, under the statute, does not offer any remedy for imprisonment under it but that of security to comply with the order of the court, nor any alternative but that of payment of the amount to the complaining witness, the mother of the child." And again: "Nor is there any remedy, other than acquiescence and compliance with the law, for his discharge." That was an application for a writ of habeas corpus, and, although other points were made, the one apparently argued in the brief was that the obligation to pay under the decree is a debt, and that imprisonment for debt is forbidden by the constitution. Of course, such obligation is not a debt within the meaning of the provision of the constitution relied upon. From the quotations in the brief printed in ³⁶⁹ the report it appears to have been stated that "the legislature had no constitutional power to authorize imprisonment without making provision for the discharge of the prisoner at some time and in some manner." But this proposition does not appear to have been argued or insisted upon, except for the purpose of showing what the true construction of the statute is, it being insisted that the statute intended that the prisoner might be discharged under the insolvent debtor's oath. At all events, it does not appear that any showing was made in the trial court of the prisoner's inability to pay. The regular and proper way to test the question would be to make such showing, and, if overruled by the trial court, an appeal (under our present statute) taken to this court would present the question. It is doubtful whether the question could be presented at all upon application for habeas corpus, and, even if it could, it would require a very strong showing, amounting substantially to absolute proof, so that the court would be without jurisdiction to continue the imprisonment.

In *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174, the act providing for such imprisonment is held not to be unconstitutional. Although neither of these cases is a very strong authority for the proposition announced in the language above quoted from the opinion of Judge Cobb, in *Ex parte Donahoe*, 24 Neb. 66, 38 N. W. 28, this has probably been taken to be the rule by the profession generally ever since the publication of the opinion in that case. Many states have statutes expressly providing for the discharge of the prisoner when absolutely unable to pay. It may be doubted whether

any state in the Union, or any civilized country, unless it be Nebraska, has ever held that there was absolutely no remedy under such circumstances. It is frequently said that habeas corpus is not an effective remedy: 5 Cyc. 671; In re Wheeler, 34 Kan. 96, 8 Pac. 276; In re Walker, 61 Neb. 803, 86 N. W. 510. There is a note to *State v. Brewer*, 37 Am. St. Rep. 752, 764 (38 S. C. 263, 16 S. W. 1001, 19 L. R. A. 362), in which the author says that in ³⁷⁰ some cases the statutes provide expressly for discharge, and then says: "Even without such a provision it would seem, on general principles, that, as the inability to pay negatives the existence of that contumacy which is a necessary element of a contempt of court, no one can be detained after he establishes the fact of his inability, and so it has been held in *Ryan v. Kingsbery*, 89 Ga. 228, 15 S. E. 302. In other cases it is said that the prisoner's proper remedy is to take advantage of the insolvent laws: *Rogers v. State*, 5 Yerg. (Tenn.) 368; *Wood v. Wood*, Phill. (N. C.) 538. The principal case shows that this remedy has in South Carolina been converted into a statutory one. But whether the inability of a defendant to discharge a pecuniary liability imposed upon him is ascertained by regular insolvency proceedings, or simply by producing the necessary evidence in the court from which the order for his commitment was issued, it is possible that no legislation would be valid which would undertake to deprive one so situated of the privilege of procuring his release in one or other of these ways." A prosecution in bastardy is a civil action. We have no statute making bastardy a crime, and there are no common-law crimes punishable in this state. The fact that he may be brought before the court by warrant to answer to the complaint does not determine the character of the proceedings. The legislature may authorize any civil action for the recovery of a penalty or forfeiture, or for fraud or trespass, to be so begun. Unless the action is for the recovery of debt upon contract, the legislature may provide this remedy, and in all such actions the legislature may provide for the enforcement of the judgment by imprisonment. Imprisonment as a punishment in such cases is not authorized. It is solely for the purpose of coercing the defendant to perform the duty which the judgment of the court requires of him. When a court of competent jurisdiction in proper proceedings for that purpose adjudges a party to perform some specific act, and obedience is refused, he is committed until he complies with the order of the court. If this were ³⁷¹ not so, such judgments would be idle. Mandamus

and kindred remedies would be abandoned. But imprisonment under such order is never continued after it is made to appear that it is impossible for him to perform the thing required of him. Do these principles apply to judgments in bastardy proceedings under our statute? We do not regard the above-cited cases, entitled *Ex parte Donahoe*, 24 Neb. 66, 38 N. W. 28, and *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174, as decisive of this question, and, even if they should be so held, they do not furnish a complete guide in determining the question now before us. Bastardy is not a crime under our statute. Imprisonment therefor as a punishment is not allowed. Can a governor remit a civil obligation? Can he relieve the reputed father from his obligation to support his illegitimate child? If such a proposition had been made without the prestige of the action of the governor of the state to support it, and not enforced by the argument of able and respected lawyers, we would have supposed that the mere statement of the question would have been sufficient answer. The constitution gives the governor power to pardon "offenses," and it is suggested that bastardy is an offense, although we have no statute defining and punishing it as a crime, and so the governor may pardon the wrongdoer and relieve him from all consequences of his act. The provision of our constitution is too plain to lead to such absurd conclusions. The word "offense" in a public statute is generally, though not always, used as synonymous with "crime." In *State v. West*, 42 Minn. 147, 43 N. W. 845, it is said that the terms, "crime," "offense" and "criminal offense" are all synonymous, and are ordinarily used interchangeably. At all events, the words are so used in the section of the constitution under consideration. There can be no doubt that "crime" in the latter part of the section is used as an exact equivalent of the word "offense" in the first part, and that the words "convict" and "sentence" are used with reference to both. Unless there has been a crime and conviction the governor cannot interfere with a pardon. "A pardon is an act of grace, proceeding from the power ³⁷² intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed": *United States v. Wilson*, 32 U. S. *150, 8 L. ed. 640. A pardon affects only the public interest in the conviction. Private obligations cannot be discharged by it: *Ex parte Mann*, 39 Tex. Cr. 491, 73 Am. St. Rep. 961, 46 S. W. 828; *In re Nevitt*, 117 Fed. 448, 54 C. C.

A. 622; *Estep v. Lacy*, 35 Iowa, 419, 14 Am. Rep. 498; *In re Boyd*, 34 Kan. 570, 9 Pac. 240. The obligation of the relator to contribute to the support of his illegitimate child, as fixed by the judgment of the court, could not be released by the governor.

3. The governor can pardon only after conviction. The verdict of a jury is not a conviction within the meaning of the constitutional provision. The term is no doubt sometimes applied to finding a person guilty by a verdict of a jury. In ordinary speech it may be used in a still more general sense. It sometimes means the judgment of conviction pronounced by a court of competent jurisdiction. In statutes providing that conviction of crime may be shown to affect the credibility of a witness it has that meaning: *Commonwealth v. Gorham*, 99 Mass. 420; *Marion v. State*, 16 Neb. 349, 20 N. W. 289. Can it be supposed that the intention of the constitution makers was to forbid the governor to pardon the offense before proceedings had been begun in the courts, and to sanction his interference with the orderly course of those proceedings? In this case no final verdict had been rendered. The defendant had asked the court to set aside the verdict because of intervening errors, as he claimed, rendering it ineffectual. Nothing but the plainest language excluding any other meaning could justify the construction of the constitution contended for. But the language employed in the constitution precludes such a construction. The governor is required to communicate to the legislature each case of pardon granted, "stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the reprieve, commutation, or pardon." 373 This he could not do if there had been no judgment and sentence.

For these reasons, the relator is remanded to the custody of the sheriff of Seward county.

Writ denied.

The Offenses Subject to the Pardoning Power by the Governor are discussed in the note to *State v. McIntire*, 59 Am. Dec. 573. It has been held that the pardoning power of the governor extends to cases of imprisonment for contempt of court: *Sharp v. State*, 102 Tenn. 9, 73 Am. St. Rep. 851.

WALLBER v. CALDWELL.

[79 Neb. 418, 112 N. W. 584.]

LIMITATION OF ACTIONS.—An Acknowledgment of an Indebtedness which will toll the statutes of limitations should be made to the creditor, or some one representing him, and not to a stranger. (p. 676.)

LIMITATION OF ACTIONS—Acknowledgment of a Debt.—The Recital in a Deed that the conveyance is made "subject to mortgage" is not such an acknowledgment of the mortgage indebtedness as will stay the running of the statute of limitations. (p. 676.)

W. W. Wood and G. W. Shields, for the appellant.

C. Patterson, contra.

419 JACKSON, C. The action is one to foreclose a real estate mortgage. The trial court sustained a general demurrer to the petition, and the plaintiff appeals.

The essential facts as pleaded are that on October 1, 1887, August Janson gave a mortgage on the land involved to secure an indebtedness of five hundred and twenty-five dollars, payable October 1, 1892. The note secured by the mortgage provided for interest payable semi-annually. Interest was paid until April 1, 1891; since that time no payment of either principal or interest is claimed. On September 7, 1900, August Janson conveyed the real estate to Mary Jane Caldwell. One recital of the deed is: "Subject to a mortgage of five hundred and twenty-five dollars made to the Farmers' Trust Company." On November 14, 1904, Mary Jane Caldwell conveyed the premises to the defendant Oscar F. Farnam. The deed recited "Subject to mortgage." This action was commenced June 6, 1905, more than ten years after the maturity of the note secured by the mortgage and the payment of any part of the indebtedness secured thereby, so that the action to foreclose the mortgage was barred by the statute of limitations, unless there is something in the transactions between Janson, Mary Jane Caldwell and Farnam that would operate to toll the statute.

It is provided by section 22 of the Code: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise." It is the contention of the appellant that the recital in the deed from Janson to Caldwell amounts to an acknowledgment of the

debt and operates to stay the running of the statute. The question has never been adjudicated by this court, and must be determined from the statute and legal principles involved. There is some conflict ⁴²⁰ in the authorities as to what constitutes a sufficient acknowledgment of an indebtedness in order to take an action out of the statute of limitations, but the rule announced by Mr. Justice Brewer in *Sibert v. Wilder*, 16 Kan. 176, 22 Am. Rep. 280, in construing a statute similar to our own, appeals strongly to our sense of justice. It was there held that an acknowledgment of a debt, to take the case out of the statute of limitations, must not be made to a mere stranger, but to the creditor or some one acting for or representing him. This rule was followed by the supreme court of the United States in *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. Rep. 56, 28 L. ed. 636. In the latter case it was held, further, that an acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference or to leave it in doubt whether the party intended to prolong the time of legal limitation. In *Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962, this court quoted with approval from *Hanson v. Towle*, 19 Kan. 273, as follows: "A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an acknowledgment as is contemplated by the statute. There must be an unqualified and direct admission of a present subsisting debt on which the party is liable." We are of the opinion that the allegation in the petition, under the authorities, is not sufficient to prevent the running of the statute.

Another contention of appellant is that the defendants acquired title subject to the mortgage and are now estopped from denying its validity. There are many circumstances under which this rule might be applied. Where one purchases real estate subject to a mortgage, and as a part of the consideration assumes and agrees to pay the mortgage debt, or where the amount of the encumbrance is shown to have been deducted from the purchase price, either in a personal transaction between private parties or in the course of a judicial sale where the purchaser ⁴²¹ gets the benefit of the amount of an encumbrance deducted from the appraised value of the land, such purchasers are estopped from denying the validity of the lien; and it is doubtless true that, had the plaintiff instituted this action after the purchase of the premises by Mary Jane Caldwell, prior to the time the action was barred

by the statute of limitations, she might have been estopped from asserting an invalidity of the mortgage, but that is not the question in the case. The plaintiff had a valid and subsisting right of action when Caldwell acquired the title. Can the defendants avail themselves of a defense subsequently accruing by reason of the statute of limitations? There seems to be no reason why they should not be permitted to do so. The allegations of the petition do not show that the purchaser of the real estate encumbered by the mortgage deducted the amount of the mortgage indebtedness from the purchase price, or that she assumed and agreed to pay it.

We conclude that the judgment of the district court was right, and recommend that it be affirmed.

Ames and Calkins, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Acknowledgment or New Promise which will arrest the running or remove the bar of the statute of limitations is discussed in the note to Warren v. Cleveland, 102 Am. St. Rep. 751. The general rule is that an acknowledgment, to have this effect, must be clear and unqualified: Throop v. Russell, 145 Mich. 482, 116 Am. St. Rep. 314; Holley's Executor v. Curry, 58 W. Va. 70, 112 Am. St. Rep. 944.

McKIBBIN v. BAX & COMPANY.

[79 Neb. 577, 113 N. W. 158.]

DRUGGIST—Injury from Drug to One Who did not Purchase It. The unlawful sale of croton oil to a minor, who administers it as a joke to another minor to his injury, creates no cause of action in favor of the father of the latter, for the injury is not the natural or proximate consequence of the sale. (p. 680.)

H. D. Rhea, for the appellant.

H. M. Sinclair and Warrington & Stewart, contra.

577 DUFFIE, C. The defendants are partners conducting a drug store at Lexington, Nebraska. On June 24, 1905, a clerk in the store sold to one Roy Barron, a minor eighteen years old, a bottle of croton oil containing one or two drams. The medical witnesses describe croton oil as a drastic purgative. Barron and a companion put a few drops of the oil on a pie, some of which they induced Charles McKibbin, the minor son of the plaintiff, to eat, causing him great pain, dis-

tress and sickness, from which he suffered for some days. This action is brought by the plaintiff for loss of services of his son and for medicine and doctor's bills. Article 3, chapter 55, Compiled Statutes of 1905, provides for a board of pharmacy, who are to examine and grant certificates ⁵⁷⁸ of registration to persons found competent to act as pharmacists. Section 8, article 3, chapter 55, *supra*, provides a penalty for any proprietor of a pharmacy who permits the compounding or dispensing of prescriptions or the vending of drugs, medicines or poisons in his place of business, except by or in the presence of or under the supervision of a registered pharmacist. Section 42 of our Criminal Code relates to dispensing poisons, and provides for keeping a register of the name, age, sex, place of abode of the purchaser, the quantity sold, and writing the word "poison" upon the package or wrapper. It further makes it unlawful to either sell or give away any article of poison to minors of either sex. Section 44 provides a penalty for the violation of section 42. It is alleged in the petition that the clerk who sold the croton oil to Barron was not a registered pharmacist; that the bottle containing the oil was not labeled poison; and that no registry of the sale was made as required by section 42 of our Criminal Code; and it is upon these grounds that it is sought to make the defendants liable. The case was tried to the court without the intervention of a jury, and judgment was entered for the defendants upon the ground that the unlawful sale was not the proximate cause of the injury to plaintiff's son.

It is urged with much earnestness that the sale of the poisonous drug to Roy Barron, a minor, in violation of our statute, was the great and moving cause of the injury to the son of the plaintiff, and that defendants are legally responsible for all damages accruing from their unlawful act. In the leading case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, it was held that a manufacturing druggist who sold a poisonous drug labeled as harmless was liable in damages to a person who, without carelessness on his part and relying on the erroneous label, took such drug as a medicine, on the ground of breach of public duty, and this whether the injured person was an immediate customer of the defendant or not. In that case it is said: "The defendant was a dealer in poisonous drugs. Gilbert was ⁵⁷⁹ his agent in preparing them for market. The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label." In that case it was urged by defendants' counsel that the damages

were too remote, and it was urged that if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury; that, although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by considerations of public policy or safety, to respond for his breach of duty to anyone except the person he contracted with. In reply to this and other similar examples found in defendants' brief, the court said: "In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant, to avoid the creation of that danger by the exercise of greater caution, or that the exercise of that caution was a duty only to his immediate vendee whose life was not endangered? . . . Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act." It will be seen from the above that the case, as numerous other cases of like character cited by the plaintiff, was placed upon the ground that the injury for which suit was brought was the direct, natural and probable consequence of the defendant's ⁵⁸⁰ negligence. In the case we are considering, if Barron had called for some harmless medicine and, through the neglect of the defendant's clerk, croton oil, or any other poisonous substance, had been given him, and this had been taken under the supposition that it was the article called for, there would be no doubt of the defendants' liability; but the rule is universal that the act complained of must be the proximate cause of the injury. In *Brotherton v. Manhattan Beach I. Co.*, 48 Neb. 563, 58 Am. St. Rep. 709, 67 N. W. 479, 33 L. R. A. 598, it is said: "To establish a cause of action based on negligence it is not sufficient for the plaintiff to show that negligence existed, but he must also show that the negligence pleaded and proved was the proximate cause of the injury complained of." In *Milwaukee & St. P. R. Co.*

v. Kellogg, 94 U. S. 469, 24 L. ed. 256, the supreme court of the United States, in discussing the question of proximate cause, said: "It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. . . . The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." This case was cited with approval by this court in *City of Crete v. Childs*, 11 Neb. 581 252, 9 N. W. 55. In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, the court further said: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." The illegal sale of the croton oil was not the immediate and proximate cause of the injury of which the plaintiff complains. That injury arose, not from the sale of the oil, but from putting it upon the pie which plaintiff's son was induced to eat by another and independent agency—the act of Barron, the purchaser. Barron asked for croton oil, and undoubtedly knew the effect which giving it to young McKibbin would produce. He was a witness for plaintiff on the trial, and, when asked for what purpose he bought the oil, replied: "Just thought we would

have a joke on the boys was all." There was no showing that Barron did not know the dangerous character of the article which he bought, or that he labored under any misapprehension of the effect which giving it to plaintiff's son would have. It was not given by mistake, or in the supposition that it was harmless, or, at least, no attempt has been made to show that such was the case. While the defendants may have been guilty of negligence and the violation of our statute in allowing sales to be made by unregistered pharmacists and by a sale of a poisonous medicine to a minor, it cannot be said that injury to the plaintiff's son was reasonably to be expected from such a sale or that his injury was the natural and proximate consequence thereof.

The district court was right in dismissing the plaintiff's ⁵⁸² action, and we recommend an affirmance of the judgment.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

The Liability of a Vender to third persons who suffer injury from the drug or other dangerous article which he sells is discussed in the notes to Keulling v. Lean Mfg. Co., 111 Am. St. Rep. 701; Woodward v. Miller, 100 Am. St. Rep. 192. For subsequent cases on this subject, see Fish v. Kirlin-Gray Electric Co., 18 S. D. 122, 112 Am. St. Rep. 782; Clement v. Rommeck, 149 Mich. 595, 119 Am. St. Rep. 695; Cunningham v. Pease etc. Co., 74 N. H. 435, 124 Am. St. Rep. 979.

HULEN v. CHILCOAT.

[79 Neb. 595, 113 N. W. 122.]

LIS PENDENS.—The Rule of *Lis Pendens* is not Intended to prevent the sale of property, but to hold it within the jurisdiction of the court for the purpose of granting the relief sought. (p. 683.)

LIS PENDENS.—Pending Litigation Neither Party can Alienate, as a general rule, the property in controversy so as to affect the rights of the other. (p. 683.)

LIS PENDENS.—An Amendment to a Pleading which more fully sets forth the original cause of action will relate to the institution of the suit, and will not relieve purchasers *pendente lite*. (p. 683.)

LIS PENDENS.—An Amended or Supplemental Petition setting forth a new or different cause of action does not relate to the filing of the original petition so as to charge property in the hands of a *pendente lite* purchaser. (pp. 683, 684.)

LIS PENDENS.—Where an Amended or Supplemental Petition setting forth a new or different cause of action is filed, the *lis pen-*

dens thereby created does not relate to the commencement of the action so as to affect intervening rights. (p. 685.)

LIS PENDENS—Impounding Property not Subject to Lien.—By the filing of a notice of lis pendens a creditor does not impound property of his debtor for the payment of a debt which is neither a general nor specific lien upon the property. (p. 687.)

A. R. Oleson and H. F. Rose, for the appellants.

George L. Loomis and H. C. Maynard, contra.

596 **EPPERSON**, C. August 2, 1904, plaintiff filed his petition in the form of a creditor's bill to subject the real estate in controversy to the payment of a judgment for \$1,216.15 obtained by plaintiff May 11, 1904, against the defendant Joel T. Chilcoat. Plaintiff alleged that the property was bought with the money of his debtor, but fraudulently placed in the name of the latter's son, the defendant Roy E. Chilcoat, and held by him in trust for his father. Plaintiff filed a notice of lis pendens in the office of the register of deeds as provided by law. August 11, 1904, defendant White purchased the land in controversy of Roy E. Chilcoat. February 2, 1905, plaintiff obtained another judgment for \$1,087.50 against Joel T. Chilcoat upon a note due November 4, 1904. On February 9, 1905, plaintiff filed a supplemental petition in this cause, alleging that he had obtained the second judgment, and praying that the property in controversy be subjected to its payment. Later plaintiff filed an amended and supplemental petition, alleging, among others, the above facts, and making White a party defendant, but charging no fraud on his part. Upon trial the court found against all of the defendants, and directed a sale of the property for the satisfaction of plaintiff's judgments. Defendants appeal.

This case involves the right of plaintiff to recover **597** against the Chilcoats, and, if that be resolved in plaintiff's favor, his right to recover as against the defendant White must be determined.

1. As to the defendants Chilcoat: The undisputed evidence shows that on August 14, 1903, \$3,800 belonging to the father and \$200 belonging to the son were deposited in a bank at Wisner, Nebraska, in the name of the son. On the same day \$3,000 of this amount was paid for the property in question and the title taken in the name of Roy E. Chilcoat, who was then but a few months past twenty-one years of age. Negotiations therefor were made jointly by the father and son. Plaintiff then held two notes against Joel T. Chilcoat,

due respectively November 4, 1903, and November 4, 1904, upon which the judgments above mentioned were obtained. To overcome the presumptions against them, defendants introduced evidence tending to show that the \$3,000 paid for the property was obtained by Roy E. Chilcoat in the following manner: Joel T. Chilcoat owed his brother William \$2,200, which Roy assumed. This sum, together with \$600 borrowed from his father and \$200 of his own money, made up the purchase price of the property. A short time before William agreed to take Roy for this \$2,200 indebtedness, he refused to grant an extension of time to Joel for its payment, because he needed the money. Yet in a very short time we find him releasing his brother, who was then able to pay the debt, and accepting therefor the young man whose property interests it appears did not exceed \$200 in value. A part of the alleged \$2,200 indebtedness owing to William was contracted in 1892. No written evidence of the indebtedness between the Chilcoats was introduced in evidence, nor its absence explained. We are satisfied that the defendants Chilcoat did not overcome the presumption which the law raises against them, and, so far as their interests are concerned, the judgment of the district court is right and should be affirmed.

2. The defendant White concedes that he has no defense to the cause of action alleged in the original petition ⁵⁹⁸ which was pending at the time he purchased the property, and he reserved \$1,250 from the purchase price to protect himself against the plaintiff's claim as there alleged. But he contends that the supplemental petition subsequently filed does not relate back to the filing of the original petition so as to charge the property in his hands with the lien claimed by plaintiff for the first time in the supplemental petition. The rule of *lis pendens* is not intended to prevent the sale of the property, but to hold it within the jurisdiction of the court for the purpose of granting the relief sought: *Merrill v. Wright*, 65 Neb. 794, 101 Am. St. Rep. 645, 91 N. W. 697. It is a general rule that pending litigation neither party can alienate the property in controversy so as to affect the rights of the other. This court recognized this rule in *Merrill v. Wright*, 101 Am. St. Rep. 645, 91 N. W. 697, and cases there cited. But can it be said that a litigant is entitled to the enforcement of rights accruing to him subsequently to the institution of an action, and alleged in supplemental or amended pleadings, as against a purchaser whose title vested prior to such accruing rights. An amendment which more fully sets forth the original cause of action will un-

doubtedly relate back to the institution of the suit, and thereby purchasers pendente lite are not relieved. But the bringing in of a new cause of action, which of itself constitutes a separate ground of relief, is a different matter, and, in our opinion, has no relation to the filing of the original petition so as to charge the property in the hands of a pendente lite purchaser against whom no fraud is charged.

In Bennett on Lis Pendens, section 32, it is said: "Where the original bill or petition does not involve the property, but, pending the suit, an amendment or amended petition or bill is filed alleging new matter, and involving property not before in litigation, the lis pendens created by the amendment will commence from the filing of the amendment or amended pleading, and will not relate back to the commencement of the action so as to affect intervening rights." 1 Freeman on Judgments, fourth edition, section 199, is as ⁵⁹⁹ follows: "It is further necessary, in order to conclude a purchaser by virtue of a judgment, that by the record in the case at the time of the purchase the parties to the suit and the nature of the claim made to the property should be so stated that no subsequent amendment will be necessary. If any amendment is made, lis pendens as to the matters and parties involved in the amendment dates from the time it is made. The amending of a bill to show a new equity creates a new lis pendens. Thus where property was sought to be subjected to the payment of plaintiff's demands upon one ground, and that ground becoming untenable, the bill was amended to show another equity, upon which plaintiff prevailed in the suit, a purchaser preceding the amendment was held not to be bound by the decree." In Stone v. Connelly, 1 Met. (Ky.) 652, 71 Am. Dec. 499, the plaintiff attached the property of his debtor. Later, and subsequently to a sale of the property by the debtor, an amended petition was filed, alleging a judgment obtained upon the debt and the return of an execution "no property found." The evidence failed to support the case as first alleged, and regarding the amendment with reference to the purchaser the court said: "An entirely new lis pendens was created by this amendment. By it the plaintiff's right to come into a court of equity was placed upon a different and distinct ground. It did not operate as a continuation of the original equity which had been relied on, but asserted an additional and independent ground of equitable relief. It presented an entirely different state of case, and amounted, substantially, to a new cause of action. The lis pendens which it created cannot be permitted to relate

back to the commencement of the action, so as to affect intervening rights."

An amended or supplemental petition setting forth a new or different cause of action is in the nature of a new suit. The only purpose we can see for permitting it is to save a multiplicity of suits. All defenses accruing to the date of the amendment may be pleaded against it. It follows that one who purchases pending the suit under the ⁶⁰⁰ original petition is a *lis pendens* purchaser only as to the cause of action therein stated. As to the cause of action subsequently arising, and alleged by supplemental pleading, he has purchased before suit, and his title is superior to the lien thus pleaded unless, of course, he has been guilty of fraud. In *Wortham v. Boyd*, 66 Tex. 401, 1 S. W. 109, it is said: "It has been held that a plaintiff cannot set up a new equity so as to affect a purchaser who bought previous to the filing of the amendment in which it is alleged, though the prayer for relief be not changed: *Stone v. Connelly*, 1 Met. (Ky.) 652, 71 Am. Dec. 499. Much less will the amendment affect such a purchaser, if the equity be different and contradictory of the original bill, . . . so far as the pendency of the suit can affect others than the parties to the suit, the cause is considered as pendent only from the time of the amendment." In *Bradley v. Luce*, 99 Ill. 234, an amendment alleging new matter was held notice to purchasers only from the time it was incorporated in the original bill. And in *Gage v. Parker*, 178 Ill. 455, 53 N. E. 317, it was held that the doctrine of *lis pendens* does not extend to a supplemental bill and adjudication under it.

The defendant White does not attempt to defeat the claim first alleged. He is as to that a *lis pendens* purchaser. But his estate is subject only to the judgment and lien set forth and claimed at the time of his purchase. By the proceedings as they existed at the time he purchased, he was in substance notified that plaintiff claimed a lien upon the property in the amount of the first judgment, for the satisfaction of which the court would retain jurisdiction over the property. Subservient to that, and that only, he purchased. In *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559, 52 N. W. 563, it is held: "Under section 85 of the Code, as it existed prior to 1887, where an action had been brought which affected the title or possession of real estate, and summons had been served or publication made, third parties were charged with notice of the pendency of the action, and while the action was pending could acquire ⁶⁰¹ no interest in the subject mat-

ter as against the plaintiff's title." There is no question but that the above stated the law correctly, as it existed prior to the amendment of 1887; but the action of which third parties are charged was the action pending at the time of the purchase, and the plaintiff's title against which the third parties could acquire no interest was the title owned by the plaintiff, and alleged in suit pending at such time. By the amendment of 1887 the legislature did not extend the rule of *lis pendens* to include causes of action accruing later, nor protect additional interests acquired by the plaintiff. The statute in part provides: "When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title. . . . From the time of filing such notice shall the pendency of such action be constructive notice to any purchaser or encumbrancer to be affected thereby, and every person whose conveyance or encumbrance is subsequently executed . . . shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken in said action after the filing of such notice to the same extent as if he were made a party to the action": Code, sec. 85. From the filing of the notice the pendency of the action is constructive notice to a prospective purchaser, who shall be bound by all proceedings therein. This clearly means that third persons are bound by all proceedings had upon the cause of action then existing and pleaded. He is not bound by the proceedings of the court upon other causes of action alleged by supplemental pleadings after his purchase. The relief sought at the time of the purchase is the only relief in which the court is interested, and for this alone jurisdiction over the property is retained.

Plaintiff in his original petition alleged the existence of the note upon which he afterward obtained the judgment set forth in his supplemental petition. This he contends 602 charged White with notice. We cannot see that such allegation in any way enlarged the jurisdiction of the court or diminished the estate acquired by White. The allegation was unnecessary. It was no part of his claim then existing. His prayer for relief only asked for the enforcement of his first judgment. Had White then paid the first judgment and procured the dismissal of the first action, could plaintiff by later alleging the second judgment have charged White

with notice? Certainly not. And by supplemental pleading he acquired no greater rights than he would have acquired by the institution of an independent action. A cause of action is not pending until pleaded. The title of a creditor seeking to enforce an equitable lien attaches only upon the institution of an action in which his lien is set forth. The existence of an indebtedness is not alone sufficient. It must have been reduced to judgment and uncollectible at law. A lien does not attach until a judgment is obtained and pleaded. To give plaintiff the relief sought, because he alleged in his original petition the existence of his then unmatured note, would be to impound the property for the benefit of a creditor whose debt is neither a general nor specific lien upon the property. This would be contrary to a well-established rule to which this court is committed: *Brumbaugh v. Jones*, 70 Neb. 786, 98 N. W. 54; *Missouri K. & T. T. Co. v. Richardson*, 57 Neb. 617, 78 N. W. 273.

Plaintiff cites *Tilton v. Cofield*, 93 U. S. 163, 23 L. ed. 858, as decisive of this case. In that case plaintiff set up a cause of action on a book account, and attached the property. He obtained judgment, which was afterward reversed. Pending suit the property was sold. Later plaintiff amended his affidavit and declaration, alleging upon a note, and prevailed, even against the purchaser. The note described in the amended declaration and the book account first alleged represented the same debt. It is not decisive of the case at bar. One of the controlling features in the case cited was the fact that the amendment did not change the cause of action or allege a different ground for relief. ⁶⁰³ In reference to the amendment the court said: "The description of the cause of action was changed, but in the view of equity, and in point of fact, it was substantially the same with that originally described." The trial court properly found against the defendants upon the first judgment obtained by plaintiff against Joel T. Chilcoat, and declaring the same a lien upon the property in controversy, but was in error in subjecting the property to the payment of the second judgment.

We recommend that the judgment be reversed and the cause remanded, with instructions to modify the decree to conform to the conclusions herein announced.

Duffie and Good, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and

the cause remanded, with instructions to enter a decree in conformity to the conclusions therein announced.

The Application of the Rule of Lis Pendens to cases where an amended appeal is filed is discussed in the note to *Stout v. Philippi Mfg. etc. Co.*, 56 Am. St. Rep. 867. See, also, *Munger v. Beard & Brother*, post, p. 688.

MUNGER v. BEARD & BROTHER.

[79 Neb. 764, 113 N. W. 214.]

PARTIES.—One is not a Party to an Action Unless made so by the record in the case, or unless he institutes the action in the name of another, or, being interested in the subject matter of the litigation, employs counsel to conduct or direct the suit. (p. 692.)

LIS PENDENS—Purpose of the Rule.—The rule that a pendente lite purchaser takes title to property involved in litigation, subject to the judgment finally entered, has been adopted out of considerations of public policy and to inspire confidence in titles based upon the judgment of a court. (p. 692.)

LIS PENDENS—Constitutionality of Statute.—The amendment to section 85 of the code of Nebraska in 1887, which brings within the rule of lis pendens persons taking title intermediate the filing of a petition and the service of summons, and also persons holding under unrecorded titles, is not unconstitutional. (p. 694.)

LIS PENDENS—Holders of Unrecorded Titles.—The purpose of the amendment to section 85 of the Nebraska code, whereby the rule of lis pendens is extended to persons holding unrecorded titles, is not to make them parties to the action nor to summon or serve them with notice, but rather to provide a means whereby they may be estopped from asserting their secret interests to the property in litigation against the judgment finally entered. (p. 694.)

LIS PENDENS—Unrecorded Titles Known to Plaintiff.—Persons holding an unrecorded interest are not affected by the filing of a lis pendens if the plaintiff has actual notice of their interests; in such case his duty is to make them parties that their rights may be litigated. (p. 696.)

NOTICE.—Possession of Property is Actual Notice of whatever interest the occupant has therein. (p. 696.)

John O. Yeiser, for the appellants.

C. E. Herring, contra.

765 DUFFIE, C. The following facts appear from the record in this case: One Anna J. Fitch, being the owner of lots 12 and 13, in block 99, in Dundee Place, an addition to the city of Omaha, executed a mortgage thereon to the Patrick Land Company, which mortgage was duly recorded August 31, 1888. The note which the mortgage was made to secure was sold and delivered to Ira C. Munger, and the

mortgage duly assigned to him by the Patrick Land Company. January 17, 1894, Munger commenced an action to foreclose this mortgage, at the same time filing a *lis pendens* notice with the recorder of deeds of Douglas county. This action resulted in a decree of foreclosure, upon which a sale was made and a deed issued to the plaintiff, Ira C. Munger, of date March 9, 1896, and this deed was recorded August 26, 1899. In said foreclosure action T. J. Beard & Brother, ⁷⁶⁶ the appellants herein, were made parties defendant, being the owners of a judgment against Anna J. Fitch, the mortgagor, and which judgment they are now seeking to enforce against the mortgaged property. They made a personal appearance in the foreclosure action, but failed to answer or plead therein, and their default was duly entered. The foreclosure decree found two thousand one hundred dollars due on the mortgage, and the sale realized the sum of twelve hundred dollars. The decree found that the mortgage was a first lien upon the premises, and foreclosed all the parties defendant of all equity of redemption or other interest or claim in the mortgaged premises. Anna J. Fitch, the mortgagor, was not served with summons in the foreclosure proceedings. It appeared that she had deeded the property to R. C. Patterson, who held the legal title at the commencement of the foreclosure proceedings, and who was made a party defendant. In his answer in that action, Patterson alleged facts showing that his deed from Mrs. Fitch was taken as security for money due from her, and it is upon this phase of the case that the appellants base their claim. Long after sale and recording of the deed growing out of the foreclosure proceedings, and some time prior to March 15, 1904, the appellants revived their judgment against Mrs. Fitch, caused execution to be issued thereon, and the mortgaged property, foreclosed in the above-mentioned action, levied on by the sheriff of Douglas county, Nebraska, as the property of Mrs. Fitch, and the sheriff advertised said lots to be sold on March 15, 1904. The appellee brought this action to enjoin the sheriff and the defendants from proceeding with the sale, their petition setting up the facts above recited. The answer of the appellants admits the facts above set forth, but alleges that it was disclosed by the answer of R. C. Patterson in the foreclosure proceedings that the deed taken by him from Mrs. Fitch was taken as security and was, in fact, a mortgage; that Mrs. Fitch was the real owner of the lots in question at the time of the foreclosure proceedings; that, not

being served with summons and not appearing ⁷⁶⁷ in the action, her interest in the property was not affected by the foreclosure decree, and that she is still the owner of the fee, which is subject to levy and sale to satisfy the appellants' judgment. The district court sustained a demurrer to this answer, and entered a decree finding that Munger is the owner in fee of the lots in question; that the defendants are attempting to sell the property at sheriff's sale, and asserting a lien against the property by virtue of their judgment against Anna J. Fitch; that their judgment is not a lien upon the lots, and that they are precluded and estopped from asserting any lien against said property by virtue of their said judgment and levy. A perpetual injunction also issued against the defendants enjoining them from asserting in any manner a lien against said real estate or from selling the property at sheriff's sale.

The appellants assert with great confidence that, R. C. Patterson having disclosed in his answer in the foreclosure proceedings that his deed from Mrs. Fitch conveying the lots in controversy was taken as security, and not as an absolute, unconditional conveyance of the lots, the court had no jurisdiction of the property in the foreclosure proceedings, Mrs. Fitch not being served with summons and not appearing in said action to assert her claim in any manner. The fact that a notice of lis pendens was filed at the commencement of the foreclosure proceedings requires us to again examine our lis pendens law in connection with the decision of *Sheasley v. Keens*, 48 Neb. 57, 66 N. W. 1010. Prior to 1887 the statute read as follows: "When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title": Code 1885, sec. 85. Experience has demonstrated that this statute was defective, and that many decrees affecting title to real estate were wholly ineffective because intermediate the filing of a petition and the service of summons the holder of the legal ⁷⁶⁸ title had transferred the property, or an interest therein, to some third party whose rights could not be affected by the decree. A second class of persons were also beyond the reach of the original statute. They were parties who had taken title or acquired an interest in the property in litigation prior to the commencement of the action, but who failed to record their conveyances, and who would therefore be unknown to the plaintiff, who could not on that

account implead them in the action to cut off whatever interest they might have. To meet these difficulties, the legislature in 1887, and prior to the making of the mortgage in suit, amended section 85 by providing that, in all actions wherein the title to real property was brought in question, the plaintiff, at the time of filing his petition, or afterward, might file a notice of *lis pendens* in the office of the register of deeds, the notice to contain the names of the parties, the object of the action, and a description of the property to be affected by the suit. A defendant who sought for any affirmative relief by way of cross-petition might also file such *lis pendens* notice, and it is provided that "from the time of filing such notice shall the pendency of such action be constructive notice to any purchaser or encumbrancer to be affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken in said action after the filing of such notice, to the same extent as if he were made a party to the action": Code 1887, sec. 85. The effect of this amendment was before the court in *Sheasley v. Keens*, 48 Neb. 57, 66 N. W. 1010, and it was there held that the amendment was unconstitutional and void, so far as it sought to bind a party who had taken title to property involved in an action prior to the commencement of the action, but who had failed to record his conveyance or encumbrance upon the property. The reasoning upon which this conclusion was reached is found at page 64 of the opinion. The argument adduced is that the holder of ⁷⁶⁹ an unrecorded deed or mortgage affecting the real estate involved in the litigation, though such deed or mortgage was executed long prior to the time of filing a *lis pendens*, is, by the amendment, in effect, made a party to the suit in which the *lis pendens* is filed, and declared to be bound by the judgment rendered in that action in the same manner as if he was in fact made a party to the suit and served with notice by publication. It is then said that this constitutes an amendment to section 77 of the Code, providing for constructive service upon the parties to an action; and, because section 77 was not referred to or amended by the act, it was in violation of section 11, article 3 of the constitution, which declares that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

If it be once established that it was not the object or purpose of the amendment to section 85 to make the holders of unrecorded conveyances or interests parties to the suit, or to summon them into court to have their interests adjudicated in the action in which the *lis pendens* notice is filed, then the reasons urged in *Sheasley v. Keens*, 48 Neb. 57, 66 N. W. 1010, for holding the act unconstitutional have nothing to rest upon. No court, so far as our investigation has extended, had, before the case of *Sheasley v. Keens*, 48 Neb. 57, 66 N. W. 1010, in holding that parties were bound by the decree because of a *lis pendens* filed, put it upon the ground that such persons were parties to the action. As a matter of fact, such persons are not parties to the action. No one is a party to an action unless made so by the record in the case, or unless they instituted the action in the name of another, or, being interested in the subject matter of the litigation, employ counsel to conduct the suit or direct and conduct its prosecution. The rule that a *pendente lite* purchaser took title to property involved in litigation, subject to the judgment finally entered, was adopted out of considerations of public policy and to inspire confidence in titles ⁷⁷⁰ based upon the judgment or decree of court. Section 85 of the code, as originally enacted, defines the persons who shall take title to the property subject to the judgment entered, and, as amended, it adds another class of persons who take title intermediate the filing of the petition and the service of the summons, and still another who, having acquired a title or interest in the property prior to the date of the commencement of the action, shall be estopped from asserting such interest against the plaintiff's rights as determined by the judgment entered in the suit. There was no intent to make persons holding unrecorded interests parties to the action. That was not the aim or purpose of the amendment, and it does not in fact make such persons parties. The old statute did not fully meet the requirements of the situation. Under it the owner of the legal title to real estate, after the filing of a petition to foreclose a mortgage thereon or to establish any other interest therein, could transfer the title to some third party, and, if this was done before service of the summons, the plaintiff's judgment was fruitless of any beneficial results. Another action against this person would be followed by the same result, and no one could tell whether a decree followed by a sale of property gave the purchaser a valid title. Another class were those where the owner of encumbered real estate transferred the title in anticipation of an

action, and the grantee did not put his conveyance of record until after judgment in the suit. His interests would not, under the original statute, be affected by the decree, and another action to determine his rights would have to be instituted.

How could these evils be remedied? The question was not how to implead and serve parties having unrecorded interests. The legislature understood, as well as anyone else, that parties secretly holding title or liens could not be known to the plaintiff, could not be made parties, could not be served, and the question was how to cut them off from asserting their interest after a judgment against the persons appearing of record as the only ones having any ⁷⁷¹ interest. The plain way to accomplish this end was to declare that all parties with unrecorded interests should be bound by a judgment against those whose interests were known or appeared of record. It was the application in another way of the doctrine that the party who fails to record his title shall be estopped from asserting it against a subsequent good faith purchaser. The legislature, in the use of an undoubted power, exercised its right to say that a party who failed to place of record any interest held by him in real estate should be bound by a judgment entered in an action involving such property, where the record owners were made parties. In other words, the purchaser of real estate, under a decree of court in which a *lis pendens* has been filed, takes title paramount to any conveyance or encumbrance not known to the plaintiff or found of record when the *lis pendens* was filed; and this upon the same theory that a subsequent good faith purchaser acquires good title against a prior conveyance which was not of record when the second party made his purchase. One who would deny the power of the legislature to declare a judgment entered against parties holding the record title to real estate paramount to the rights of a party who acquired an interest in the property prior to the commencement of the action, but who failed to record his conveyance or encumbrance, would have to deny the right of the legislature to say that a subsequent bona fide purchaser can take title as against a prior unrecorded conveyance. Such a party would have to argue that our recording acts are unconstitutional as taking from a man his property without due process of law. We might go further than this, and assert that it is the undoubted privilege of the legislature to say that no deed or instrument affecting real estate shall be of any validity or force whatever until it is recorded, and, when possessed

of this power, its right to ordain that an unrecorded conveyance or interest in real property shall not be asserted against a judgment or decree of court affecting the property, where all known owners thereof are made parties to ⁷⁷² the suit, cannot be questioned or disputed. This being the case, it might have provided in the amendment to section 85 that a judgment against the owner or record owner of real estate should bind those holding unrecorded interests therein, and have dispensed altogether with the filing of a *lis pendens* notice by the plaintiff; and we cannot see how the provision for a notice, which the legislature might have dispensed with altogether, can be used as an argument to make the amendment unconstitutional. The thought of the legislature in providing for a notice to be filed with the register of deeds undoubtedly was to protect the interest of secret owners or lienholders so far as might be done without prejudice to the plaintiff, and to allow them to come into court and have their rights adjudicated. Realizing that owners of secret interests could not be known to the plaintiff, and that they could not be made parties or served with process, in order to protect them, so far as could be done with justice to the plaintiff, the statute, as amended, requires the plaintiff to file with the register of deeds a notice of the action, containing "the names of the parties, the object of the action, and a description of the property sought to be affected thereby," thus putting of record in the office where such third person's conveyance ought to appear, and where he would be most likely to discover it, a notice that the property in which he may have an interest is in litigation, and giving him the opportunity to inform and make himself a party to the action and to have his rights determined before closing his mouth.

The amendment to the statute was adopted from the state of New York, where it had received a construction prior to its enactment by our legislature. In *Fuller v. Scribner*, 76 N. Y. 190, it was held: "Where, after the filing of a notice of *lis pendens* in accordance with section 132 of the Code of Procedure, and service of summons upon one or more of the defendants in an action for the foreclosure of a mortgage, a judgment is perfected and docketed against the owner of the equity of redemption, the judgment ⁷⁷³ creditor is bound by the judgment in the foreclosure suit, the same as if he were a party thereto; and this, although, at the time of the entry of his judgment, said owner had not been served with summons in the foreclosure suit." In *Ayrault v. Murphy*, 54 N. Y. 203, it is said: "The mortgage which the plaintiff

seeks to enforce was not recorded until two days after the commencement of that action and notice of its pendency duly filed in the office of the clerk of the county where the premises were situated; and hence the plaintiff became bound by the proceedings in that action in which the title of the mortgagor was, as against Savage as receiver, and Mead and Holcomb, judgment creditors of George Murphy, held to be fraudulent and void, and in pursuance of an order contained in that judgment, Savage, as receiver, had, before the commencement of this action, become invested with the title to the mortgaged premises." The mortgage spoken of in that case was made prior to the commencement of the action, but was not recorded, and the court of appeals, speaking of the effect of their *lis pendens* statute, further said: "The court at special term was, therefore, right in holding that the title or lien of the defendant Savage as receiver, and of Mead and Holcomb as judgment creditors, had, by the proceedings in that action, become prior to and superior to the lien of the plaintiff's mortgage; or, in other words, that the plaintiff, by reason of his mortgage not having been recorded prior to the notice filed of the pendency of that action, became an encumbrancer subsequent to Savage, Mead and Holcomb."

The opinion in *Sheasley v. Keens*, 48 Neb. 57, 66 N. W. 1010, was filed April 10, 1896, and has stood as the law of this state for more than ten years. Were it possible, with that opinion standing unreversed, for the legislature to exercise its discretion in passing a *lis pendens* law in conformity with its judgment, and to bind thereby all such parties as it saw fit, we would not feel like interfering with the holding in that case; but, as long as that opinion stands, the hands of the legislature are tied, and it will be impossible for it to⁷⁷⁴ enact a law estopping parties holding unrecorded conveyances or liens made prior to the filing of a *lis pendens* notice from asserting such conveyance in opposition to the judgment rendered. This being the case, we have, after much consideration, deemed it our duty to overrule the holding in *Sheasley v. Keens*, 48 Neb. 57, 66 N. W. 1010, so far as it declares unconstitutional the amendment to our *lis pendens* laws passed in 1887, declaring parties whose interests in the real estate in controversy "are subsequently recorded" bound by the decree entered, to the same effect as if they were parties to the action, and to hold that the statute, as amended, is valid and effective. Having no doubt that the statute, as amended, is constitutional and valid, and that it should be enforced, its effect would have been to bind Mrs. Fitch, who,

it is claimed, held an unrecorded interest in the property foreclosed, were it not for one fact alleged in the answer of Beard & Brother, and admitted by the demurrer filed by the plaintiff. The answer alleges that Mrs. Fitch has been in possession of the property for the past fourteen years. This would carry her possession back to a period anterior to the commencement of the foreclosure suit, and, being in possession, the plaintiff was bound to take notice of any rights or equities which she had in the premises, and to make her a party and bring her into court.

In *Wiltsie on Mortgage Foreclosure*, section 157, it is said: "The occupant or person in possession of the premises at the time of the commencement of the foreclosure is also indispensable, no matter how or under what circumstances he came into possession. . . . His omission will, moreover, produce such a defect of title as to relieve a purchaser at the sale of his bid." The statute of *lis pendens* does not relieve the plaintiff from making parties to an action all persons having an interest in the property when the action is commenced, if such interest is known to him. In the leading case of *Lamont v. Cheshire*, 65 N. Y. 30, the question was elaborately considered, and it was there held that a party holding an unrecorded interest in the ⁷⁷⁵ real estate in controversy was not affected by the filing of a notice of *lis pendens*, provided the plaintiff had actual notice of his interest. This is undoubtedly a correct construction of the statute, the intent of the legislature being to give the plaintiff the benefit of a *lis pendens* notice as against parties holding secret liens, and not against those whose liens or interests were actually known to him. It being admitted that Mrs. Fitch was in possession when the foreclosure proceeding was commenced, her possession was actual notice to the plaintiff in that action of whatever interest she may have had in the property, and, having such actual notice, it was his duty to make her a party that her rights might be litigated.

We recommend a reversal of the judgment and remanding the cause for further proceedings not inconsistent with this opinion.

Epperson and Good, CC., concur.

By the COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with said opinion.

The Law of Lis Pendens is the subject of a note to Stout *v.* Philippi Mfg. Co., 56 Am. St. Rep. 853. The prime object of the rule of lis pendens is to preserve the property which is the subject of litigation in order to make it possible for the court to execute final judgment: Wingfield *v.* Neall, 60 W. Va. 106, 116 Am. St. Rep. 882. A lis pendens, prosecuted in good faith, is notice to any and all purchasers so as to affect and bind by the decree any interest in the property which they may acquire by reason of their purchase: Turner *v.* Edmonston, 210 Mo. 411, 124 Am. St. Rep. 739, and see cases cited in the cross-reference note thereto. See, also, Hulen *v.* Chilcoat, ante, p. 681.

CASES
IN THE
SUPREME COURT
OF
OREGON.

KAMM v. NORMAND.

[50 Or. 9, 91 Pac. 448.]

NAVIGABLE STREAMS.—The Common Law of England that the only navigable streams are those in which the tide ebbs and flows has never been adopted in this country. (p. 699.)

NAVIGABLE WATERS.—Use of Stream for Floating Logs.—Streams which in their natural course are useful for the transportation of sawlogs during the whole or a part of each year are highways for that purpose. (p. 700.)

NAVIGABLE WATERS.—To Make a Stream a Highway, it must at least be navigable or floatable in its natural state, at ordinary recurring freshets, long enough to make it useful for some purposes of trade or agriculture. (pp. 700, 701.)

NAVIGABLE WATERS.—A Stream Capable of Floating Logs unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose. (p. 702.)

NAVIGABLE WATERS.—Aiding by Artificial Means.—A stream which is not a highway cannot be made so by the use of dams or other artificial means; nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. (p. 703.)

NAVIGABLE WATERS.—Floating of Sawlogs.—A stream, to be navigable or floatable for sawlogs, must be capable, in its natural condition at ordinary recurring freshets, of being successfully and profitably used for that purpose; and a stream not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation. (p. 705.)

NAVIGABLE WATERS.—Stream Floatable for Short Period.—A stream which will carry sawlogs only at times of freshets which occur only a few times each year and continue but a few hours at a time is not navigable for the purpose of floatage, and cannot be made

so by means of a splash dam or other artificial structures, without first acquiring the rights of the riparian proprietors. (p. 709.)

NAVIGABLE WATERS.—Unless a Stream is in Fact Navigable or floatable, it cannot be taken or used without the consent of the owner, except by due process of law, however beneficial it might be to private interest or to the public itself. (pp. 709, 710.)

Dolph, Mallory, Simon & Gearin and Frank J. Taylor, for the appellant.

Fulton Brothers and Charles Erskine Scott Wood, for the respondents.

⁹ **BEAN, C. J.** This is a suit by Jacob Kamm to enjoin Alex and Fred Normand from using the north fork of Klaskanie creek for floating sawlogs. The complaint alleges that the stream in question runs through plaintiff's land for a distance of about one-half mile, and that it is not navigable or floatable for rafts, logs, lumber or timber; that the defendants cut and put into the channel above plaintiff's premises large quantities of sawlogs, and, in order to cause them to float down such stream, constructed ¹⁰ a splash dam, whereby a large volume of water was accumulated and suddenly released and permitted to flow down the stream, forcing the logs on plaintiff's land in great numbers, cutting and breaking the banks, and otherwise damaging his premises; and that, unless enjoined and restrained, defendants will continue to so use the stream, to plaintiff's irreparable damage. Defendants admit, by their answer, that they are engaged in the logging business on the stream above the lands of plaintiff, and that they have constructed therein a splash dam for use in their logging operations. But they allege that the stream is navigable and suitable for the floatage of sawlogs and other timber products where it runs through and for several miles above plaintiff's lands; that they are the owners of large tracts of valuable timber lands on the stream, and the only way the timber can be marketed is by floating it down such stream; that the stream is not navigable at all stages of the water, but has well-defined banks on either side; that in October, 1903, they constructed, at great expense, about two miles above the premises of plaintiff, a splash dam for the purpose of aiding and assisting the floatage of logs; that such dam is so constructed and operated as to be a benefit to plaintiff, since it is possible thereby to control the water and prevent it from overflowing the banks or reaching the height of ordinary freshets; and that logs floated down stream by use of the dam do less injury to plaintiff's premises than if floated

without such dam. Upon a trial the court found the averments of the answer to be substantially true, and dismissed the suit, and plaintiff appeals.

¹¹ The questions for determination on this appeal are: (1) Whether the Klaskanie, where it flows through the lands of plaintiff, is a navigable or floatable stream; (2) to what extent, if any, the defendants may render it navigable or assist the navigability thereof by means of a splash dam.

1. The common law of England, that the only streams which are navigable are those in which the tide ebbs and flows, has never been adopted in this country. Rules which reason and convenience may have approved in reference to the streams of that country are wholly inapplicable to our waterways, natural resources and conditions, and it is now considered here that any stream which can be used in its natural state for commercial purposes is navigable. The existence of immense bodies of timber in Maine, Michigan and other states, which could be transported to market only by use of adjacent streams, influenced the courts to early hold that any stream which is capable in its natural condition of being commonly and generally used for floating sawlogs at periods of high water is navigable or floatable for the transportation of the timber along its banks. This doctrine has been accepted and declared by this court, and the courts of this country generally, until now it may be regarded as settled that streams, which in their natural condition are useful for the transportation of sawlogs during the whole or part of each year, are highways for that purpose: *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Shaw v. Oswego Iron Co.*, 10 Or. 371, 45 Am. Rep. 146; *Haines v. Welch*, 14 Or. 319, 12 Pac. 502; *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384; 27 Cyc. 1566; 21 Am. & Eng. Ency. of Law, 2d ed., 428. But streams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private: *Munson v. Hungerford*, 6 Barb. 265; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525. "The true test, therefore, to be applied in such cases," says the supreme court of ¹² Maine, in *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641, "is whether a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs." It is not necessary that the stream should be floatable at all seasons of the year. It is

sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing for a sufficient length of time to make it commercially profitable and beneficial to the general public. But every small creek or rivulet in which logs can be made to float for a few hours during a freshet is not a public highway. To make a stream a highway, it must at least be navigable or floatable in its natural state, at ordinary recurring winter freshets, long enough to make it useful for some purposes of trade or agriculture: *People v. Elk River M. & L. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Morgan v. King*, 35 N. Y. 454, 18 Barb. 277, 91 Am. Dec. 58; *Banks v. Frazier*, 111 Ky. 909, 64 S. W. 983; *Commissioners of Burke County v. Catawba Lum. Co.*, 115 N. C. 590, 20 S. E. 707, 847; *Lewis v. Coffee Co.*, 77 Ala. 190, 54 Am. Rep. 55; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Carlson v. St. Louis River D. & I. Co.*, 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1044, 41 L. R. A. 371, note; 1 *Farnham on Waters*, 121; *Gould on Waters*, secs. 107-109.

"The true rule is," says the supreme court of New York, in *Morgan v. King*, 35 N. Y. 460, 91 Am. Dec. 58, "that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines or of the tillage of the soil upon its banks. It is not essential to the right that the property to be transported should be carried in vessels, or in some other mode whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being thus navigated against its current, as well as in the direction of its current. If it is so far navigable or floatable, in its natural state and its ordinary capacity ¹³ as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state at all seasons of the year should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. These general views are in harmony with those maintained

by the supreme court of Maine in *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641, and by the supreme court of Michigan, in *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209." And this is the rule adopted in this state. In *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621, it is said "that if a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation applicable to the circumstances of the case." And in *Haines v. Welch*, 14 Or. 319, 12 Pac. 502, Mr. Justice Thayer says: "If it (Anthony creek) is capable of serving an important public use as a channel for commerce, it should be considered public; but if it is only a brook, although it might carry down sawlogs for a few days during a freshet, it is not, therefore, a public highway." And in *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609, in speaking of the same stream, the court said: "Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated as to have such length and capacity as will enable it to accommodate the public generally as a means of transportation."

¹⁴ The doctrine, then, which we derive from the authorities, is that a stream, to be a public highway for floatage, must be capable, in its natural condition and at the ordinary winter stages of water, of valuable public use, and if not, it is private property. Ordinary stages of water or natural conditions, within this rule, do not mean a continuous state of floatage or an average volume of water. The term has reference to the natural flow of the water, and is applied to the stream in its natural condition, without the application of artificial means, and is used in contradistinction to extraordinary or unusual floods. That which occurs with reasonable certainty, periodically, can hardly be said to be unusual, and much less extraordinary, and may be properly characterized as ordinary. A stream, therefore, that is capable of floating logs, unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose.

2. But a stream which is not such a highway cannot be made one by the use of dams or other artificial means, without first acquiring the rights of riparian proprietors: 1 Farnham on Waters, sec. 139. Nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. No one has a right to store water and then suddenly release the accumulation, and thus increase the natural volume of the stream, and overflow, injure or wash the adjoining banks, or otherwise interfere with the rights of riparian owners. The riparian proprietor is entitled to the enjoyment of the natural flow of the stream with no burden or hindrance imposed by artificial means: *Brewster v. Rogers Co.*, 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495; *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Witheral v. Muskegon Booming Co.*, 68 Mich. 48, 13 Am. St. Rep. 325, 35 N. W. 758; *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272; *Ford Lum. & Mfg. Co. v. Clark (Ky.)*, ¹⁵ 68 S. W. 443; *Kentucky Lum. Co. v. Miracle*, 101 Ky. 364, 41 S. W. 25; *De Camp v. Thomson*, 16 App. Div. 528, 44 N. Y. Supp. 1014.

Dams, dikes, embankments and the like may be constructed in or along floatable streams to facilitate their use (*Union Power Co. v. Lichty*, 42 Or. 563, 71 Pac. 1044), but not to the extent of injuring the riparian proprietors by retarding the flow of the water or sending it down in increased volumes to his injury or at times when the stream would not otherwise be navigable. And this rule is not changed by the fact that a stream cannot be successfully used for logging purposes without such artificial aids to navigation on the ground of necessity. In *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184, and *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527, 38 N. W. 649, the supreme court of Michigan had occasion to consider the right to make a stream which is navigable only at certain seasons of the year navigable at other times by impounding the water until a flow sufficient to float logs could be caused. In the former case, Mr. Justice Cooley, after reviewing the Maine and Michigan cases, quoting with approval what is said to be the true rule by the New York court of appeals, noting the fact that all the cases carefully restrict within the bounds of capability for use in their ordinary and natural condition the public

easement in streams navigable only at certain seasons of the year, and holding that a stream is navigable during the period the water in its natural condition is sufficient to permit of a public use, says: "During that time the public right of floatage and the private right of the riparian proprietors must each be exercised with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage he must submit to as incident to his situation upon navigable waters: *Middleton v. Flat River Boom Co.*, 27 Mich. 533. But at periods when there is no highway at all, there is no ground for asserting a right to create a highway by means which appropriate or destroy private rights. The doctrine that this may be done without compensation to parties injured is at war with all our ideas of property and of ¹⁶ constitutional rights. The most that can be said of this stream during the seasons of low water is that it is capable of being made occasionally navigable by appropriating for the purpose the water to the natural flow of which the riparian proprietors are entitled. It is highly probable, in view of the large interests which are concerned in the floatage, that the general public good would be subserved by so doing; but this fact can have no bearing upon the legal question. It is often the case that the public good would be subserved by forcing a public way through private possessions; but it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public. . . . As was remarked in *Morgan v. King*, 35 N. Y. 460, 91 Am. Dec. 58, the question of public right in a case like this is to be decided without reference to the effect which artificial improvements have had in the navigable capacity of the river; in other words, the public right is measured by the capacity of the stream for valuable public use in its natural condition, and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation." *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272, was a suit to enjoin the defendant from using the west fork of Woods creek for floating shingle-bolts and from maintaining a splash dam thereon. The court held the stream to be navigable or floatable during the freshets which occur with periodic regularity in the spring and fall of each year, but that the detention of the water by means

of a dam, and the release thereof at irregular intervals, causing the stream to overflow and washing the lands of the lower riparian proprietor, was such an interference with the natural flow of the water as would be enjoined. And in *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046, it was held that the floating of logs down a stream, by means of dams and artificial freshets, at the time of the year when it is not navigable in its natural state, is an abuse of the right of ¹⁷ navigation for which an injunction will lie at the suit of riparian owners injured thereby, and that a private corporation which is not a boom company is not entitled to exercise the right of eminent domain against a lower riparian owner, for the purpose of facilitating the floating of logs down a stream by means of dams and artificial freshets, which damages the lower proprietor and interferes with his use of the stream. In fact, our attention has not been called to a case, nor have we been able to find one, sustaining the right to maintain dams or other artificial structures in a stream whereby the water is impounded and let down in such a head or volume as to make the stream navigable, when it would not otherwise be so, unless it be in the states of Maine, Wisconsin and Minnesota, where the construction of dams in floatable streams to facilitate their use is authorized by statute: *Brooks v. Cedar Brook etc. Imp. Co.*, 82 Me. 17, 17 Am. St. Rep. 459, 19 Atl. 87, 7 L. R. A. 460; *Kretzschmar v. Meehan*, 74 Minn. 211, 77 N. W. 41; *Field v. Apple River Log Driving Co.*, 67 Wis. 569, 31 N. W. 17.

3. Having thus ascertained that a stream, to be navigable or floatable for sawlogs, must be capable in its natural condition at ordinary recurring freshets of being successfully and profitably used for that purpose, and that a stream not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation, we are now prepared to consider the facts of the particular case before us and determine the respective rights of the parties litigant. The plaintiff is the owner of four hundred and eighty acres of land, most of which is bottom or meadow land and has been extensively improved and used as such. Through this land, from the north and east, flows the north fork of the Klaskanie, for a distance of about one-half mile, to a point a short distance west of plaintiff's land, where it joins another stream from the southeast, called the "south fork" of the Klaskanie, and

the two streams united flow to the west, forming the Klaskanie river. The tide ebbs and flows in the Klaskanie from its mouth ¹⁸ up to or about the confluence or junction of the two streams referred to, and is conceded by the plaintiff to be navigable to that point. From the junction of the two streams toward its source the north fork is a shallow tortuous stream, from forty to sixty feet wide. For about half the distance through plaintiff's land it consists of riffles or shoals, and the water is but a few inches deep in the summer time, and from one and one-half to two feet deep during the ordinary winter freshets. At places the banks on one side are from four to six feet high, the opposite bank gradually sloping back to the meadow land. The soil is alluvial, and easily eroded in time of high water, and plaintiff has expended large sums of money in constructing embankments and other improvements to preserve the banks. In the fall of 1903 the defendants went upon the stream, about two miles above plaintiff's land, and constructed a dam twenty-eight feet high for use in their logging operations, which dam is provided with four gates—three trip gates, each eight feet wide and sixteen feet high, and one slide gate, six feet wide and twenty-four feet high. By means of this dam the defendants are enabled to impound a large volume of water, which they suddenly release and allow to flow down the channel to suit their convenience.

Many witnesses were called and testified in behalf of both parties as to the character and capacity of the stream. They differ as to whether logs can be floated down it without the aid of dams. The witnesses for plaintiff, most of whom are farmers or land owners along the stream or in the vicinity, all concur in opinion that it cannot be so used; while the witnesses for defendants, most of whom are loggers or millmen, are equally positive that it can. But while the witnesses differ in their opinions, there is no substantial conflict in the facts as testified to by them. They all agree that the stream is not floatable except in times of winter freshets, and that such freshets do not ordinarily occur more than three or four times a year, and continue but a few hours at a time. Christian Peterson, who was plaintiff's foreman, and lived upon his farm for twenty-four years prior to 1902, testified that during the ordinary winter freshets the water was from one and one-half to two feet deep in the riffles ¹⁹ and shoal places, and would not float logs, but there might be two or three days in the year during which small logs would float down the stream; that the freshets would continue sometimes a

couple of hours and sometimes a half a day, and the water would fall as rapidly as it came up; that some years ago Gilliam and Warnstaff put eighty thousand or ninety thousand feet of logs in the stream above plaintiff's land, and that only five or six of them had come out, and the remainder were scattered along the banks at the time he left the farm in 1902. John Leahy, who for twenty years has lived about one and one-half miles above plaintiff's premises, testified that the water is from one and one-half to two feet deep in the winter, except in case of unusually high water, which may occur once or twice a year and continue for a few hours at a time; that logs could not be floated at ordinary high water, but they would stop on the bars and along the banks; that more damage was done to the banks during the winter of 1903 by the operation of defendants' splash dam than in the entire twenty years he had lived on the stream, and that logs had been left higher on the banks than by the winter floods; that within three weeks prior to the trial in July, 1904, defendants had flushed down the stream, by means of their dam, about one hundred thousand feet of logs, which had lodged above his place, and there was great danger of their carrying away his house.

James Leahy, who had lived on the stream above plaintiff's place for more than twenty years, testified that during the winter of 1903 and 1904 there was but one freshet sufficient to float logs, and then only small ones, and that it did not continue for more than three hours; that some years there would be three or four freshets, depending upon the rainfall, but they would only continue two or three hours; that the running of logs by defendants during the winter of 1903 and 1904 caused more damage than the natural wash of the stream for the previous twenty years. Michael Leahy and Charles Gilliam, who live on the stream, say that the water is from two and one-half to three feet deep during the ordinary winter freshets, and not sufficient to float any but small sawlogs. Gilliam testified that some twelve or fifteen years ago he put one hundred and thirty-seven logs in the stream and got one out the first ²⁰ year, and that six or seven of the smaller ones came down to plaintiff's place; that he tried to get the logs out, but could not do so for want of water, and had to abandon the enterprise; that logs would go down from a quarter to a half mile during a freshet, and then the water would recede and leave them in the channels of the stream or along the banks; that some of the logs were still in the stream, and others came out during the winter

of 1903, when defendants were operating their splash dam; that logs which had laid in the stream for fifteen or sixteen years and were not carried out by ordinary winter freshets were floated out by water from the splash dam. Stephen Thies, who had charge of plaintiff's farm from April, 1902, to date of trial in July, 1904, testified that during the winter of 1902 and 1903 there were two or three freshets, one of which was extremely high, and continued from ten to twelve hours; that during ordinary winter freshets the water was from two to three feet deep in shoal places, and not that during the winter of 1903 and 1904; that in June, 1904, the defendants were running logs down the stream by use of their splash dam; that they opened the dam and allowed the accumulated water to come down the stream, bringing logs with it, perhaps twenty times during the winter; that they were not able by this means to get all the logs out, but many of them were left on the banks and lowland along the stream, and there has been no time since defendants commenced the operation of their dam that plaintiff's land has been free of logs. Frank Buxton, who was employed on plaintiff's farm, testified that the stream was flushed by defendants during the winter of 1903 and 1904 from twenty-five to thirty times, raising the water two or three feet above its natural stage; that there was a rise of water during the winter from natural causes sufficient to float small logs.

Most of the witnesses for defendants do not live on the stream and have no actual knowledge of its conditions, but testified as to their opinion from an examination of the stream and their general knowledge of the climatic conditions of the surrounding country and its waterways. They generally agree that not more than from two to five freshets, sufficient to float logs, may reasonably be expected in the streams of that vicinity each year, ²¹ continuing, as a rule, from six to twelve hours, but there were no such freshets during the winter of 1903 and 1904. Wallace and J. C. Dunkin, who were employed by defendants, testified that there was not more than one logging freshet during the winter of 1903 and 1904, and that the splash dam operated by defendants would raise the water as high as an ordinary freshet. Fred Normand, one of the defendants, says there are ordinarily from three to five freshets a year, depending upon the amount of rainfall, and last from three to five hours; that defendants' splash dam was constructed in the fall of 1903, and there was once during the succeeding winter that logs would float down the stream in its natural stage; that defendants were

careful not to open the dam so as to overflow the banks of the stream and carry the logs out on the meadow, nor in the summer time, "because we do not want to overflow the bottom land." Alex Normand, the other defendant, said that four or five freshets may be reasonably expected each year, and they usually last from five to six and ten to twelve hours, and that, by assisting them, "we can run logs for a day and a half or two days"; that their dam will raise the water in the stream about four feet, when a full head is turned down, but hardly as high as an ordinary freshet; that defendants used the dam for scattering logs along the stream, and "to assist them on down, so we can market them and not have to wait for freshets, as we would otherwise have to do"; that during the winter of 1903 and 1904 they were able, by use of their dam, to float down to tide water from one million seven hundred thousand to two million feet of logs, for about four miles, which they expected to splash out during the succeeding winter.

4. We have made this extended reference to the testimony because whether a given stream is in law navigable or floatable depends upon the facts, and a decision in one case cannot be regarded as a precedent in another, unless the facts are the same. From the testimony of the witnesses, both for plaintiff and defendants, it is apparent, we think, that the Klaskanie, where it flows through plaintiff's land, is not, in its natural condition, floatable for logs, because it is not capable of serving any important public use. Logs cannot be floated therein except, ²² perhaps, at extreme high water continuing for a few hours at a time, and then only small logs. It would be going beyond any precedent of which we have knowledge to hold that such a stream is a public highway; and, since it is not such highway in its natural condition, it cannot be made so by means of a splash dam or other artificial structures, without first acquiring the rights of the riparian proprietors.

5. It is suggested that in view of the great lumber interests in the state, the public good would be subserved by holding that streams like the north fork of the Klaskanie are public highways for the floating of sawlogs; but this argument can have no bearing whatever upon the question. The magnitude or importance of any business or industry will not justify the slightest encroachment upon the rights of the citizen, and, unless a stream is in fact navigable or floatable, it cannot be taken or used without the consent of the owner, except by due process of law, however beneficial it might be to private in-

terest or the public itself. It is often the case that the public good would be subserved by taking one man's property for the benefit of the community; but as already quoted from Judge Cooley, "it neither should be nor can be done under any circumstances without observing the only condition on which it can be permitted in constitutional government, namely, that the private proprietor be compensated for the value which he surrenders to the public."

The decree will be reversed, and one entered here for plaintiff.

WHAT WATERS ARE NAVIGABLE.

I. General Meaning of the Term "Navigable Waters," 710.

II. What Constitutes Navigable Waters at the Common Law, 711.

III. Effect of the Civil-law Doctrine of Navigable Waters on the Rule in the United States, 715.

IV. Power of Legislative Bodies to Declare Certain Bodies of Water Navigable, 717.

V. General Tests by Which the Navigability of Waters is Determined in the United States.

a. Navigability in Fact as the General Test, 717.

b. Necessity for the Waters to be Capable of Being Used for Transportation Purposes.

1. The General Rule, 720.

2. Capacity for, and not Extent of the Use for, Transportation is the Criterion, 722.

3. Effect Where the Waters are Useful Merely for Boating, Fishing or the Like, 723.

c. Sufficiency of Capacity for Mere Floatage as Distinguished from Navigation in Its Ordinary Meaning, as a Test.

1. Synonymous Character of Floatage and Navigability, 725.

2. Capacity to Float the Products of the Surrounding Country as a Test.

A. In General, 726.

B. Logs, Rafts and Other Timber Products, 726.

3. Effect, Where Artificial Means are Required to Produce a Floatable Capacity, 728.

4. Effect Where the Stream has Floatable Capacity for Only Short Periods or During Freshets, 729.

d. Necessity that the Waters be Fit for Navigation in Their Natural Condition Without Engineering Improvements, 730.

e. Effect of Shallow Places, Waterfalls and Other Obstructions, 731.

f. Necessity for a Terminus at Each End of the Body of Water, 731.

g. Effect of the Waters Having been Meandered or Returned by Government Officials as Navigable, 732.

h. What Constitutes Navigability in Respect to Lakes, Marshes, Bayous and the Like, 732.

I. General Meaning of the Term "Navigable Waters."

As commonly used, the term "navigable waters" includes all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation: *Commonwealth v. Vincent*, 108 Mass. 441. In England, however, the term "navigable waters" is synonymous with

tide waters, but in this country it is not confined to tide waters, and includes any waters on which commerce is carried on: *Illinois Central Ry. Co. v. State*, 146 U. S. 387, 13 Sup. Ct. Rep. 110, 36 L. ed. 1018. In some jurisdictions a distinction is observed between the use of the term in its strict legal sense and in the use of it in the common acceptation of the term, as applied to the ownership of the soil, although, if capable of valuable floatage, it is held that the public have a right to such a use of the stream: *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

"In the United States there are three classes of navigable streams: 1. Tidal streams, that are held navigable in law, whether navigable in fact or not; 2. Those that, although nontidal, are yet navigable in fact for 'boats or lighters' and susceptible of valuable use for commercial purposes; 3. Those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests and tillage of the country they traverse to mills or market": *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60, 5 L. R. A. 392.

II. What Constitutes Navigable Waters at the Common Law.

At the common law only the arms of the sea and streams where the tide ebbs and flows are deemed navigable. And streams above tide water, although navigable in fact, were not so deemed in law: *Wright v. Seymour*, 69 Cal. 122, 10 Pac. 323; *Enfield Toll-Bridge Co. v. Hartford etc. R. Co.*, 17 Conn. 40, 42 Am. Dec. 716; *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Veazie v. Dwinel*, 50 Me. 479; *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Scott v. Wilson*, 3 N. H. 321; *Society for Establishing Useful Manufactures v. Morris Canal & B. Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41; *Cobb v. Davenport*, 32 N. J. L. 369; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *People v. Tibbetts*, 19 N. Y. 523; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Walsh v. Hopkins*, 22 R. I. 418, 48 Atl. 390; *Stuart v. Clark's Lessee*, 32 Tenn. 9, 58 Am. Dec. 49; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60, 5 L. R. A. 392; *Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 15 Sup. Ct. Rep. 991, 40 L. ed. 85.

In the case of *People v. Canal Appraisers*, 33 N. Y. 461, Judge Davies entered into an exhaustive review of the English rule making the ebb and flow of the tides the criterion by which to determine navigability, and cited English cases which seemed to curtail the supposed extent of the rule. But regardless of the question as to whether the ebb and flow of the tides is the sole criterion of navigability at the common law the court decided that the common-law rule needed modification in its application to the waters of this country, the court saying: "It is undoubtedly true that such parts of the common law as were in force on the twentieth day of April, 1777, were adopted by the people of this state as the laws thereof, subject to such alterations as the legislature should make concerning the

same. But such declaration does not compel us blindly and slavishly to incorporate into our system of jurisprudence principles totally inapplicable to our circumstances and condition, and which would produce absurd results. I think we shall find, in an investigation of this subject, that the remarks of Judge Johnson in *Browne v. Scofield*, 8 Barb. 239, are eminently sound and pertinent: 'The common law of England upon this subject, from its utter want of fitness and adaptation to the condition of things here, in an extended territory with its numerous inland lakes and countless streams, capable of floating the products of the country hundreds and thousands of miles from the ebb and flow of tide water, has never been adopted, or if adopted, it has been in a form modified and improved to fit the condition of the country and the wants of its inhabitants.' And continuing he observed: "Our knowledge of the geography and physical conformation of the island of Great Britain enables us to see that a writer might readily fall into the supposition that, necessarily, the tide would ebb and flow in all of its navigable waters. Navigation is defined to be the act of passing on water in ships or other vessels (Webster). It would be difficult to conceive, in the days of Sir Matthew Hale, the practicability of passing over any of the waters of Great Britain in ships or other vessels, not influenced by the tides or subject to their ebb. Our own great rivers and lakes, which float in their waters thousand of vessels, propelled by steam or wind, are entirely fresh water, and the tides of the ocean have never disturbed their purity. The Missouri river is navigable for three thousand miles from its mouth with vessels, and its junction with the Mississippi more than one thousand miles from tide water, and yet, if we adhere to Sir Matthew Hale's definition, literally, we must hold it to be a fresh private river, and that its alveus or bed is owned by the adjacent owners. This statement shows the inapplicability of the doctrine contended for to our condition and circumstances. It has been shown that at an early day it was emphatically repudiated by the legislature of this state."

The common-law test of the ebb and flow of the tides as fixing the navigable status of streams was particularly applicable in England, since the longest river in England, the Thames, is only about two hundred and fifty miles in length, while the Severn is only about two hundred and ten miles in length: *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195, 13 S. W. 931, 8 L. R. A. 559. Thus, it will be seen that owing to the limited extent of the country and the topography of the country, the rule of ebb and flow of the tide was a reasonable one in England, since most of the streams would be in fact navigable only as far as tide water would reach: *Wright v. Seymour*, 69 Cal. 122, 10 Pac. 323. Under the common-law rule the Mississippi river would not be navigable in law above tide water, though navigable in fact: *Fuller v. Dauphin*, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917.

The opinion of the court in *McManus v. Carmichael*, 3 Iowa, 1, is a very able one, and reviews the earlier cases in both this country and England on the extent of the rule at common law. The result of the review was practically summed up in the following observation: "Although the ebb and flow of the tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one. The term 'navigable' embraces within itself, not merely the idea that the waters could be navigated in fact, but also the idea of publicity, so that saying waters were public was equivalent, in legal sense, to saying they were navigable. Yet the navigability in fact was the leading idea, and was the ground of their publicity. But, on the other hand, there are in England and in this country many arms of the sea, which, though not navigable in fact, are so legally. It is worthy of attention that the ebb and flow of the tide does not, in reality, make the waters navigable, nor has it, in the essence of the thing, anything to do with it. The fact that certain rivers were accessible and could be navigated by vessels of considerable burden always constituted the substance of the thing. But as in England the tide waters, particularly the seas, were by far the most important, and as all of the rivers of that country navigable in fact were affected to a greater or less extent by the tide, and as the high and important admiralty jurisdiction was always governed by this criterion, the ebb and flow of the tide became the usual test. The nature of the admiralty, relating as it did to the high seas, where the king's authority had sole sway, and to the arms of the sea, gave prominence to the tidal ebb and flow, in legal thought. But there is nothing in nature or reason to constitute this the only criterion."

The ebb and flow of the tide as a test by which to determine whether waters are public or private was strenuously defended by the supreme court of New Jersey as having the merit of uniformity, certainty and ease of application, even though it be conceded as being devoid of principle: *Cobb v. Davenport*, 32 N. J. L. 369. In the case last cited the New Jersey court, in adopting tidal test, stated that by the common law all waters were divided into public and private waters, and that: "In the former, the proprietorship is in this sovereign; in the latter, in the individual proprietor. The title of the sovereign being in trust for the benefit of the public—the use, which includes the right of fishing and of navigation, is common. The title of the individual, being personal in him, is exclusive—subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact." The same rule was announced by the court in *Simons v. City of Paterson*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 994, 48 L. R. A. 717.

In the principal case the court also declared that the tidal test had not been adopted by the courts of this country, and that any stream which can be used in its natural state for commercial purposes is navigable: *Kamm v. Normand*, 50 Or. 9, ante, p. 698, 91 Pac. 448, 11 L. R. A., N. S., 290.

Chief Justice Shaw in *Rowe v. Granite Bridge Corp.*, 21 Pick. 344, said: "It is not every ditch in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek in which a fishing skiff or gunning canoe can be made to float, at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture."

Expressions of a like character have been made by other courts also which have favored the tidal test rule: *Wethersfield v. Humphrey*, 20 Conn. 218; *Glover v. Powell*, 10 N. J. Eq. 211. In this country it may be said that this ebb and flow of the tide does not constitute the usual test of navigability as in England: *Lowber v. Wells*, 13 How. Pr. 454; *State v. Eason*, 114 N. C. 787, 41 Am. St. Rep. 811, 19 S. E. 88, 23 L. R. A. 520; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Stover v. Jack*, 60 Pa. 339, 100 Am. Dec. 566; *Sigler v. State*, 66 Tenn. 493.

But while the common law seemed to regard only those streams navigable in law in which the tide ebbed and flowed, still there was another class of streams, called fresh-water streams, which, if susceptible of navigation by boats or lighters or for any beneficial public purpose, were regarded as highways, over which the public had free access for the purposes of trade and commerce. The distinction between the two classes of streams arose from the distinction as to the ownership of the alveus of the stream and the rights of riparian owners therein. The latter class of streams were said to be burdened with a public easement of passage: *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239, 54 L. R. A. 178.

This rule of the common law has been adopted very largely in all of the states which have had large lumbering interests. In an early and much cited case, that of *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209, the court, in commenting on it, said: "Strictly at the common law, those rivers only are subject to the servitude of the public interests which are of common or public use for carriage of boats and lighters, and for transportation of property. 'There be some streams or rivers,' says Lord Hale, in his treatise *De Jure*, etc., 'that are private, not only in propriety or ownership, but also in use as little streams or rivers that are not a common passage for the king's people. Again there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters—and these whether they are fresh or salt—whether they flow and reflow or not, are *prima facie*, *publici juris*, common highways for man or goods, or both, from one inland town to another.' Like every other rule of the common law, this sprung from usage and immemorial custom;

and giving to it its broadest signification, it could only have had application to those rivers which were susceptible of use by the public generally for navigation, and their adaptation to a particular use by individuals in the course of their trade, but not to general use, would not constitute them public highways. But in this country the public right cannot depend upon custom or upon general use; and we accordingly find in nearly all the states this rule has been extended so as to be adapted to the necessities of our trade and commerce, and to embrace all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use, or the extent of such use. A stream which can only be made floatable by artificial means can in no sense be deemed a public highway; nor, on the other hand, can the fact that a floatable stream has not been used by the public, or has only been used by persons following a particular occupation, deprive such stream of its public character. This principle is one of vast importance to the interests of this and all new states. We have a large territory yet undeveloped, rich in forest and in mineral wealth—washed by vast bodies of water upon three sides, and threaded by innumerable streams which are capable of navigation, many of which are, and many others of which may be, made serviceable in developing its resources—and with a commerce already established, rivaling in extent that of some of the Atlantic states, and rapidly growing under the influence of increasing population, settlements and wealth, it is of the first importance that the rights of the public be recognized to the free use of all streams susceptible of any valuable floatage. In this commerce our lumbering interests sustain, and will continue to sustain an important part, and their success depends to a vast, if not entire, extent upon this principle. Indeed, a moment's reflection will convince us that a liberal application and retention of the common-law rule, and its adaptation to our condition and wants, lies at the bottom of this branch of our trade. Although in some of the states usage and custom have been regarded as the foundation of this public right in fresh rivers, yet in others the application of this doctrine has been denied. In the new states, from necessity and the very nature of things, such cannot be the foundation of the public right."

III. Effect of the Civil-law Doctrine of Navigable Waters on the Rule in the United States.

"By the Roman civil law, rivers in which the flow of water is perennial belonged to the public, and were navigable if they were capable of being 'navigated,' in the common sense meaning of that term. According to the Digest, a navigable river is 'statio iturve navigio.' The Code Napoleon speaks of navigable rivers as 'flottables'; that is, rivers admitting floats: Angell on Tide Waters, p. 79. The rule of the civil law has ever prevailed in the United States, and is another instance of our great obligation to that splendid system of jurisprudence which was developed by the Roman people.

In the state of New York, the doctrine of the civil law has been carried to its utmost limit, and the rule to be deduced from the authorities is that all streams are deemed navigable which are capable, in their natural state, and in their ordinary volume of water, of transporting to market the products of the fields, forests and mines. Because some products may be floated to market as rafts, and upon rafts, it is not essential to the public character of the stream that property can be carried in vessels. As some streams are unnavigable against their current, if they are floatable in their natural state, so as to be of public use with the current, their public character is liberally supported. Neither is it essential that the floatable capacity must be continuous. If it be ordinarily subject to fluctuations in volume, attributable to natural causes, and occurring with regularity, and continuing sufficiently long to make it useful as a highway, it is subject to the public use": *Ten Eyck v. Town of Warwick*, 75 Hun, 562, 27 N. Y. Supp. 536.

Although the rule prevailing in the United States is generally thought to have been based on the doctrine of the civil law and properly so, still it would appear that the practical effect of the rule at the common law in respect to streams above tide water which were, as a matter of fact, navigable, was to declare an easement or servitude in such streams for the purposes of irrigation. The distinction which was observed was in respect to the ownership of the soil underneath such waters; in the case of streams in which the tide ebbed and flowed, such ownership was in the sovereign, while in respect to navigable streams in which the tide did not ebb and flow it was in the riparian owners. But at the common law waters above tide water which were navigable in fact were not termed navigable. This distinction is shown by Mr. Chief Justice Parker in *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342, wherein he observed: "The common law recognizes an important distinction as to the use of waters, and the property of the soil between rivers or waters navigable and those which are not navigable. The former invariably and exclusively belong to the public unless acquired from it by individuals under grant or prescription. The latter are held to belong to those whose land borders on the waters; so that they have the exclusive right of fishing in front of their own land, and have a property in the bed or soil of the river under the water subject, however, to an easement or right of passage up and down the stream in boats or other craft, for purposes of business, convenience or pleasure. This is called in the civil law a servitude which is quite consistent with the right of property. The text-book from which this common-law principle is most generally deduced is Sir Matthew Hale's celebrated treatise, '*De Jure Maris*,' published in Hargrave's Law Tracts, page 37; on recurrence to which it will appear that Hale referred to the ancient British writer, Bracton, for the foundation of his doctrine and that he also relied upon the Roman civil law as compiled in the digest in the reign of Justinian: See Dig., lib. 41,

tit. 1, De Acquirendo Rerum Dominio, leg. 7, 12, 29, 30, 38, 56, 65, and perhaps many others. . . . There appears, however, to be an important difference between the common and civil law, in regard to the rights of the public and individuals, on this subject. By the former, it would seem that the right of the king or the public is limited to those places, whether bays, coves, inlets, arms of the sea or rivers, in which the tide ebbs and flows, this being the definition of navigable waters; whereas by the civil law all rivers properly so called, even above tide waters, provided they are navigable by ships or boats, or perhaps any other floating vehicle, are considered as public property; and so is the French law, as will appear by the Code Napoleon, lib. 2, tit. 1, c. 3, art. 538, in which are enumerated, among other subjects of public domain, *les fleuves et rivières navigables ou flottables*, which last word seems to have been coined to comprehend all streams on which boats, rafts, lumber or any other species of property may be transported. It is probable that this distinction arose from the difference in magnitude between the rivers on the continent and those on the island, many of the former being navigable much beyond the ebbing and flowing of the sea, and few, if any, of the latter being of consequence for passage or transportation above the tide."

The easement or "servitude of public interest," attaching to rivers which are navigable in fact, under the terms of the Roman civil law, is as absolute and unlimited in the public as is the right, under the common law, to navigate rivers which are navigable within the meaning of the common law: *Stuart v. Clark's Lessee*, 32 Tenn. 9, 58 Am. Dec. 49.

IV. Power of Legislative Bodies to Declare Certain Bodies of Water Navigable.

A statutory declaration is not necessary in order to make a stream navigable: *Martin v. Bliss*, 5 Blackf. 35, 32 Am. Dec. 52; *Southern Ry. Co. v. Ferguson*, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343. And a legislature cannot declare a stream to be navigable which is not in fact navigable: *Olive v. State*, 86 Ala. 88, 5 South. 653, 4 L. R. A. 33; *People v. Elk River Mill etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531; *Potlach Lumber Co. v. Peterson*, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426; *Kreger v. Fogarty (Kan.)*, 96 Pac. 845; *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232, 50 S. W. 1095; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Walker v. Board of Public Works*, 16 Ohio, 540; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Jones v. Pettibone*, 2 Wis. 308; *Duluth Lumber Co. v. St. Louis Boom etc. Co.*, 5 McCrary, 318, 17 Fed. 419.

V. General Tests by Which the Navigability of Waters is Determined in the United States.

a. **Navigability in Fact as the General Test.**—In this country the main test by which the navigability of waters is determined is not

whether the tide ebbs and flows therein, but whether the waters are navigable as a matter of fact. If they are navigable as a matter of fact, they are deemed navigable waters: *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L. R. A., N. S., 745; *McManus v. Carmichael*, 3 Iowa, 1; *Turner v. Holland*, 65 Mich. 453, 33 N. W. 283; *Baldwin v. Erie Shooting Club*, 127 Mich. 659, 87 N. W. 59; *Lamphrey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1129, 18 L. R. A. 670; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *State v. Eason*, 114 N. C. 787, 41 Am. St. Rep. 811, 19 S. E. 88, 23 L. R. A. 520; *State v. Baum*, 128 N. C. 600, 38 N. E. 900; *State v. Turford*, 136 N. C. 603, 48 S. E. 586; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Flanagan v. Philadelphia*, 42 Pa. 219; *Fulmer v. Williams*, 122 Pa. 191, 9 Am. St. Rep. 88, 15 Atl. 726, 1 L. R. A. 603; *State v. Pacific Guano Co.*, 22 S. C. 50, rehearing denied 24 S. C. 598; *Southern Ry. Co. v. Ferguson*, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N. W. 257; *McGilvra v. Ross*, 161 Fed. 398, affirmed 164 Fed. 604; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *Jones v. Soulard*, 24 How. 41, 16 Fed. 604; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210, 34 L. ed. 819.

"If a stream is 'navigable in fact [as the jury found under the above instructions], it is navigable in law': *Gould on Waters*, 3d ed, sec. 67. The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use: *State v. Eason*, 114 N. C. 787, 41 Am. St. Rep. 811, 19 S. E. 88, 23 L. R. A. 520; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242; *Ingram v. Threadgill*, 14 N. C. 59; *Wilson v. Forbes*, 13 N. C. 30. The same ruling is maintained in the United States supreme court: *The Daniel Ball*, 10 Wall. 537, 19 L. ed. 999; *The Montello*, 11 Wall. 411, 20 L. ed. 191; 20 Wall. 430, 22 L. ed. 391. Navigability is a question of fact, dependent upon the depth of water and other circumstances, and was properly submitted to the jury in the charge. Navigability cannot be affected by the conditions on the adjacent land, such as there being a large town on the shore, with numerous streets or wharves, or whether, as here, one riparian owner has a monopoly of the road with no public road to the water, thus cutting off access by land. It is the navigability of the water that is the test, its accessibility by water, and not accessibility by land; else whether bays, estuaries, creeks and rivers are *publici juris* would depend upon whether or not riparian owners have monopolized the ownership of the adjacent soil": *State v. Twiford*, 136 N. C. 603, 48 S. E. 586.

Mr. Justice Mitchell in *Lamphrey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1129, 18 L. R. A. 670, said: "In this state we have adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England, the principal of which are that navigability

in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use.

"In accordance with the rules of the common law, we therefore hold that where a meandered lake is non-navigable in fact, the patentee of land bordering on it takes to the middle of the lake; that where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity, and that the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water."

Navigable waters are regarded as natural highways, if they are navigable in fact. They are treated as publici juris in so far as they may be properly used for such purposes in their natural state. The public right arises only in cases of their navigability: *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411.

The court in *Fulmer v. Williams*, 122 Pa. 191, 9 Am. St. Rep. 88, 15 Atl. 726, 1 L. R. A. 603, in stating the reasons for the rule in this country of determining navigability in law from navigability in fact, said: "In the British Islands, the rivers are inconsiderable in volume and of little value for purposes of navigation except where they are affected by the ebb and flow of the tide. From this it resulted naturally that royal or public streams, the bed of which belonged to the crown, came to be distinguished from private streams, the beds of which belonged to the owners of the banks, by reference to the presence or absence of tide water. On this continent, the early settlers found large rivers with navigable tributaries, forming vast systems of internal communication, extending hundreds, and in some instances thousands, of miles above the reach of tide water. The common-law definition of a navigable river was unsuited to this state of things, and seems never to have been adopted in Pennsylvania; on the contrary, navigability in fact was made the test by which the character of a stream, as public or private, was determined, and the great but tideless rivers of the state were held to be navigable rivers, public highways belonging to the state, and held for the use of all her citizens. The beds of such rivers, between the lines of ordinary low water, on their opposite sides, have not been granted out by the commonwealth to individuals, but continue to be held and controlled by and for the public: *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *Flanagan v. City of Philadelphia*, 42 Pa. 219."

The question whether a stream is navigable is generally regarded as one of fact: *Smith v. Fonda*, 64 Miss. 551, 1 South. 757; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *McKinney v. Northcutt*, 114

Mo. App. 146, 89 S. W. 351; *Jones v. Johnson*, 6 Tex. Civ. 262, 25 S. W. 650. But where the facts on which the question of navigability depends are ascertained, it becomes a question of law: *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Walker v. Allen*, 72 Ala. 456; *Morgan v. King*, 18 Barb. 277.

b. Necessity for the Waters to be Capable of Being Used for Transportation Purposes.

1. **The General Rule.**—A navigable stream is a highway open to the use of all: *State v. Charleston Light etc. Co.*, 68 S. C. 540, 47 S. E. 379. It should be capable, as one court expresses it, of furnishing "a common passage for the king's people": *Munson v. Hungerford*, 6 Barb. 265. In order for waters to be classed as navigable waters, they should be capable of public use as a highway for purposes of commerce and travel: *Smart v. Aroostook Lumber Co.*, 103 Me. 31, 68 Atl. 527, 14 L. R. A., N. S., 1083. The rule as generally stated is that the waters should be capable of being used as a highway for the purposes of commerce and trade: *Walker v. Allen*, 72 Ala. 456; *Sullivan v. Spotswood*, 82 Ala. 163, 2 South. 716; *Healy v. Joliet & C. R. Co.*, 2 Ill. App. 435; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L. R. A., N. S., 745; *Neaderhouser v. State*, 28 Ind. 257; *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Baldwin v. Erie Shooting Club*, 127 Mich. 659, 87 N. W. 59; *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Morgan v. King*, 30 Barb. 9; *State v. Narrows Island Club*, 100 N. C. 477, 6 Am. St. Rep. 618, 5 S. E. 411; *Farmers' etc. Mfg. Co. v. Albemarle etc. R. Co.*, 117 N. C. 579, 53 Am. St. Rep. 606, 23 S. E. 43, 29 L. R. A. 700; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *State v. Pacific Guano Co.*, 22 S. C. 50, rehearing denied, 24 S. C. 598; *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *The Montello*, 11 Wall. 411, 20 L. ed. 191. And, of course, where the stream is susceptible of navigation by boats, vessels, rafts, barges and other water craft, it is deemed navigable: *Miller & Lux v. Enterprise etc. Co.*, 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770; *Goodwill v. Police Jury*, 38 La. Ann. 752; *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Turner v. Holland*, 65 Mich. 453, 33 N. W. 283; *Munson v. Hungerford*, 6 Barb. 265; *Southern R. R. v. Ferguson*, 105 Tenn. 552, 80 Am. St. Rep. 908, 59 S. W. 343; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. "A river is regarded as navigable which is capable of floating to market the products of the country through which it passes, or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes in law a public river or highway. The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce": *Hickok v. Hine*, 23 Ohio

St. 523, 13 Am. Rep. 255. Hence the test is whether the stream is capable and suitable for the usual purposes of navigation: Walker v. Allen, 72 Ala. 456; St. Louis etc. Ry. Co. v. Ramsey, 53 Ark. 314, 22 Am. St. Rep. 195, 13 S. W. 931, 8 L. R. A. 559; Webster v. Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

In *Morgan v. King*, 30 Barb. 9, a well-reasoned case, the court, after an exhaustive discussion of the history and reasons for the common law, held that in applying those rules to this country they should be modified to suit the needs of navigation in this country. In the course of the opinion, the court said: "The right of public servitude in a stream depends, not upon its navigability, in the common-law sense of the term, but upon its capacity for the purposes of trade, business and commerce. The Hargrave Tracts define fresh-water rivers deemed public to be such as float vessels, boats and lighters. Mr. Butter, in his notes (205) to Coke on Littleton, says a river where boats, etc., may be floated to market is a public river.

"In this country, our courts, following the principles of the common law, and adapting them to the subjects presented for their application, have recognized other and still more primitive modes of transportation as evidence of capacity." After discussing several cases the court further said: "1. The rule to be deduced from these authorities is, that any stream capable of being used in the transportation of any kind of property to market—whether in boats, rafts or single pieces—whether guided by the hand of man or floated at random on the water, is a public stream, and subject to the public easement; 2. Adopting the rule thus laid down as a correct exposition of the common law as understood in this country, and applying that rule to the facts of this case, the Racket river is, and was always, a public highway; 3. The facts show that upon this stream there is an immense commerce in sawlogs and manufactured lumber; that this river, in its natural state, at the place of obstruction, has ample capacity to transport that commerce to market in a cheap and expeditious mode. It is not necessary that commerce should be transported in crafts or rafts that can be guided by the hand of man. The test of capacity is not alone in the nature or character of the craft, nor how guided, or whether guided at all. If it has capacity sufficient to transport to market the whole, or a part, of the commerce, no matter of what particular character, that grows or gathers upon its banks, it is subject to the public servitude. If it can do this, to that extent it is a public highway, within the principles of the common law.

"If, in the course of time, the particular commerce which alone it is capable of bearing ceases to gather upon its banks, then will cease the public use of the river as a highway."

In *Harrison v. Fite*, 148 Fed. 781, Judge Hook expressed the rule in this country in the following language: "To meet the test of navigability as understood in the American law, a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of

the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable, is not sufficient. While the navigable quality of a watercourse need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a watercourse must have a useful capacity as a public highway of transportation: *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 Fed. 680, 33 C. C. A. 233; *Moore v. Sanborne*, 2 Mich. 520, 524, 59 Am. Dec. 209; *Morgan v. King*, 35 N. Y. 454, 458, 91 Am. Dec. 58; *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239, 54 L. R. A. 178; *Wethersfield v. Humphrey*, 20 Conn. 218; *Rowe v. Granite Bridge Corp.*, 38 Mass. 344; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60, 5 L. R. A. 392; *Neaderhouser v. State*, 28 Ind. 257; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Little Rock etc. Railroad v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277."

In some jurisdictions, even though the ebb and flow of the tides is not regarded as the usual or real test of navigability, it has been held to impress *prima facie* the character of navigability upon waters so affected: *Sullivan v. Spotswood*, 82 Ala. 163, 2 South. 716; *Olive v. State*, 86 Ala. 88, 5 South. 653, 4 L. R. A. 33; *Glover v. Powell*, 10 N. J. Eq. 211. And in several cases in North Carolina it has been asserted that waters are not deemed navigable in the strict legal sense in that state unless they are navigable for sea-going vessels: *State v. Glen*, 52 N. C. 321; *State v. Eason*, 114 N. C. 787, 41 Am. St. Rep. 811, 19 S. E. 88, 23 L. R. A. 520.

2. Capacity for, and not Extent of the Use for, Transportation is the Criterion.—Where the waters have the capacity of being used for useful purposes of navigation, it is the capacity for such use, and not the extent or manner of the use, which determines the question whether they are to be regarded as navigable waters. They need not be in actual use if capable of the use: *Sullivan v. Spotswood*, 82 Ala. 163, 2 South. 716; *Healy v. Joliet & C. R. Co.*, 2 Ill. App. 435; *Neaderhouser v. State*, 28 Ind. 257; *Goodwill v. Police Jury*, 38 La. Ann. 752; *Commonwealth v. Inhabitants of Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *State v. Twiford*, 136 N. C. 603, 48 S. E. 586; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *The Montello*, 11 Wall. 411, 20 L. ed. 191. Nor does the fact that a floatable stream is not used by the public generally but only by persons following particular occupation deprive it of its public character if it has

the capacity for useful navigation: *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209.

3. Effect Where the Waters are Useful Merely for Boating, Fishing or the Like.—The expressions of the courts in cases in which the question was not directly involved would tend to give the impression that where the waters are useful merely for boating, fishing or hunting, that such a use does not constitute them navigable waters. The idea conveyed by the cases is that the use must be a commercial one, but the cases in which the question was directly involved are not in harmony upon this point.

In *Attorney General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380, the court said: "It is also denied that the stream is navigable, although it is about two feet deep at low water, because it is not proved to be used for the purposes of navigation except with pleasure boats. The case of *Rowe v. Granite Bridge Co.*, 21 Pick. 344, 347, is cited to sustain this position. Chief Justice Shaw there says: 'It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable. But in order to have this character it must be navigable to some purpose useful to trade or agriculture.' The same thing in substance is stated in *Charlestown v. County Commissioners*, 3 Met. 202, and *Murdock v. Stickney*, 8 Cush. 113, 115. But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it this character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or by water, as a traveler for business. Certainly fishing and fowling are as really regarded, on navigable waters, as trade and agriculture, though not mentioned in the case cited above; and in *West Roxbury v. Stoddard*, 7 Allen, 158, 171, it is said that the use of great ponds, which are public property, may as well be for bathing, boating, skating, fishing and fowling, as for business, and is entitled to equal consideration. If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation."

Mr. Justice Mitchell, in *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, 18 L. R. A. 670, said: "Most of the definitions of 'navigability' in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters or navigable waters, if the old nomencla-

ture is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.

"Many, if not most, of the meandered lakes of this state are not adapted to and probably will never be used to any great extent for commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural and even city purposes, cutting ice, and other public uses which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts, two hundred and fifty years ago, reserved to public use her 'great ponds,' probably only fishing and fowling were in mind; but, as is said in one case, 'with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise': *West Roxbury v. Stoddard*, 7 Allen, 158."

A lake which has an average depth of sixteen feet is navigable, even though the sole navigation on it consists of a steamboat conveying visitors and pleasure seekers and small boats for rowing and fishing: *Kalez v. Spokane Valley etc. Co.*, 42 Wash. 43, 84 Pac. 395. But where an unmeandered fresh-water stream of an average width of forty feet and depth of four feet at high water and two feet at low water, and in places of only six inches, has never been used as a floatable stream except in small rowboats by persons desiring to fish for pleasure, it cannot be regarded as navigable: *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239, 54 L. R. A. 178.

But there are decisions declaring that mere depth of water without profitable utility will not render the watercourse navigable in the legal sense, even though it be sufficient to enable hunters or fishermen to float a skiff or canoe: *Wethersfield v. Humphrey*, 20 Conn. 218; *Town of Groton v. Hurlburt*, 22 Conn. 178; *Schulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L. R. A., N. S., 745; *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491; *Baldwin v. Erie Shooting Club*, 127 Mich. 659, 87 N. W. 59; *Harrison v. Fite*, 148 Fed. 781. In *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 90 Fed. 680, 33 C. C. A. 233, the body of water was of such shallow depth and contained such a mass of aquatic vegetation, that it was impenetrable by a boat except by the laborious method of punting. The court said: "At no time is the greater part of this marsh susceptible of supporting 'commerce,' in any reasonable sense of the term. That the water stands permanently, and that it has a deep opening into Lake Erie, does not establish that this shallow body of water is capable of sustaining commerce, or is burdened with a public use. It is nothing more or

less than a marsh opening into the lake. To be navigable in law, it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce. None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term 'navigable' had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes which is the test."

In *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275, the court remarked: "Though the belief seems to be somewhat widely held, it is not true that wherever one may catch fish the waters are navigable, or that wherever one may row or pole a boat he has the right so to do because of the navigability of the water."

In the cases above cited holding that the mere capacity to float a rowboat or duck-boat is not sufficient to constitute the waters navigable, the bodies of water in controversy were very shallow, and in the deeper parts were filled with aquatic vegetation and stumps of trees, thus making it very questionable whether the waters were naturally fit for navigation. It being a question of fact whether they were naturally fit for navigation, the decisions were undoubtedly correct. But if navigable waters are deemed to be public highways, it may be asked, why should the purpose with which they are navigated be any more material than the purpose with which one travels a public road? The weight of authority, however, undoubtedly in stating the rule of navigability lays stress upon the necessity for the act of transportation to relate to subjects of commerce.

c. Sufficiency of Capacity for Mere Floatage as Distinguished from Navigation in Its Ordinary Meaning, as a Test.

1. Synonymous Character of Floatage and Navigability.—"The extended application of the right of the public to use navigable streams, whether tidal or nontidal, even those of inconsiderable size, as highways for transporting merchandise, rafting and driving logs, and propelling boats, has made the terms 'navigable' and 'floatable' practically synonymous": *Smart v. Aroostook Lumber Co.*, 103 Me. 37, 68 Atl. 527, 14 L. R. A., N. S., 1083. Inasmuch as some products may be floated to market upon rafts or as rafts, it is not essential to the public character of the stream that property be carried in vessels, and as some streams are not floatable against their current, if they

are floatable with their current in their natural state, so as to be of public use, it is sufficient to give that right to the public: *Ten Eyck v. Town of Warwick*, 75 Hun, 562, 27 N. Y. Supp. 536. A stream may be a public highway for floatage when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use: *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232, 50 S. W. 1095. In other words, if the stream is in its natural condition capable of such floatage as is of practical utility and benefit to the public as a highway for trade and commerce, it is deemed navigable regardless of whether it is capable of carrying ships, boats, barges or the like: *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1139, 18 L. R. A. 670; *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42; *Irwin v. Brown (Tenn.)*, 12 S. W. 340. The capacity for floatage need not be continuous, but it should occur at regular periods and continue a sufficient length of time to make it useful as a highway for some purposes of trade or commerce: *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232, 50 S. W. 1095; *Kamm v. Normand*, 50 Or. 9, ante, p. 698, 91 Pac. 448, 11 L. R. A. N. S., 290.

2. Capacity to Float the Products of the Surrounding Country as a Test.

A. In General.—Without regard to the question as to ownership of the soil under the stream, the general rule is that streams which are capable of floating the products of the mines, forests and tillage of the country through which they flow to the mills or markets are regarded as navigable for those purposes: *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Sullivan v. Spotswood*, 82 Ala. 163, 2 South. 716; *Little Rock etc. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277; *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Johnson v. Johnson*, 14 Idaho, 561, 95 Pac. 499; *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829, 21 S. E. 941; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250.

B. Logs, Rafts and Other Timber Products.—The use of streams for purposes of floating articles of commerce to market or mill naturally arises more frequently in respect to logs and timber products than other products. Hence, the rule recognizing such a use as a test of navigability has been expressed frequently in those states whose natural resources consisted largely of timber. Streams which in their natural condition are susceptible during the whole or any part of each year of valuable use for the purpose of floating logs, rafts and the like are deemed public highways for that purpose: *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Goodin's Exrs. v. Kentucky*

Lumber Co., 90 Ky. 625, 14 S. W. 775; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 611; *Veazie v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Me. 256, 81 Am. Dec. 569; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545; *Collins v. Howard*, 65 N. H. 190, 18 Atl. 794; *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495; *State v. White Oak River Corp.*, 111 N. C. 661, 16 S. E. 331; *Burke County Commissioners v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829, 21 S. E. 941; *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; *Halloek v. Suitor*, 37 Or. 9, 60 Pac. 384; *Kamm v. Normand*, 50 Or. 9, ante, p. 698, 91 Pac. 448, 11 L. R. A., N. S., 290; *Stuart v. Clark*, 32 Tenn. 9, 58 Am. Dec. 49; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60, 5 L. R. A. 392; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N. W. 257; *Village of Bloomer v. Town of Bloomer*, 128 Wis. 297, 107 N. W. 974. In Georgia the right to use such streams for the floating of logs and the like is given by statute: *Seaboard R. Co. v. Sikes*, 4 Ga. App. 7, 60 S. E. 868. And under a statute declaring navigable all streams emptying into a certain river "which are now, or at any time have been, used for the purpose of floating logs or timber," it must appear in order to make such a stream floatable for logs, that it is capable of being used to an extent that would make it of some value as a highway for that purpose, and the fact that it could be so used for a few days in the rainy season is not sufficient: *People v. Elk River etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531. A lake which is capable of floating logs, shingle-bolts and the like is navigable, even though it is used but infrequently: *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278. The doctrine of floatability will not be extended so as to include a small stream of only a few miles in length, although it rises during a few weeks in the year sufficiently high to be used to some extent by the application of artificial means: *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609. But where a stream is capable of floating logs at certain periods, the fact that it is so shallow in places that rowboats have to be pushed does not affect its navigability: *Willow River Club v. Wade*, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

A stream which is incapable of floating sawlogs may yet be navigable if it will float shingle-bolts. Thus the court in *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272, in so holding, said: "But the evidence shows that it has sufficient capacity, in its natural state, during annually recurring periods, to float shingle-bolts, and while a shingle-bolt contains but a small amount of timber, compared with a sawlog, yet in the aggregate

timber in that form in this locality is relatively of equal commercial value with sawlogs, and its carriage to market is, perhaps, as important to the timber industry of this state as that of sawlogs. Elochoman creek was declared to be navigable, for the reason that it furnishes a natural highway for the product of the great logging industry in this state, and Woods creek should also be held to be navigable, because it furnishes a similar highway for the produce of another branch of the same industry. Elochoman creek was held to be a navigable stream because it is navigable in fact for the floatage of logs or timber to market. Its navigable character is restricted to a certain commercial and industrial purpose, and does not comprehend navigability in the broad sense, as applied in America to the great rivers and water highways. The rule that navigability in fact for commercial purposes makes a watercourse a navigable one was also declared in *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. The reasons leading to the holding in this state and others, where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose are founded upon commercial convenience and necessity, because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities, without great expense. Nature has, however, provided numerous streams which flow out from these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated, it seems reasonable that these highways should be used for such purposes. It is true, the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent land owner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the land owner for the timber product to float along with the already running water, provided it is so done as not to damage his land. His rights in the latter particular must, however, be strictly and carefully guarded."

But a stream must have a capacity to float more than a single log in order to be regarded as navigable: *American River Water Co. v. Amsden*, 6 Cal. 443; *Irwin v. Brown* (Tenn.), 12 S. W. 340. The fact that during a period of over fifty years no logs were floated through a certain stream is almost conclusive evidence that the stream was incapable of being used for that purpose: *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491.

3. Effect Where Artificial Means are Required to Produce a Floatable Capacity.—A stream which will carry logs only at times of freshets which occur only a few times each year and continue but a few hours at a time is not navigable for the purpose of floatage, and cannot be made so by means of a splash dam or other artificial structures, without first acquiring the rights of the riparian pro-

prietors: *Kamm v. Normand*, 50 Or. 9, ante, p. 698, 91 Pac. 448, 11 L. R. A., N. S., 290. Nor is a stream deemed navigable where, in order to float logs down it, it is necessary to station men along its banks "to break jams" by arranging logs so as to confine the water in a narrower channel at certain points, and by constructing reservoirs above and opening them so as to make a greater flow of water: *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609. Nor is such a stream regarded as navigable where it is necessary to use the banks of the stream in order to float the logs: *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S. W. 351; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58.

4. **Effect Where the Stream has Floatable Capacity for Only Short Periods or During Freshets.**—In order for a stream to be deemed navigable, it is not necessary that it be capable of navigation continuously throughout all the seasons if it is so capable during a material portion of the year. It is the valuable and not the continued use which is the important element to navigability: *Bucki v. Cone*, 25 Fla. 1, 6 South. 160; *Brown v. Chadbourne*, 31 Me. 9, 21 Am. Rep. 641; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399. If a stream has sufficient capacity to float logs during seasons recurring regularly, and of sufficient duration to be of public use, the stream is regarded as navigable: *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184; *United States v. Rio Grande Dam & I. Co.*, 9 N. M. 292, 51 Pac. 674; *Ten Eyck v. Town of Warwick*, 75 Hun. 562, 27 N. Y. Supp. 536; *Shaw v. Oswego Iron Co.*, 10 Or. 371, 45 Am. Rep. 146; *Hallock v. Suitor*, 37 Or. 9, 60 Pac. 384; *Kamm v. Normand*, 50 Or. 9, ante, p. 698, 91 Pac. 448, 11 L. R. A., N. S., 290; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60, 5 L. R. A. 392; *Olson v. Merrill*, 42 Wis. 203. But such seasons must recur with regularity at reasonable certainty: *Cue v. Breeland*, 78 Miss. 864, 29 South. 850; *Farmers' etc. Mfg. Co. v. Albemarle etc. R. Co.*, 117 N. C. 579, 53 Am. St. Rep. 606, 23 S. E. 43, 29 L. R. A. 700; or at least with tolerable regularity: *Little Rock etc. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277. For instance, a stream is navigable or floatable, if, by the increased precipitation at certain seasons occurring periodically with reasonable certainty, the flow of water is sufficient for useful public transportation: *Hot Springs Lumber Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580, 9 L. R. A., N. S., 894. And it is likewise navigable if business men may calculate that, with tolerable regularity as to seasons, the water will rise to and remain at such a height as to enable them to make it profitable to use the stream as a highway for the transportation of logs to mills or market: *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829, 21 S. E. 941. Thus a river upon which logs may be floated during periodical freshets of six weeks, or two months' duration is a navigable stream: *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134, 58 N. W. 257. And a creek which can be navi-

gated when the rises of the Mississippi river force back the waters of other rivers, which are thereby forced back into the creek, is a navigable stream: *Sigler v. State*, 66 Tenn. 493.

But where the stream has only the required volume of water occasionally and for brief periods as a result of freshets, it is not a navigable stream: *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 53 Am. St. Rep. 133, 16 South. 923; *Olive v. State*, 86 Ala. 88, 5 South. 653, 4 L. R. A. 33; *Cardwell v. Sacramento County*, 79 Cal. 347, 21 Pac. 763; *Allison v. Davidson* (Tenn. Ch.), 39 S. W. 905. So, also, a stream which, even in periods of high water, cannot be used to any practicable extent for floating logs because the water subsides in a few hours, is not regarded as navigable: *Murray v. Preston*, 106 Ky. 561, 90 Am. St. Rep. 232, 50 S. W. 1095. In order for a stream to be deemed floatable and navigable, it must be capable of being used as a highway to float logs during some considerable portion of the year, and the fact that it can be so used for only a few days during the rainy season with the aid of dams is not sufficient to make it navigable: *People v. Elk River Mill etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531. Nor is it sufficient where it is susceptible of use during a period in the aggregate of from two to four weeks in the year while swollen by spring and autumn freshets: *Munson v. Hungerford*, 6 Barb. 265.

d. Necessity that the Waters be Fit for Navigation in Their Natural Condition Without Engineering Improvements.—One of the tests of navigability is whether the stream can be used for that purpose in its natural condition without the aid of artificial improvements, such as dams, reservoirs, flooding and other methods of engineering: *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 53 Am. St. Rep. 133, 16 South. 923; *Little Rock etc. Co. v. Brooks*, 39 Ark. 403, 43 Am. Rep. 277; *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209; *East Branch etc. Imp. Co. v. White etc. Lumber Co.*, 69 Mich. 207, 37 N. W. 192; *Curtis v. Keesler*, 14 Barb. 511; *Ten Eyck v. Town of Warwick*, 75 Hun, 562, 27 N. Y. Supp. 536; *De Camp v. Thomson*, 16 App. Div. 528, 44 N. Y. Supp. 1014; *Kamm v. Normand*, 50 Or. 9, ante, p. 698, 91 Pac. 448, 11 L. R. A., N. S., 290; *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324; *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239, 54 L. R. A. 878; *East Hoquiam Boom etc. Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60, 5 L. R. A. 392; *The Montello*, 87 U. S. 430, 22 L. ed. 391. Where, by reason of its rapid current and projecting rocks, boats or rafts would be destroyed in attempting to pass along the stream, the stream will not be deemed a floatable stream in which the public has the right to float rafts or logs: *Munson v. Hungerford*, 6 Barb. 265. The navigability of a river does not depend upon its susceptibility to improvement by high engineering skill and the expenditure of large sums of money, but upon its present natural condition: *United States v. Rio Grande Dam & I. Co.*, 9 N. M. 292, 51 Pac. 674.

But it may be made navigable by the removal of artificial obstructions: *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272. The public cannot, however, use a stream made floatable by improvements constructed by a riparian owner: *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Nutter v. Gallagher*, 19 Or. 375, 24 Pac. 250. But it has also been held that if a person artificially raises the level of the waters of a navigable lake, the public rights therein are correspondingly extended so long as such artificial level is maintained: *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436, 50 L. R. A. 836. The Erie canal, though lying wholly within the state of New York, forms a part of a continuous highway for interstate and foreign commerce by connecting Lake Erie with Hudson river, and is a navigable water of the United States as contradistinguished from a navigable water of the state: *Perry v. Haines*, 191 U. S. 17, 24 Sup. Ct. Rep. 8, 48 L. ed. 73.

e. Effect of Shallow Places, Waterfalls and Other Obstructions.—The general rule is that a stream whose natural obstruction prevents the passage of boats of any description is not navigable: *Society for Establishing Useful Manufactures etc. v. Morris Canal etc. Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41; *Cates' Exrs. v. Wadlington*, 1 McCord, 580, 10 Am. Dec. 699. In order to be navigable it is not necessary that the waters of the stream be deep enough or in condition to admit of the passage of boats at all portions of the stream. Navigable waters do not lose their character as such merely because interrupted by falls, if they can be used for purposes of commerce both above and below the falls: *Brown v. Chadbourne*, 31 Me. 9, 1 Am. Rep. 641; *In re State Reservation at Niagara*, 16 Abb. N. C. 159; *In re State Reservation Comms.*, 37 Hun. 537; *Brodnax v. Baker*, 94 N. C. 675, 55 Am. Rep. 633; *Spooner v. McConnell*, 1 McLean, 337, Fed. Cas. No. 13,245; *St. Anthony Falls Water Power Co. v. Board of Water Comms.*, 168 U. S. 349, 18 Sup. Ct. Rep. 157, 42 L. ed. 497. But where a lake is shallow in its ordinary stage of water, has no banks and only a doubtful channel, which is from one hundred feet to one-half mile from the water's edge, and which is filled with stumps and in places with trees, the deep bases of the lake being surrounded by stumps and trees, the lake is not navigable: *Webster v. Harris*, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

f. Necessity for a Terminus at Each End of the Body of Water.—In order to make a stream navigable by the public, it is not enough that it is floodable. It must be a public highway. To be a public highway it must have a terminus a quo the public can enter it and a terminus ad quem they can leave it: *Manigault v. S. M. Ward & Co.*, 123 Fed. 707. The test is whether the stream is capable of becoming a public highway—that is, a means open to the public of passing from one place where they have a right to be to another place where they have the same right. In other words, there must be a terminus at each end. A creek, which opens upon a bay but leads merely into private land is not public navigable water: *Chis-*

holm v. Caines, 67 Fed. 285. But, on the other hand, it is claimed that the above test applies only in determining whether the waters "are navigable waters of the United States," under the laws of the United States, so as to subject them to the laws of interstate commerce, and that it does not apply to navigable streams under the control of the state: *Heyward v. Farmers' Mining Co.*, 42 S. C. 138, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42. And in this connection it has also been held that the navigability of a stream is not affected by the question whether one riparian owner has a monopoly of the surrounding land: *State v. Twiford*, 136 N. C. 603, 48 S. E. 586.

g. Effect of the Waters having been Meandered or Returned by Government Officials as Navigable.—The fact that the government surveyor meandered the banks of a river is evidence that the water was navigable, but is not conclusive evidence of that fact: *Kregar v. Fogarty* (Kan.), 96 Pac. 845; *Harrison v. Fite*, 148 Fed. 781. The fact that a stream was not so meandered is said to cast the burden of proving it to be navigable on the one asserting its navigability: *Morrison v. Coleman*, 87 Ala. 655, 6 South. 374, 5 L. R. A. 384; *Alloby v. Manston Electric Service Co.*, 135 Wis. 345, 116 N. W. 4. But it has also been stated that the question of navigability depends in no manner upon whether it has in fact been meandered or not: *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663.

h. What Constitutes Navigability in Respect to Lakes, Marshes, Bayous and the Like.—The same rule which applies to other waters applies to lakes, bays and the like. The waters should be capable of navigation in fact as public highways for the transportation of commerce. A bay or arm of one of the Great Lakes patented to the state as swamp land, containing some four thousand acres, and with an average depth of not more than two feet and rarely more than three feet, and covered with grass and rushes, is not navigable: *Toledo Liberal Shooting Club v. Erie Shooting Club*, 90 Fed. 680, 33 C. C. A. 233. An inland lake five miles long and three-quarters of a mile broad, with no current and no main outlet, not used as a highway in any respect, is not navigable water: *Ledyard v. Ten Eyck*, 36 Barb. 102. But a lake having a total area of nine hundred and five acres, four hundred and ninety-nine of which are covered with water to a depth of over twenty-five feet, with a maximum depth of fifty feet, and used for the transportation of booms of logs, shingle-bolts and the like, is navigable even though used but infrequently for that purpose: *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278. A branch of a sound which was from two to four feet deep and from one hundred and forty to three hundred yards wide, and used by the public for passing in boats from one point in the sound to another, and which shortened the distance and made it safer in rough weather, is navigable: *State v. Baum*, 128 N. C. 600, 38 S. E. 900. But in North Carolina it has been held that a lake eight miles by fifteen miles in extent, but which has in fifty years decreased

from eight to three feet in depth, and having no outlet except an artificial drainage canal, is not navigable, even though it has been infrequently navigated by flat-bottomed nonsea-going vessels: *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242. And bayous which contain fresh water and drain prairies are held to be non-navigable even though the tide reaches them at times: *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 South. 249. And where marsh land which borders on navigable water is subject to only temporary inundation in times of heavy gales, it is not sufficient to make it navigable: *Niles v. Cedar Point Club*, 85 Fed. 45, 29 C. C. A. 5. A drainage ditch, constructed under grant from private land owners, from twelve to fifteen feet wide and in some places less than two feet deep, and so filled with vegetation that a light skiff cannot be rowed therein, cannot be regarded as navigable: *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 Pac. 532, 12 L. R. A., N. S., 275.

MYER v. ROBERTS.

[50 Or. 81, 89 Pac. 1051.]

LANDLORD AND TENANT—Assignment of Lease.—If a lease is in the nature of a personal contract and not assignable without the consent of the lessors, an attempted assignment works a forfeiture and authorizes the lessor to re-enter and take possession. (p. 735.)

LANDLORD AND TENANT—Right to Crops After Re-entry.—A lessor who re-enters after a forfeiture is entitled to the crops then growing upon the premises. (p. 735.)

LANDLORD AND TENANT—Right to Crops by Lessor Out of Possession.—The rule that the owner of land out of possession is not entitled to annual crops grown and severed from the soil by an occupant cannot be invoked by the assignee of a tenant, who secures and maintains possession by an injunction wrongfully issued after the lessor had lawfully re-entered for condition broken in making the assignment. (p. 736.)

LANDLORD AND TENANT—Receipt of Crop as Evidence of Tenancy.—The receipt by the owner of land of a part of a crop grown thereon is not evidence of the relation of landlord and tenant, if he denies the right of the occupant to possession and claims title to the entire crop. (pp. 736, 737.)

John H. McNary and Charles L. McNary, for the appellants.

William Marion Kaiser, Wirt Minor, Woodson T. Slater and Teal & Minor, for the respondents.

⁸¹ BEAN, C. J. This is an action in trover by J. W. Myer against John J. Roberts and T. A. Livesley for the conversion by defendants of twenty-one thousand nine hundred and thirteen pounds of hops alleged to belong to the plaintiff.

The facts are these: On March 7, 1900, I. M. Simpson, being the owner of a hopyard in Polk county, leased it, with the improvements, certain farming implements and personal property, to the defendants for the years 1900 to 1904, inclusive. On October 25, 1902, the defendants sublet the yard on shares to W. D. Huston for the years 1903 and 1904. On January 15, 1904, Huston attempted to assign and transfer his contract to the plaintiff. On January 23, 1904, the defendants, without notice ⁸² of the assignment, entered into a new lease with Huston for the current year, taking from him a mortgage on his interest in the crop to secure a balance due for advances made the previous year and to be thereafter made. It was stipulated that in case of a violation of the terms of the lease defendants could re-enter, take possession of the property, complete the cultivation of the yard, harvest and sell the hops, paying over the surplus, if any, to Huston.

At the time of the attempted assignment by Huston to plaintiff there was no one in actual possession of the hopyard, and no dwelling thereon. A few days later the plaintiff went to examine the yard, but finding it too wet to work returned home. His brother, whom he had employed to cultivate the yard for him, returned about the 4th of February and remained a few days, but as the weather was unfavorable, but little, if any, work was done by him. On the 14th of March defendants, learning that the plaintiff claimed some right to the yard, sent one Vincent, an employé of theirs, to take possession and cultivate it for them. Vincent found no one in actual possession at the time, but some of plaintiff's employés arrived either that afternoon or the next morning, and they and Vincent were in joint occupancy until the latter part of March, when plaintiff commenced a suit to enjoin and restrain defendants from interfering with his possession. A preliminary injunction was issued and served, in obedience to which Vincent left the premises. On June 27, 1904, a decree was entered in such suit to the effect that the assignment from Huston to plaintiff was valid and entitled him to possession during the time specified therein, but that defendants had a lien on the crop to secure the payment of six hundred and twenty-five dollars by virtue of their contract with Huston. This decree was reversed in November, 1904, and the complaint dismissed, on the ground that the contract between Huston and the defendants was unassignable: *Meyer v. Livesley*, 45 Or. 487, 106 Am. St. Rep. 667, 78 Pac. 670. Pending the litigation, however, the plaintiff remained in possession, cultivated and harvested a crop from the yard, one-

fourth of which ⁸³ he delivered to the defendants, and stored the remainder in a near-by warehouse, where it was afterward taken by defendants and converted to their own use. The purpose of this action is to recover the value of the hops so converted. The court below directed a verdict for defendants and the plaintiff appealed.

⁸⁴ 1. The lease or agreement between the defendants and Huston for the possession and cultivation of the hopyard for the years 1903 and 1904 was a personal contract and not assignable to a third person without consent of defendants. An ⁸⁵ attempt to make such an assignment would work a forfeiture of Huston's interest and give the defendants an immediate right of re-entry: *Meyer v. Livesley*, 45 Or. 487, 106 Am. St. Rep. 667, 78 Pac. 670; *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429. When, therefore, Huston undertook to assign his interest to the plaintiff and put the latter in possession it worked a forfeiture of the agreement and authorized the defendants to immediately re-enter and take possession of the property.

2. The evidence shows they did this in a peaceable and orderly manner on March 11th, and were thereby restored to possession: *Smith v. Reeder*, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172. At that time the hop roots had sprouted and were growing, and upon re-entry by the defendants the title thereto vested in them. When the estate of a tenant or occupant of land is forfeited, or the tenancy terminated by some act of his, and the landlord or owner re-enters, the tenant or occupant is not entitled to the crops growing thereon, but they pass to the landlord with the title to the land: 8 Am. & Eng. Ency. of Law, 2d ed., 319; *Taylor on Landlord and Tenant*, sec. 535; *Samson v. Rose*, 65 N. Y. 411. This latter case is much in point. In that case the plaintiff leased his farm to Tripp & Greene for five years for an annual rent, payable in January of each year. There was a clause authorizing the re-entry of the lessor in case the rent was not so paid. Tripp & Greene did not pay the rent due in January, 1870, and on March 20th thereafter the plaintiff brought an action in ejectment to recover possession of the premises, and in due time recovered judgment, and was put in possession. Pending the litigation Tripp & Greene sublet the premises to the defendant, who raised a crop of grain from seed sown after the commencement of ejectment proceedings, which had been cut but not removed from the land at the time plaintiff was put in possession under the judgment in ejectment. The question in the case was as to the title to

such grain. The court held that it belonged to the plaintiff, because under the statute the commencement of the ejectment proceeding was ⁸⁶ equivalent to a re-entry on the demised premises for condition broken, thus applying the doctrine alluded to that an entry by a landlord for condition broken vests in him the title to growing crops.

The principle of that case seems to us controlling here. Indeed, the case at bar is much more favorable to the defendants on its facts than the one cited. In this case there was an actual re-entry by defendants while the crop was growing and unharvested, while in the New York case the re-entry was constructive. Again, in this case the crop was growing on the premises at the time of the re-entry, while there, seed was planted after the constructive re-entry. The judgment was not unanimous in the New York case, but the judges all agreed as to the general principle of law: that an actual re-entry by a landlord for condition broken vests him with title to all growing crops on the land; but they differed as to whether the commencement of an action of ejectment was equivalent to such re-entry—a question that does not arise in this case.

3. The plaintiff relies for recovery upon the general doctrine that the owner of land out of possession is not entitled to annual crops grown and severed from the soil by an occupant: *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Groome v. Almstead*, 101 Cal. 425, 35 Pac. 1021; *Martin v. Thompson*, 62 Cal. 618; *Jenkins v. McCoy*, 50 Mo. 348; *Adams v. Leip*, 71 Mo. 597; *Ray v. Gardner*, 82 N. C. 454; *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737, 9 S. E. 394; *Stockwell v. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Phillips v. Keysaw*, 7 Okl. 674, 56 Pac. 695; *Kirtley v. Dykes*, 10 Okl. 16, 62 Pac. 808; *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; 8 *Ballard on Real Property*, sec. 99. But we think this rule cannot apply to one who secures and maintains possession by an injunction wrongfully issued after a landlord has lawfully re-entered for condition broken. The plaintiff never was in the exclusive possession of the premises, except by virtue of the injunction, either in his capacity as the assignee of Huston or in any other capacity. At most, ⁸⁷ his possession was joint with that of the defendant, and both were engaged in cultivating hops until the time of the injunction. It takes something more than such a holding to constitute an occupant within the meaning of the rule invoked by plaintiff. Because he was able by reason of the injunction to crop the land without license and against the protest

of the defendants does not give him a legal title to the crop growing thereon at the time of his entry. His act was without right or authority, and at his peril, and he must suffer the consequences. If he thought himself wronged by the refusal of the defendants to recognize the assignment from Huston, he should have resorted to an appropriate action to recover damages and not insisted on remaining in possession by means of an injunction.

4. It is claimed that the delivery to and acceptance by the defendants in October, 1904, of a part of the hops raised on the yard during that year is prima facie evidence of the relation of landlord and tenant, and sufficient to take the case to the jury on that point. As a general rule, the payment of rent by one in occupancy of premises is evidence of a tenancy, but not when paid under such circumstances as to rebut such an idea: Wood on Landlord and Tenant, sec. 4; Taylor on Landlord and Tenant, sec. 3. It clearly appears that defendants did not receive or accept the hops delivered to them by plaintiff with any intention of recognizing plaintiff as their tenant, but because they claimed title to all the hops grown in the yard. They had denied plaintiff's right to possession from the beginning and were at the time of the delivery litigating that question with him; and it would be inconsistent with their entire attitude throughout the proceedings, and all the circumstances of the case, to give to the mere fact of the receipt by them of a part of the hops the effect of evidence of a tenancy.

It follows that the judgment of the court below must be affirmed, and so ordered.

The Owner of Land Out of Possession is ordinarily not entitled to crops grown thereon by the occupant: *Faulcon v. Johnston*, 102 N. C. 264, 11 Am. St. Rep. 737; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462. But a tenant after surrender of the leased premises has no right to the crop growing thereon, cannot maintain an action therefor, and can transfer no right therein to another: *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. Rep. 384.

Am. St. Rep., Vol. 126—47

DAVIDSON v. RICHARDSON.

[50 Or. 323, 89 Pac. 742.]

DOWER—Statute Enlarging, When Impairs Obligation.—A statute enlarging the dower estate is unconstitutional as against one who has contracted with the husband for a judgment lien on the property, although the judgment is not actually entered until after the passage of the statute. (p. 740.)

JUDGMENT.—The Office of a Nunc Pro Tunc Entry is to record some act of the court done at a former term which was not then carried into the records. Such entry is retrospective and has the same effect as if entered at the time when rendered, except as to third parties having intervening rights. (p. 740.)

JUDGMENT—Nunc Pro Tunc Entry—Intervening Right.—To entitle a person to protection, on the ground of his intervening rights, from the effect of the nunc pro tunc entry of a judgment, he must be in the position of a bona fide purchaser. (p. 741.)

JUDGMENT—Nunc Pro Tunc Entry—Intervening Dower.—A woman whose dower right has been enlarged by statute passed after the confession of judgment by her husband is not an intervening party against whose rights the judgment cannot thereafter be entered nunc pro tunc. (pp. 741, 742.)

William M. Kaiser, for the appellant.

James K. Weatherford, for the respondent.

324 EAKIN, J. This is a suit for the assignment of dower. Decree for plaintiff, and defendant appeals. W. M. Davidson, plaintiff's husband, in his lifetime was the owner in fee of the donation land claim of Carter T. Davidson and wife, containing three hundred and twenty acres. On November 9, 1892, defendant, A. J. Richardson, loaned three thousand five hundred and fifty dollars to W. M. Davidson, who in consideration thereof agreed to give a judgment lien on said premises less forty-six and one-half acres theretofore sold, and for that purpose, and on the same day, duly executed and delivered to the clerk of Polk county his confession of judgment in the circuit court for that county, without action. Said confession of judgment was duly entered by the clerk in the journal and in the judgment docket of said court, but he failed to enter the formal judgment on said confession, and thereafter, on December 5, 1898, on the application of defendant, such judgment was entered nunc pro tunc. Prior to the entry of said judgment, viz., July 10, 1897, execution was issued on said confession of judgment and the judgment docket entry, which execution was duly levied on said land, and sale thereof duly made thereon to defendant on August 14, 1897. Thereafter and on December 28, 1899, a sheriff's

deed was made thereon to defendant. W. M. Davidson died July 26, 1904. His wife brings this suit for the assignment of dower in said lands under the law in force at the time of the death of her husband, viz., for one-half thereof. Defendant concedes that she is entitled to dower therein, but only to the extent of one-third thereof, according to the law in force at the time of the docketing of said confession of judgment. The statutory provision for dower at that time was section 2954 of Hill's Code: ³²⁵ "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

This law was amended in 1893 by changing the words "one-third part" to read "one-half part": B. & C. Comp., sec. 5515.

1. In the original opinion we rested the case exclusively upon the fact that the legislature has control over the liens of judgments, and that, in this case, the effect of the enlargement of the dower estate was only a withdrawal of property from the lien of the judgment to the extent of the increase of the dower estate. It is insisted, however, that the effect of the amended statute increasing the dower estate is to deprive the defendant of his remedy by execution by withdrawing a portion of the debtor's property from liability, and that this impairs the obligation of his contract, and we must concede that this is the effect of the amendment.

The case of *Watson v. New York Cent. R. Co.*, 47 N. Y. 157, cited in the opinion, holds that the lien is subject to the control of the legislature, but it was further suggested that, though the legislature could authorize the appropriation of the land for public use free from the lien, yet the compensation paid therefor was still subject to execution; that is, the legislature did not put the debtor's property beyond the reach of his creditor. The right to the lien relates to the remedy, but the right of the creditors of a debtor to avail themselves of his property at all events for the satisfaction of his debts is not a question of remedy, but of right. The case of *McCormick v. Alexander*, 2 Ohio, 65, quoted in the opinion, and cases cited thereunder, ³²⁶ only hold that the lien is subject to the control of the legislature, but do not go to the extent of holding that the debtor's property may be exempted from existing debts. *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, relates to the creation of a home-

stead exemption, which withdrew the property not only from the lien of judgments, but also from liability to execution, and there it is held to impair the obligation of the contract. This is also the effect of *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212. The facts in the case of *Patton v. Asheville*, 109 N. C. 685, 14 S. E. 92, are parallel with those before us, so far as it affects this question, and it was held that the act of the legislature enlarging the dower estate impaired the obligation of the contract. In that case there was no lien in favor of the creditor, but under the law at that time the property of a debtor was subject to the payment of his debts, and the statute enlarging the dower, having the effect to withdraw a portion of the debtor's property from levy and sale, was void as to such debts contracted prior to the statute, and we conclude, without reference to the power of the legislature to modify or abolish the lien of a judgment, if the property of the debtor, or a material portion thereof, is withdrawn from the reach of pre-existing creditors, it thereby impairs the obligation of such contracts. That was the effect of the enlargement of the dower estate before us, and such statute cannot affect defendant's judgment; and the decision of this court heretofore rendered in this case as to the effect of this statute must be set aside.

2. It appears, however, that when the confession of judgment by Wm. M. Davidson on November 9, 1892, was executed and entered by the clerk, no judgment was entered thereon, but it was entered upon the judgment docket upon that date, and on July 7, 1897, execution was issued thereon and sale of the lands in question was had thereunder on August 14, 1897. Afterward, on December 5, 1898, by order of the said court, such judgment was entered nunc pro tunc, as of November 9, 1892, and plaintiff insists that such entry of judgment is not ³²⁷ retrospective as against plaintiff's interests, and that she is entitled to dower under the statute of 1893. The office of a nunc pro tunc entry is to record some act of the court done at a former term which was not then carried into the record; and such entry is retrospective and has the same force and effect as if entered at the time when rendered, except as to third parties having intervening rights: *Cleveland Leader Print. Co. v. Green*, 52 Ohio St. 487, 49 Am. St. Rep. 725, 40 N. E. 201; *McNamara v. New York etc. R. Co.*, 56 N. J. L. 56, 28 Atl. 313; *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821. It was held in *Doughty v. Meek*, 105 Iowa, 16, 67 Am. St. Rep. 282, 74 N. W. 744, that such entry validates all prior proceedings, including the

issuing of execution: *Los Angeles Bank v. Raynor*, 61 Cal. 145; *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316, 35 South. 322; *Lowenstein v. Caruth*, 59 Ark. 588, 28 S. W. 421. Although such entry validates the execution issued therein, it could not operate to create a lien from a date earlier than its actual entry to affect intervening rights of third parties: *McNamara v. New York etc. R. Co.*, 56 N. J. L. 56, 28 Atl. 313. As between Richardson and Davidson, the nunc pro tunc entry is retrospective, and has the same force and effect as if entered at the time the judgment was rendered (*Freeman on Judgments*, 3d ed., sec. 67), and, unless they have rights intervening prior to the date of such entry, its effect cannot be questioned by third parties.

3. Plaintiff's interest in the land on December 5, 1898, the date of the entry of the judgment, was not such as to make her an intervening party within the meaning of the law. Her inchoate right of dower was increased by the legislative act, but she did not act upon conditions then existing, nor did she pay value or otherwise change her condition upon faith in the record, but was only a possible beneficiary under the statute. We understand that, to be protected from the effect of the nunc pro tunc entry, plaintiff must have been in the position of a bona fide purchaser for value: *Freeman on Judgments*, 3d ed., ³²⁸ secs. 66, 67; *Leonard v. Broughton*, 120 Ind. 536, 16 Am. St. Rep. 347, 22 N. E. 731. In this case it is held: "It appears from the fact averred that the judgments in favor of the appellants were rendered upon pre-existing obligations. Their rights were fixed prior to the rendition of the judgments, and it does not appear that they were misled, or that they parted with anything of value, or acquired any rights during the interval which elapsed between the date the judgment should have been properly entered and the making of the nunc pro tunc entry, except that they acquired a judgment lien; and the rule is that the general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third persons at the time of the recovery of the judgment."

However independent of the effect of the entry of the judgment, the contract between Richardson and Davidson is the thing protected by the constitution, and the act increasing the dower is void as to such contract without reference to the entry of judgment or the creation of a lien, and therefore it is immaterial whether plaintiff's inchoate rights under the dower act can be affected by a nunc pro tunc entry or not.

Defendant's right antedates the judgment, and is such that the legislature cannot impair it, and plaintiff cannot complain of the *nunc pro tunc* entry, as the dower statute is without effect as to defendant's contract, regardless of the judgment: *Patton v. Asheville*, 109 N. C. 685, 14 S. E. 92; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Bronson v. Kinzie*, 42 How. (U. S.) 311, 11 L. ed. 143; *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. ed. 212.

Therefore, the decision of this court heretofore rendered must be set aside, and the decree of the lower court is hereby modified as follows: That the plaintiff is entitled to dower in the lands described in the complaint to the extent of one-third part thereof, and the cause will be remanded to the lower court, with directions to proceed with the assignment of such dower in manner provided by law.

Modified and remanded.

The Constitutionality of Statutes affecting the estate of a husband in his wife's property, or the estate of a wife in her husband's property, is the subject of a note to Rose v. Rose, 84 Am. St. Rep. 437. A statute providing that a wife's inchoate interest in her husband's lands shall become vested when such land is sold at judicial sale does not deprive him of his property without due process of law: Green v. Estabrook, 168 Ind. 123, 120 Am. St. Rep. 349.

The Entry of a Judgment Nunc Pro Tunc is binding to the same extent as though entered at the proper time, except as to persons who meanwhile have in good faith acquired rights without notice of the rendition of any judgment: Coe v. Erb, 59 Ohio St. 259, 69 Am. St. Rep. 764; Leonard v. Broughton, 120 Ind. 536, 16 Am. St. Rep. 347; Ninde v. Clark, 62 Mich. 124, 4 Am. St. Rep. 823.

KNAPP v. WALLACE.

[50 Or. 348, 92 Pac. 1054.]

FOREIGN CORPORATION.—Before Service of Process on the President of a foreign corporation will confer jurisdiction, it must be made to appear that the corporation is doing business in this state, or is otherwise within its jurisdiction. If the company is doing business in this state, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation. (p. 745.)

FOREIGN CORPORATION.—Presumption of Service of Process. So long as a foreign corporation confines its operations to the state within which it was created, no presumption can arise that service of process on its president within this state is service on the corporation. (p. 746.)

PROCESS—Presumption of Service in Case of Collateral Attack.

If the record is silent as to service, or if, in the absence of a return, there is a recital of due service in the judgment, then jurisdiction will be conclusively presumed on collateral attack; but if the record contains the return of service, then the recital must be considered as referring to such return. (p. 748.)

FOREIGN CORPORATION—Recital in Judgment of Service of

Process.—A decree against a foreign corporation is open to collateral attack, where the record discloses that there was no service upon it, notwithstanding the decree recites: "And now having fully examined the return made in the cause, wherefore it is thereby and otherwise made to appear to the satisfaction of the court that the defendant, Althouse Mining Co. has been duly served with summons within the state of Oregon, default is entered." (p. 748.)

PROCESS—Amendment of Return, Who can Make.—A sheriff

cannot, after the termination of his office, amend a return of service which his deputy made. (p. 749.)

PROCESS—Service by Publication—Mailing.—Where an affi-

davit for an order of service by publication states the defendant's postoffice address; the order of court requires mailing accordingly; the summons requires the defendant to appear and answer "on or before the last day of the time prescribed in the order for the publication"; the order for publication is dated May 16, 1904; the first publication is made June 25, 1904, and the last August 6, 1904; the affidavit of mailing was made January 4, and filed January 9, 1905, and states that the copies of summons and complaint were mailed August 6, 1904—the mailing is not a compliance with the order of court or the statute, and is insufficient to confer jurisdiction. (p. 749.)

PROCESS—Service by Publication—Amendment of Return.—

Where the plaintiff, four months after the entry of a decree based on service by publication wherein the mailing was insufficient to confer jurisdiction, files as an amended return an affidavit of mailing, but it does not appear that leave of court was obtained for such amendment, nor is there any showing by affidavit as to facts upon which to base the order for leave to amend, the amendment is ineffectual to aid the jurisdiction of the court. (p. 749, 750.)

FOREIGN CORPORATION—Affidavit for Publication of Sum-

mons.—An affidavit for publication which shows that the defendant is a foreign corporation with its principal place of business in another state; that theretofore it has been engaged in mining in this state, but has ceased such operations; and that it has no officer or agent in this state on whom service can be made, but that its officers reside and are now in another state, is sufficient to show that service cannot be made in this state as prescribed by the statute. (p. 750.)

APPEAL—Disposition and Remanding of Cause.—Where it ap-

pears from the record on appeal in a foreclosure case that the defendant has a prior mortgage which the plaintiff admits but claims has been paid, though there is no proof of payment, and the trial court has held the foreclosure by the defendant valid, which on appeal is held void, an issue is left undisposed of, and if the answer of the defendant is such that the appellate court cannot give him the relief to which he is entitled, it will not render a final decree but will remand the cause with leave to amend the answer. (p. 750.)

James A. Fee, L. R. Reeder and McCourt & Phelps, for the appellant.

Harry K. Sargent, for the respondent.

350 EAKIN, J. The complaint in this case sets out a cause of suit for foreclosure of a mortgage, bearing date of February 7, 1900, executed by Edgar T. Wallace, in favor of Mrs. O. Julien, upon mining lands in Josephine county, Oregon, as security for the payment of a promissory note for fourteen hundred and forty-five dollars, with interest thereon at the rate of ten per cent per annum; that thereafter on March 7, 1901, said Wallace conveyed said lands to the defendant, the Althouse Mining Company, a corporation, and on October 13, 1904, said Mrs. Julien duly assigned said note and mortgage to plaintiff, who is now the owner and holder thereof; that the defendant, the Althouse Mining Company, is a foreign corporation organized under the laws of the state of Maine; that its principal office and place of business is in Yreka, California; that defendant, James Camp, claims some interest under a prior mortgage, but that the same has been paid. The defendant Camp answers the complaint, alleging that he is the owner of a note and mortgage executed by defendant Wallace September 26, 1899, upon the same property in favor of Minnie P. Shotwell, in the sum of four thousand two hundred and fifty-six dollars, with interest thereon at the rate of ten per cent per annum, and that on May 14, 1904, he commenced a suit in the circuit court of the state of Oregon for Josephine county, to foreclose said mortgage, in which he made said Wallace and Mrs. Julien and the Althouse Mining Company defendants; and on January 9, 1905, decree was rendered thereon in favor of this defendant Camp, foreclosing his said mortgage and the rights of Mrs. Julien under the mortgage at that time owned by her, which is the one sought to be foreclosed by plaintiff Knapp in this suit, and pleads that decree as a bar to this suit. Plaintiff replied to the new matter of the answer, in which he questions the jurisdiction of the court to render the decree by reason of alleged defects in proof of service of the summons.

351 1. At the trial, the judgment-roll in the suit of Camp v. Althouse Mining Co. was offered in evidence by the plaintiff, to show want of jurisdiction of the court, and by the defendant to show jurisdiction. The proof of service of the summons upon the defendant, the Althouse Mining Company, appears by the return of the sheriff of Multnomah county,

W. A. Story, by H. L. Moreland, his deputy, made on the eighteenth day of May, 1904, by personal service in Multnomah county on B. F. Walker, president of the said Althouse Mining Company; but it does not show that such service was made in the county where defendant corporation had its principal office or place of business, or that it was doing business within the state of Oregon, nor does either of those facts appear anywhere in the record. Section 55, B. & C. Comp., provides that a corporation may be served by delivering a copy of the summons and certified copy of the complaint "to the president or other head of the corporation, secretary, cashier, or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county, or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent."

2. Plaintiff insists that the record discloses want of jurisdiction, in that the sheriff's return shows service upon Walker, as president of the defendant corporation, in Multnomah county, without any showing that the company is doing business within the state or has an office therein, or that such officer was within the state upon business of the corporation. Whether this could be collaterally attacked upon the recital of this return, in case defendant were a domestic corporation, is not necessary for a decision here. But the defendant is a foreign ³⁵² corporation, and, before service in Oregon upon its president will confer jurisdiction, it must be made to appear that the corporation is doing business in Oregon, or otherwise within its jurisdiction. If the company is doing business in Oregon, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation.

As said in *Farrell v. Oregon Gold Co.*, 31 Or. 463, 49 Pac. 876: "So long as the corporation confines its operations to the state within which it was created, it cannot be subjected to the jurisdiction of a court of another state, where it has no office or transacts no business, by the service of process on some officer or agent while temporarily present in the latter state, because he cannot take the corporation with him beyond the jurisdiction of the state of its creation."

In such a case no presumption can arise that service on Walker, as president, within the state, is service upon the corporation. As said in 17 *American and English Encyclo-*

pedia of Law, second edition, 1078: "Jurisdiction of the person of a defendant is presumed, in support of the judgment, only when he is within the territorial limits of the court, and if he is not within such limits, the record must show service on him": *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 21 L. ed. 959. Therefore, the return indorsed upon the summons is insufficient to show service upon the corporation.

3. Unless it is aided by the recitals in the decree, such defect renders the decree void as to defendant corporation, but the decree recites: "And now having fully examined the return made in the cause, wherefore it is thereby and otherwise made to appear to the satisfaction of the court that the defendant, Althouse Mining Company, has been duly served with summons within the state of Oregon," default is entered. The authorities are not in harmony as to when such a recital is conclusive upon a collateral attack, some holding that it is conclusive unless it is positively contradicted by the record; others holding that, if the record discloses the return upon which the recital ³⁵³ is based, and such return does not support the recital, it will not aid the return: See 1 Black on Judgments, secs. 273, 275. Mr. Justice Field, in *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 21 L. ed. 959, in discussing presumptions in favor of the judgment of a court of general jurisdiction, says: "It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. . . . The latter (of the parties) should regularly appear, by evidence, in the record of service of process upon the defendant or his appearance in the action. . . . But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts, concerning which the record is silent. . . . When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer, or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon

a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face. The answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

1 Black on Judgments, section 273, says: "But while it is inadmissible to contradict the record by extrinsic evidence, it is always open to the party to show that one part of the record contradicts another part. Thus the recital of service in a judgment may be contradicted by producing the original summons and return. But the contradiction must be explicit and irreconcilable."

³⁵⁴ In *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110, where a judgment rendered in Oregon is collaterally attacked, it is said: "Here it is contended that the recital in the entry of the default of the defendant in the case of the state court, 'that, although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former."

4. This corporation is a nonresident, and when a judgment against a defendant, not within the territorial limits of the state, "is produced in evidence, the authority for its rendition must appear upon the face of its record. . . . The presumptions of jurisdiction which exist in favor of the judgments of a court of general jurisdiction, when proceeding according to the course of the common law, ceases when the authority to render the judgment is made to depend upon a prescribed mode, according to special statutory provisions. . . . (In the latter case) no presumption will be indulged to sustain the judgment": Mr. Chief Justice Lord, in *Odell v. Campbell*, 9 Or. 298. See, also, *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800, 42 Pac. 514. In *Northcut v. Lemery*, 8 Or. 316, it is said: "But where a decree contains a recital that due service was made, and the return of the sheriff purports to set out the mode of service,

and the mode set out is insufficient, the recital will not aid the return."

To the same effect in *Heatherly v. Hadley*, 4 Or. 1; *Tustin v. Gaunt*, 4 Or. 305. So, also, it is held in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. ed. 222, upon collateral attack of the judgment, that when "service is made within the state, upon an agent of a foreign corporation, it is ³⁵⁵ essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court, that the corporation was engaged in business in the state." *Harris v. Sargeant*, 37 Or. 41, 60 Pac. 608, is to the same effect, although in that case the recital of the decree expressly refers to the return.

5. Neither the return nor the record, in this case, shows that the company was doing business within the state, nor that it had an office or place of business within the state. On the contrary, the complaint only shows that the corporation is a foreign corporation, and that it owns the property in question situated in Josephine county. Generally, if the record is silent as to service, or, in the absence of a return, there is a recital of due service, then, upon a collateral attack, jurisdiction will be conclusively presumed. But where the record contained the return of service, then the recital must be considered as referring to such return; and in this case the record discloses that there was no service upon the Althouse Mining Company, and the court acquired no jurisdiction over it.

6. Defendant, however, attempted to remedy this defect by an amended return of the sheriff, in which W. A. Story, who was sheriff at the date of the attempted service, May 18, 1904, makes affidavit to a return in which he states that H. L. Moreland, his deputy, served the Althouse Mining Company by delivering the copies of summons and complaint "to B. F. Walker, at the principal and only known place of business of the Althouse Mining Company, aforesaid, within the state of Oregon," he being president, etc. This does not even bring the return within the rule laid down in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. ed. 222. Further, this amended return was executed December 8, 1904, and on motion of plaintiff on the ninth day of January, 1905, the court granted leave to file said amended return. Here the return of the sheriff of a service made by a deputy is sought to be amended by the then sheriff, ³⁵⁶ now out of

office; not as to matters of form, but by adding facts relating to such service. This, we think, is not competent. "The amendment can only be properly made by the officer who served the process or in accordance with memoranda made by him, which state the facts that were omitted or incorrectly set forth in the return": Murfree on Sheriffs, sec. 876. See, also, O'Conner v. Wilson, 57 Ill. 226; County of La Salle v. Milligan, 143 Ill. 321, 32 N. E. 196. The ex-sheriff, W. A. Story, cannot be presumed to know what was done by his deputy in making a service; and if the facts in such a case may be established from memoranda of the deputy, it must be upon proof to the court: Murfree on Sheriffs, sec. 875a, p. 440u; In re Bayley, 132 Mass. 457; Smith v. Martin, 20 Kan. 572; White v. Ladd, 34 Or. 422, 56 Pac. 515; Fisk v. Hunt, 33 Or. 424, 54 Pac. 660. Therefore, the jurisdiction in Camp v. Althouse Mining Co. is not aided by the amended return.

7. The service of the summons in the suit of Camp v. Althouse Mining Co. upon Mrs. O. Julien, the plaintiff's assignor, which is by publication, is questioned as to the proof of mailing. The affidavit for an order of service by publication states her postoffice address, and the order of the court requires the mailing accordingly. The summons requires the defendant to appear and answer "on or before the last day of the time prescribed in the order for the publication." The order for publication is dated May 16, 1904. The first publication was June 25, 1904, and the last August 6th. The affidavit of mailing was made by Ernest Lister on the fourth day of January, and filed on January 9, 1905, and states that the copies of summons and complaint were mailed August 6, 1904, so that the mailing was not a compliance with the order of the court or the statute, and was not actually made until the last day of the time limited in the summons for her appearance, and is insufficient to give the court jurisdiction: Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359.

9. Then, four months after the entry of the decree, i. e., May 3, 1905, plaintiff files an amended return of mailing, viz., an ³⁵⁷ affidavit of Lister that the mailing was done on June 25, 1904. It does not appear that leave of the court was obtained to amend such return, nor is there any showing made by affidavit as to facts upon which to base the order for leave to amend it so, and such amendment is ineffectual to aid the jurisdiction of the court. Therefore, the decree in Camp v. Althouse Mining Co. was ineffectual to foreclose

the Camp mortgage, and does not bar plaintiff in this suit from foreclosing his mortgage.

9. In the suit before us, default was rendered against the Althouse Mining Company, and is not questioned in the record, but defendant, in his brief, urges that plaintiff is not entitled to a decree, for the reason that the affidavit for publication does not sufficiently show that the Althouse Mining Co. had no clerk in the county, or that such clerk had no residence there. It does show that defendant was a foreign corporation with its principal office and place of business in Yreka, California; had theretofore been engaged in mining in Josephine county, but had ceased such operations therein, and has no officer or agent therein upon whom service of the summons can be made, but that its officers reside and now are at Yreka, California. We think this is sufficient to show that service could not be made in Oregon under section 55, B. & C. Comp.

10. These views result in a reversal of the decree of the lower court; but we believe that a final decree should not be entered here which would defeat defendant's rights under his mortgage. The record discloses that defendant has a prior mortgage upon the same property in the sum of four thousand two hundred and fifty-six dollars; and this is admitted by plaintiff in his complaint, but he claims it has been paid. Yet the only contest in the case was whether the decree of foreclosure of said mortgage is valid as against the Althouse Mining Company, and no proof being offered by plaintiff to show payment, hence an issue is left undisposed of. The lower court held this decree of foreclosure to be valid, and, this court now holding such decree void, defendant is still entitled to have his mortgage foreclosed; but in the present condition ³⁵⁸ of his answer this court cannot give him the relief to which he is equitably entitled.

Therefore, on the authority of *Smith v. Wilkins*, 31 Or. 421, 51 Pac. 438, and *Robson v. Hamilton*, 41 Or. 239, 69 Pac. 651, the cause will be remanded to the lower court with leave to amend his answer, and such other proceedings as may be proper, not inconsistent with this opinion.

Reversed.

Jurisdiction of Foreign Corporations is the subject of a note to *Abbeville etc. Co. v. Western etc. Co.*, 85 Am. St. Rep. 905. The principal case (*Knapp v. Wallace*, 50 Or. 348, ante, p. 742) is cited in the subsequent case of *Brown v. Lewis*, 50 Or. 358, 92 Pac. 1058, where the court said: "The following facts are before us: A private corporation doing business within the state; an action upon a contract for service

within the state relating to that business; service of summons made upon its president in another county than the one where the action is pending, and judgment rendered thereon. This is notice that reaches defendant corporation and is sufficient to give the court jurisdiction as against a collateral attack. In *St. Clair v. Cox*, 106 U. S. 350, 359, 1 Sup. Ct. Rep. 354, 362, 27 L. ed. 222, it is said: 'When service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court, to render a personal judgment that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company.' When such service is obtained, it is sufficient to give notice to the defendant, and, if it is defective, he must attack it in that proceeding, and it cannot be questioned collaterally.

"The situation here is identical with the case of *Farrell v. Oregon Gold Co.*, 31 Or. 463, 49 Pac. 876, except that here the service on the president is not made in the county where the defendant company was doing business. In that case it is held that it is not necessary that the return show that he was the agent of defendant to represent it in this state, but that such a service is *prima facie* sufficient to give the court jurisdiction. In that case the question arose upon a direct attack. In the case under consideration the attack is collateral, and the action, being transitory, may be brought in any county, and the service upon the president within the state, when the corporation is doing business therein, is sufficient *prima facie* to give the court jurisdiction under B. & C. Comp., section 44, and *Fratt v. Wilson*, 30 Or. 542, 47 Pac. 706, 48 Pac. 356 and is *prima facie* evidence that the president represented the defendant company here. Therefore we hold that the defendant cannot question the sufficiency of the service of the summons in this proceeding."

STATE v. BARTLETT.

[50 Or. 440, 93 Pac. 243.]

CRIMINAL TRIAL—Misconduct of Judge.—Any language, gestures, remarks, facial expressions or tones of voice which might seem even to hint at what the court thinks of the merits of a case should always be avoided at a trial of issues before a jury. (p. 758.)

CRIMINAL TRIAL—Instructions as to Testimony of Accused. An instruction in a criminal trial where the defendant has testified in his own behalf: "You are not bound to consider the testimony of the defendants as absolutely true, nor any part of it as absolutely true, nor as equal to the testimony of disinterested witnesses. You are to bear in mind that the defendants speak in their own behalf to discharge themselves of a criminal accusation, and you are to consider the

great temptation which one so situated is under, so to speak, as to procure his acquittal," is erroneous as seeming to leave an implication that it is incumbent upon the jurors to consider the defendant's testimony as false, and for that reason to reject it. (p. 758.)

Samuel White, for the appellant.

A. M. Crawford, attorney general, Francis S. Ivanhoe, district attorney, and Charles H. Finn, for the state.

441 MOORE, J. The defendant, E. W. Bartlett, was jointly convicted with one S. A. Gardinier of the crime of attempting to extort money, alleged in the information to have been committed by unlawfully threatening to accuse certain persons of the offense of gambling, and to prosecute them therefor. Bartlett appeals from the judgment which followed, and his counsel contend, inter alia, that the trial court erred in charging the jury. The instruction particularly complained of, and to the giving of which an exception was taken, is as follows: "In this case the defendants went upon the witness-stand as witnesses in their own behalf. I instruct you that under the statutes of this state a person accused or charged with the commission of a crime is, at his own request, deemed a competent witness, and while you are to give his testimony such weight and credibility as you consider it entitled to, yet you are to consider the fact in connection therewith that he is the accused person testifying in his own behalf. You are not bound to consider the testimony of the defendants as absolutely true, nor any part of it as absolutely true, nor as equal to the testimony **442** of disinterested witnesses. You are to bear in mind that the defendants speak in their own behalf to discharge themselves of a criminal accusation, and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal."

1. That part of the foregoing charge, commencing with the words, "You are not bound," etc., was evidently patterned after a quotation found in the works of a distinguished author (2 Thompson on Trials, sec. 2447), in a note to which it is said, "Approved in *Solander v. People*, 2 Colo. 48." In the case to which attention is called in the note the plaintiff in error, a woman, was indicted for manslaughter, and, at her trial, one Knauss, a witness for the prosecution, detailed certain declarations against interest which were imputed to her. Upon argument the counsel for the people insisted that the sworn statements of Knauss were entitled to credit, from the circumstance that the accused, though examined in her own

behalf, had not contradicted his testimony, and that her counsel had not interrogated her in relation thereto, whereupon her attorney requested the court to give the following instruction: "That, in the examination of the prisoner provided for by the statute, which examination extends only to the facts and circumstances of the cause on trial, and does not confer on the prisoner the right to testify to facts or circumstances tending to impeach any of the witnesses in the cause. Therefore, the fact that defendant did not testify to facts or circumstances calculated to impeach any of the witnesses sworn in the case is not to be taken as properly commented upon, or as a circumstance against her." The report of the case states, "but the court refused to so charge, and the prisoner excepted."

The jury were charged in relation to the law involved in the issue, and the court gave, *inter alia*, the instruction quoted in the latter part of section 2447, as indicated in 2 Thompson on Trials, but no exception thereto appears to have been reserved. The accused, having been convicted, appealed, and, in affirming the judgment, Mr. Chief Justice Hallett refers to the requests made by the appellants' counsel for certain instructions, relating to the corroboration of the testimony of an accomplice, and says: ⁴⁴³ "The prisoner having elected to testify under the act of 1872 (9 Sess. Assem., p. 95), her testimony became a fair subject of criticism before the jury, and the counsel for the people was at liberty to analyze her testimony, to compare it with the other testimony in the cause, and comment upon the omissions and contradictions, if any, therein. The prisoner was at liberty to contradict Knauss, and to give her own account of the matters related by him, and the fact that she did not do so might well be considered by the jury in determining the credibility of Knauss: *People v. Dyle*, 21 N. Y. 578. The prisoner was not required to testify, and, by the terms of the statute, if she had chosen to remain silent, no inference of guilt could be drawn from her conduct. By taking the witness-stand she opened the door to criticism, and cannot now complain that an effort was made to measure her testimony by the ordinary rules which govern human conduct."

The foregoing observation, relating to the declarations upon oath of the accused as a witness in her own behalf, constitutes the only reference made by the court to any instruction requested by her counsel or to any charge given to the jury as to her testimony. How, then, can it be said, as indicated

in the note adverted to, that the language quoted in the text by the noted author, and as given by the court in the case cited, was approved, when the instruction does not appear even to have been challenged by counsel for the accused or commented upon in any manner by the justice who wrote the opinion? The only references to the case of *Solander v. People*, 2 Colo. 48, that we have been able to find in the Colorado reports relate to other questions: See, upon this subject, *Jones v. People*, 2 Colo. 351; *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565; *Jones v. People*, 6 Colo. 456, 45 Am. Rep. 526; *Minich v. People*, 8 Colo. 440, 9 Pac. 4; *Wisdom v. People*, 11 Colo. 170, 17 Pac. 519; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *Johnson v. People*, 33 Colo. 237, 108 Am. St. Rep. 85, 80 Pac. 133.

In *People v. Cronin*, 34 Cal. 191, an instruction of similar import to that contained in the latter part of the charge complained of in the case at bar was approved. In *People v. Murray*, ⁴⁴⁴ 86 Cal. 31, 24 Pac. 802, Mr. Justice McFarland, referring to the rule announced in the preceding case, says: "That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already gone. An instruction giving the general rule can do no harm, and is not of much importance, for every intelligent juror knows, without any instruction on the subject, that a defendant, whether innocent or guilty, is deeply interested in being acquitted. But when such an instruction is reiterated, and put into exceedingly strong language, so as to give it peculiar emphasis, it is too apt to lead the jury to believe that the court thinks the defendant in the particular case on trial to be unworthy of belief."

In *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520, the trial court, in referring to the declarations under oath made by the defendant as a witness in his own behalf, charged the jury as follows: "In weighing his testimony you are to consider what he has at stake. You are to consider the temptations that may be brought to bear upon a man in his situation to tell a falsehood for the purpose of inducing you to acquit him, or to disagree."

The defendant, having been convicted, appealed, and in reversing the judgment, the court say: "If the question were entirely an open one we would feel constrained to hold, upon

principle, that any instruction at all as to the credibility of any witness, or the weight to be given to his testimony, is violative of section 19 of article 6 of the constitution, which provides that 'judges shall not charge jurors with respect to matters of fact,' and section 1887 of the Code of Civil Procedure, which, referring to a witness, provides that 'the jury are the exclusive judges of his credibility.' "

It is further intimated that the instruction last above quoted was more restrictive than the charge approved in *People v. Cronin*, 34 Cal. 191. It will thus be seen that the supreme court of California practically condemned the instruction given in *People v. Cronin*, 34 Cal. 191, but felt impelled to follow ⁴⁴⁵ the rule thus announced, because of its repeated approvals for nearly a generation.

In *Johnson v. United States*, 157 U. S. 320, 15 Sup. Ct. Rep. 614, 39 L. ed. 71, cited by counsel for the state in the case at bar, the jury were charged as follows: "The defendant goes upon the stand before you, and he makes his statement—tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness—its own inherent proving power that may belong to it."

This instruction was approved by the supreme court of the United States, but as the cause was originally tried in a federal court, where the rules of the common law prevail, thereby permitting the judge to comment upon the weight of the testimony, no other deduction could well have been made: *Carver v. Astor*, 4 Pet. 1, 7 L. ed. 761; *Magniac v. Thompson*, 7 Pet. 348, 8 L. ed. 709. The conclusion there reached, however, is not controlling in the case at bar, in consequence of our statute prohibiting such method of charging the jury.

In *Territory v. Romine*, 2 N. M. 114, a similar charge was upheld on the assumption that such an instruction was permissible under the rules of the common law, which at the time of that trial had not been changed, but subsequent thereto, and prior to the hearing of the cause in the supreme court a statute had been adopted by the legislative assembly of New Mexico, which precluded a court from commenting upon the weight of the evidence. In that case it is intimated that, after the passage of the statute, the giving of such an instruction would have been erroneous. Our statute, regulating the giving of instructions, was adopted in its present form, De-

ember 20, 1865 (Laws Or. 1865, p. 37), and is as follows: "In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact": B. & C. Comp., sec. 139.

⁴⁴⁶ This section practically prohibits the giving of an instruction as to the weight of the evidence, for if a court cannot present the facts of a case, it is necessarily precluded from charging the jury in respect to any particular conclusion which might be deduced from a consideration of the testimony.

An early statute of this state prevented a defendant in a criminal action from becoming a witness for or against himself: Section 166, title 1 of chapter 16 of the Criminal Code, as compiled by Matthew P. Deady and Lafayette Lane. This section was amended October 25, 1880 (Laws 1880, p. 28), so as to read, as far as deemed involved herein, as follows: "In the trial of or examination upon all indictments, complaints, information and other proceedings before any court, . . . against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court": B. & C. Comp., sec. 1400.

As this alteration was made after the passage of section 139, B. & C. Comp., it would seem, from a construction of such amendment in *pari materia* with that section, that it had been impliedly amended, so as to permit the court to call the attention of the jury to the credibility of a defendant in a criminal action when he appeared as a witness in his own behalf. Our statute, elucidating the general principles of evidence, contains the following clause: "A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility": B. & C. Comp., sec. 695.

It has been the practice of courts to give this entire section, or the substance thereof, in charging juries. Construing this clause together with section 1400, B. & C. Comp., it would further appear that section 695, B. & C. Comp., was also impliedly amended, so as to allow the court to inform the

jury ⁴⁴⁷ that a defendant in a criminal action, when he appeared as a witness in his own behalf, is interested in any verdict which they might return—a fact of which they have knowledge without such declaration: *People v. Murray*, 86 Cal. 31, 24 Pac. 802.

An instruction stating that, while the defendant in a criminal action is a competent witness in his own behalf, the jury, nevertheless, have the right to take into consideration his interest in the result of the trial, and all the facts and circumstances of the case, and to give his testimony only such weight as they, in their judgment, think it entitled to, has been held proper: *Smith v. State*, 107 Ala. 139, 18 South. 306; *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *State v. Ryan*, 113 Iowa, 536, 85 N. W. 812; *People v. Calvin*, 60 Mich. 113, 26 N. W. 851; *Gatliff v. Territory*, 2 Okl. 523, 37 Pac. 809; *Emery v. State*, 101 Wis. 627, 78 N. W. 145. Under the rule thus announced, the first part of the charge in the case at bar, which was manifestly modeled after section 2447, 2 Thompson on Trials, a note to which is as follows: "Approved in *State v. Jones*, 78 Mo. 278," is supported by authority, though the jury were not instructed to take into consideration all the facts and circumstances of the case, nor informed that they were the exclusive judges of the defendant's credibility. No request, however, appears to have been made to enlarge the instruction in these particulars.

In *Chambers v. People*, 105 Ill. 409, the following charge was given: "The court instructs the jury, for the people, that they are not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he is defendant, and give his testimony such weight as, under all the circumstances, they think it entitled to."

In that case it was held that such instruction was calculated to mislead, and was, therefore, erroneous. A similar instruction was also condemned in *Sullivan v. People*, 114 Ill. 24, 28 N. E. 381, and *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245.

⁴⁴⁸ In *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797, the jury were instructed as follows: "In this case the defendant and members of his family have given testimony. You have no right to reject the testimony they have given, simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the facts on behalf of the defendant, but you have a right to consider, and you should consider, that testimony the same as you would

other testimony, taking into account the relationship of the parties and the motives which may induce them to testify."

The defendant, having been convicted, appealed, and, in reversing the judgment, it was held that the instruction was erroneous, as an expression of opinion on the motives of the witnesses.

Any person who carefully notices the trial of a cause before a jury must surely observe the attention which they give to the remarks, gestures, facial expressions or tones of voice which the judge may adopt, in their evident desire to gain from him some information as to the kind of verdict they think he would expect in the case. Any language, therefore, which might seem even to hint at what the court thought of the merits of a case, ought always to be avoided at a trial of the issue before a jury. Though the judge, in the instruction complained of, said to the jury: "You are not bound to consider the testimony of the defendants as absolutely true, . . . and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal"—he seems to leave an implication that it was incumbent upon them to consider the defendants' testimony as false, and for that reason to reject it: *Clark v. State*, 32 Neb. 246, 49 N. W. 367.

We think the language thus used is not warranted, and hence the judgment is reversed, and a new trial ordered.

If in a Criminal Trial the Accused Testifies in His Own Behalf, the court should not, by conduct or instructions, in any manner disparage his testimony. An instruction concerning the testimony of the accused given in his own behalf which concludes with the words: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true or made in good faith, or only for the purpose of avoiding conviction," is erroneous: *Donner v. State*, 72 Neb. 263, 117 Am. St. Rep. 789.

FIRST NATIONAL BANK v. McCULLOUGH.

[50 Or. 508, 93 Pac. 366.]

TRIAL—Order of Proof—Discretion of Court.—The order of proof is a matter within the sound discretion of the trial court, the exercise of which will not be disturbed on appeal except in case of an abuse. (p. 760.)

BILLS AND NOTES—Indorsement to Cashier.—Parol Evidence is not admissible to show that the indorsement of a note to a person who is the cashier of a bank, but is not so designated, was such a

transfer as vests legal title in the bank and precludes defenses good against the payees. (p. 761.)

APPEAL—An Assignment of Error in Permitting Cross-examination on matters not testified to on direct examination is unavailing, if the bill of exceptions does not contain all the testimony of the witness on direct examination. (p. 762.)

BILLS AND NOTES—Transfer Without Indorsement—Defense. The transfer of a note without indorsement does not cut off the equities of antecedent parties. Hence, when a note is indorsed to the cashier of a bank and he delivers it to the bank without indorsement, the bank holds the paper subject to all the equities existing in favor of the maker. (pp. 762, 763.)

BILLS AND NOTES—Transfer Without Indorsement—Parties. The transfer without indorsement of a promissory note, payable to order, carries under the law-merchant only an equitable right which can be enforced in the name of the payee only; but under a statute providing that every action shall be prosecuted in the name of the real party in interest, a bank may maintain an action in its own name on a note transferred to it without indorsement. (p. 764.)

APPEAL—The Grant or Denial of a Motion for a New Trial is not a final order from which an appeal lies. (p. 764.)

APPEAL—No Determination of a Trial Court can be Reviewed on appeal unless the question has been distinctly presented to that tribunal for its action. (p. 764.)

McCourt & Phelps, for the appellant.

Lovell & Winter, for the respondent.

509 MOORE, J. This is an action by the First National Bank of Pomeroy, Iowa, a corporation, against B. F. McCullough and M. H. Gillette, to recover on two promissory notes. The facts, so far as deemed material herein, are that on March 2, 1904, and November 23d of that year, the defendants obtained from one W. J. Furnish leases of certain lands in Umatilla county for a term which would expire March 1, 1907, agreeing to give for the use of the premises six hundred and forty dollars annually. This sum was evidenced **510** by their negotiable promissory notes, executed to Furnish, for five hundred and twelve dollars and one hundred and twenty-eight dollars, respectively, which instruments, given for the rent of 1905, were payable June 1, 1906. The leases did not contain a covenant to the effect that in case of a sale of the real property the tenancy could be terminated at the option of either party. The landlord, in the fall of 1905, listed the land with one M. L. Moody, an agent, for sale, to whom he duly indorsed the notes, which would mature June 1, 1906. The agent having entered into a contract for the sale of the premises with one G. E. York, the defendants surrendered to the latter the possession of the real property, and

relinquished to him all their rights under the leases. The notes mentioned were, prior to their maturity, transferred by the following indorsement: "Pay A. B. Nixon or order, waiving demand and notice of protest. H. L. Moody." The person named as the last indorsee was at the time of such transfer the cashier of the plaintiff bank. No part of the notes having been paid, this action was instituted without any other written transfer of the negotiable instruments. The complaint, embracing two causes of action, is in the usual form, states when the notes were executed, and contains, *inter alia*, in each count, the following averment: "That thereafter, and before the maturity thereof, said note was indorsed, transferred and assigned to the plaintiff herein, and plaintiff is now the owner and holder of said note." The answer denies the material allegations of the complaint, states the facts, in substance as hereinbefore detailed, and avers, in effect, that about March 8, 1906, and while the defendants had a crop growing on the leased land, they, at the request of Furnish, who then was the owner and holder of the notes sued on, and at the solicitation of York, who had secured a contract for the purchase of the premises, surrendered to the latter the possession of the real property, in consideration of the cancellation of the notes given for the rent; that at that time Moody, who was then the agent of Furnish, was advised by the defendants of the payment of the notes, which, without any consideration therefor, and not in ⁵¹¹ the ordinary course of business, were delivered to the plaintiff. The allegations of new matter in the answer were denied in the reply, and the cause having been tried, the defendants secured a verdict, and from the judgment rendered thereon, the plaintiff appeals.

1. It is contended that an error was committed in permitting the defendants to introduce evidence tending to show that the notes sued on were agreed to be canceled by Furnish without having first shown that Nixon, the cashier of the plaintiff bank, had knowledge of the alleged agreement. The order of proof is a matter within the sound discretion of the trial court, the exercise of which will not be disturbed, except for an abuse of such discretion: *B. & C. Comp.*, sec. 842; *Jones v. Peterson*, 44 Or. 161, 74 Pac. 661. An examination of the bill of exceptions fails to disclose any misuse of the power thus reposed.

2. It is maintained that the court erred in striking out, over objection and exception, Moody's testimony to the effect that the notes in question were indorsed to the plaintiff. No

question seems to have been raised at the trial as to the right of the bank to maintain this action as the real party in interest. The consideration of the exception reserved is therefore limited to an inquiry as to whether or not parol evidence was admissible to show that the indorsement of the notes to Nixon, though not designated as cashier, was such a transfer as vested the legal title in the bank, and precluded the defendants from maintaining any defense that they might have had against the payee or indorsee. We will examine the cases to which plaintiff's counsel call attention in support of the legal principle which they seek to invoke. In *Arlington v. Hinds*, 1 D. Chip. (Vt.) 431, ⁵¹² 12 Am. Dec. 704, it was held that a note made to a town treasurer, "or his successors in office," might be sued by the town. In *National Life Ins. Co. v. Allen*, 116 Mass. 398, it was ruled that a principal might sue in his own name on a non-negotiable promissory note, given for its benefit, but by its terms made payable to "J. T. Phelps, agent." In *Bank of New York v. Bank of Ohio*, 29 N. Y. 619, in adhering to the rule announced in the case of *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, it was determined that a bill drawn payable to "D. C. Converse, Esq., cashier," was payable to the bank of which he was the officer. So too, in *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 234, 17 L. ed. 534, it was adjudged that, where negotiable paper was drawn to a person by name, immediately after which appeared the word "cashier," but with no designation of the particular bank of which he was such officer, parol evidence was admissible to show that he was the cashier of the bank which was plaintiff in the suit, and that in taking the paper he was acting as agent for the corporation.

3. The rule to be extracted from these decisions has been embodied in our statute, known as the "Uniform Negotiable Instrument Law," as follows: "When an instrument is drawn or indorsed to a person as 'cashier,' or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer": B. & C. Comp., sec. 4444.

The clause just quoted, and the decisions adverted to, are undoubtedly based on the theory that the employment of the qualifying word "cashier" or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show

who is the principal for whose benefit such agent received or accepted the promise to pay a stipulated sum of money. In the case at bar, however, no official designation is added to Nixon's name, and hence no uncertainty is apparent from an inspection of the indorsement ⁵¹³ made by Moody to him, and parol evidence was inadmissible to control or vary the terms of the writing. In view of the purpose for which Moody's testimony was evidently offered, no error was committed in striking it out.

4. It is insisted that the court erred in requiring Moody to be cross-examined, over objection and exception, as to certain matters to which he had not theretofore testified. The bill of exceptions shows that this witness, on direct examination, identified the notes sued on, and stated that he sent them with other negotiable instruments to Nixon, from whom he received a draft in payment therefor. On cross-examination he was required to testify as to other matters, but as the bill of exceptions does not purport to contain all his testimony on direct examination, the error thus assigned is unavailing.

5. It is argued that, having taken an exception to the following part of the court's charge, an error was committed in giving it, to wit: "I instruct you, gentlemen of the jury, that the indorsement on the notes in question, under the evidence in this case, plaintiff did not come into possession of the notes in controversy in due course, or in the ordinary and usual course of business as recognized by the law; and therefore that any defense which these defendants may have had against said notes, if in the hands of the indorsee, H. L. Moody, will be available to the defendants as against this plaintiff."

The uniform practice of merchants in transferring credits, represented by commercial paper, as a means of purchasing goods or settling accounts, gave rise to certain rules, demanded by the wants and convenience of trading communities, which are known as the law-merchant, and have become a part of the common law: 7 Cyc. 520; *Woodbury v. Roberts*, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312. An observance of these rules requires that the property represented by a promissory note, payable to order, when transferred to a designated party before maturity for a valuable consideration and without notice, should be evidenced by an indorsement on the instrument, or ⁵¹⁴ on a paper attached thereto, in order to bar the equities of antecedent parties. This method of transferring such property constitutes the ordinary or usual course of business, a departure from which is equivalent to

a notice of equities, and subjects the negotiable instrument to defenses in the hands of a holder who has acquired a right thereto in any other manner: B. & C. Comp., sec. 4433; Randolph on Commercial Paper, 2d ed., sec. 789; *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308; *Franklin v. Twogood*, 18 Iowa, 515; *Elias v. Finnegan*, 37 Minn. 144, 33 N. W. 330. In *Osgood's Admrs. v. Artt* (C. C.), 17 Fed. 575, Mr. Justice Harlan, in discussing this subject, says: "It is a settled doctrine of the law-merchant that the bona fide purchaser for value of negotiable paper, payable to order if it be indorsed by the payee, takes the legal title unaffected by any equities which the payor may have as against the payee. But it is equally well settled that the purchaser, if the paper be delivered to him without indorsement, takes, by the law-merchant, only the rights which the payee has, and therefore takes subject to any defense the payor may rightfully assert as against the payee."

6. A transfer, without indorsement, of a promissory note payable to order, assigns to the holder, under the rules of the law-merchant, only an equitable right, to enforce which suit was formerly required to be maintained in the name of the payee. Our statute demands that every action, except in certain cases not involved herein, shall be prosecuted in the name of the real party in interest: B. & C. Comp., sec. 27. In *Moore v. Miller*, 6 Or. 254, 25 Am. Rep. 518, it was ruled that the holder of a note, payable to order, which has been transferred without indorsement, could maintain an action at law thereon in his own name. That decision, however, is not based on the section of the statute last referred to, but upon the fact that the evidence showed that the plaintiff therein possessed the title to the note sued on, and had the sole right to receive the money due thereon. As illustrating the right of a holder of a negotiable promissory note, transferred without indorsement, to maintain an action thereon in his own name, see the very able opinion of ⁵¹⁵ Circuit Judge Gilbert in *First Nat. Bank v. Moore*, 137 Fed. 505, 70 C. C. A. 89. This legal principle is here adverted to for the purpose of showing that Moody's testimony was excluded, not on the ground of establishing a right in the plaintiff to maintain an action in its corporate name, but to prove that the bank was an indorsee, in due course, though not named in the evidence of the transfer, nor was any fiscal designation appended to the name of the indorsee from which it could be inferred that the plaintiff was the party intended by the writing. The note sued on having been delivered by Nixon,

without indorsement, to the plaintiff, the bank was authorized to maintain an action thereon in its own name; but it took and held the paper subject to all equities existing in favor of the makers, and this being so, no error was committed in giving the instruction under consideration.

7. It is contended that the court erred in refusing to set aside the verdict and to grant a new trial, on the ground that no contract had been consummated between Furnish and the defendant, whereby the notes in question were to be canceled. The rule is settled in this state that the action of a court in granting or denying a motion for a new trial is not a final order from which an appeal lies. This principle has so often been announced that it is unnecessary to cite the cases which uphold the doctrine.

8. It is argued that as all the testimony given at the trial has been sent up, a perusal thereof will conclusively show that no contract was ever entered into between the makers and the payee of the notes whereby they were to have been canceled, and hence the judgment should be reversed, and a new trial ordered. An appellate court is created to review errors alleged to have been committed by lower courts in the trial of law actions, to which rulings exceptions have been duly reserved. No determination of a trial court can be reviewed on appeal, unless the question has been distinctly presented to that tribunal for its action. In the case at bar the court was not requested to give any instruction that involved a consideration of all the testimony, and ⁵¹⁶ this being so, that exhibit attached to the bill of exceptions will not be examined.

Other alleged errors are assigned, but, believing them unimportant, the judgment is affirmed.

The Transferee of a Note Without Indorsement acquires no better title than had the payee; he holds it subject to all equities existing between the original parties: *Sackett v. Montgomery*, 57 Neb. 424, 73 Am. St. Rep. 522. A note payable to a certain person or order can take its place in the hands of a subsequent holder with the peculiar qualities and incidents of negotiable paper only where it has been regularly indorsed in such a way that the indorsement becomes a part of the paper: *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153.

If a Note Purports to be Payable to W. C., Cashier, at a designated place, a bank, on proving that he was then its cashier and acted for it, may maintain an action on the note without any indorsement thereof by him: *First Nat. Bank v. Johnson*, 133 Mich. 700, 103 Am. St. Rep. 468.

CASES
IN THE
COURT OF CRIMINAL APPEALS
OF
TEXAS.

REED v. STATE.

[53 Tex. Cr. 4, 108 S. W. 368.]

LIQUORS—Want of Knowledge of Intoxicating Character When Sold.—On a prosecution for the violation of a local option law, testimony is admissible that the defendant believed the beverage sold was not intoxicating. (p. 766.)

LIQUORS—Evidence.—On a Prosecution for the Violation of a Local Option Law, the statute makes admissible an examined copy of the internal revenue collector's books, but there is no statutory authority for the introduction of his certificate. (p. 767.)

LIQUORS—Sale in Violation of Local Option Law.—All parties participating in the sale of liquors in violation of a local option law are principals. (p. 767.)

W. H. Murchison, for the appellant.

F. J. McCord, assistant attorney general, for the state.

⁴ **BROOKS, J.** Appellant was convicted of violating the local option law, and his punishment assessed at a fine of fifty dollars and twenty days' confinement in the county jail.

Bill of exceptions No. 1 shows the following: "While defendant was on the stand as a witness in his own behalf, the following question was propounded to him by his counsel: 'State whether or not at the time you begun work for B. S. Foreman, and at the time you are accused of the sale alleged in the indictment, you had been led to believe, and did ⁵ honestly believe, that the liquors sold in the said Foreman's place of business were nonintoxicating beverages.' The court sustained the state's objection to same on the ground that the testimony was irrelevant and immaterial. If permitted, the defendant would have stated that 'Mr. Fore-

man told me at the time I went to work for him, which was about two weeks prior to the date alleged in the indictment, that the liquors sold by him were nonintoxicating, and I believed at the time of the alleged sale to Mr. Miller that the cold drinks sold to said Miller in said Foreman's place of business were in fact nonintoxicating beverages.' " This testimony was admissible, and the court erred in refusing to admit same. We have heretofore held that, if a party honestly believes the liquor sold is not an intoxicant, said fact can be proven. Here the defense proposed to prove by the party who employed appellant that he was informed that the liquor was not intoxicating, and, so believing, he sold same. This testimony was admissible: See *Walker v. State*, 49 Tex. Cr. 345, 94 S. W. 230; *Covington v. State*, 51 Tex. Cr. 48, 100 S. W. 368.

Bill of exceptions No. 2 shows the following: The state, over appellant's objection, was permitted to introduce in evidence the following instrument, in writing, to wit:

"Internal Revenue Service, 4th District of Texas.

"Collector's Office.

"Dallas, Texas, February 27, 1907.

"COLLECTOR'S CERTIFICATE.

"I hereby certify that it appears from the records of my office that license was issued, as follows, viz.:

"Kind of stamp—Retail Malt Liquor Dealer.

"Serial number, 7847.

"Date of Issue, August 28, 1906.

"To whom Issued, B. S. Foreman.

"Issued for period, commencing August 1, 1906.

"Place of Business: Rule, Texas. Locality.

"Amount paid: Eighteen and 33-100 Dollars (\$18.33).

"In witness whereof, my official seal and signature, this the 27th day of February, 1907.

"(Seal)

P. B. HUNT, Collector."

Appellant objected to same because it was not shown by any testimony whatever that the defendant had any knowledge of the existence of the said license, or that it had ever been issued to said Foreman, or that he had any knowledge that the said Foreman, his employer, had said license; because the said instrument was wholly immaterial and irrelevant to any issue in the case on trial, and was calculated to injure and prejudice the rights of the defendant. There is no authority in this state for the introduction of the internal

revenue collector's certificate. " The statute makes admissible an examined copy where proof of said fact is made; then the examined copy of the internal revenue collector's books can be admitted, but there is no statutory authority for the introduction of the collector's certificate.

Appellant complains of the following charge of the court: "You are charged that, if you believe from the evidence, beyond a reasonable doubt, that the defendant and any other person acting together sold intoxicating liquors to M. P. Miller at the time and place alleged in the indictment in this case, and that each and both of said persons were present at the time of such sale, and each knew the unlawful act in making said sale, then the defendant would be guilty, regardless of whether it was the defendant or such other person who actually delivered to said Miller such intoxicating liquor, or received the pay therefor." This charge is correct. All parties are principals in misdemeanor cases. Besides, the evidence shows, according to the testimony of the prosecuting witness, that appellant was present at the time of the sale, aiding and abetting.

For the error of the court in excluding the testimony above discussed, the judgment is reversed and the cause is remanded.

Ignorance that Liquors are Intoxicating constitutes no defense or excuse, according to *Haynes v. State*, 118 Tenn. 709, 121 Am. St. Rep. 1055, for their unlawful sale. The seller must know at his peril whether or not they are intoxicating, and his belief that they are not, however honest, and resulting from a guaranty under which he bought them, is no excuse.

EDWARDS v. STATE.

[53 Tex. Cr. 50, 108 S. W. 673.]

FORGERY—Identical Names.—It is No Defense to a charge of forgery that the name of the defendant is the same as the name of the person whose name he forges. (p. 771.)

W. D. Scarbrough, for the appellant.

F. J. McCord, assistant attorney general, for the state.

⁵¹ BROOKS J. Appellant was convicted of passing a forged instrument, and his punishment assessed at confinement in the penitentiary for two years.

The indictment contains four counts. The jury convicted appellant on the fourth count, which reads as follows: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present in and to said court that J. R. Edwards, on or about the 2nd day of April, A. D., 1907, in said county and state, did willfully, knowingly and fraudulently pass as true to one L. E. Martin, a false and forged instrument in writing which had theretofore been made without lawful authority, and with intent to defraud, and was then of the tenor following:

"Merkel, Texas,.....190..No.

"The First National Bank of Merkel,

"Pay to Samuel Killston.....or bearer \$32.45 •

"Thirty Two and 45-100.....Dollars.

"J. R. EDWARDS."

"And which said instrument in writing the said J. R. Edwards, then and there well knowing to be false and forged, he the said J. R. Edwards, did pass the same as true, in this, that he, the said J. R. Edwards did pass the same as being a check or an order given by J. R. Edwards of Newman, Fisher county, Texas, and represented at the time he so passed it that it was given by the J. R. Edwards of Newman, Fisher county, Texas, and he did so pass the same with the intent to injure and defraud, against the peace and dignity of the state.

"W. S. CHINN,

"Foreman of the Grand Jury."

The facts in this case are, in substance, as follows: L. S. Martin testified: "I live in Merkel, Texas. I have seen the defendant, J. R. Edwards; saw him about the first of April, 1907, at Merkel, at Hogue-Hamilton & Company's store where I was working. [Witness is handed check in question.] I have seen that check before; saw it at Hogue-Hamilton & Company's store. I cashed that check after I received it, and received it from a party representing himself as Samuel Killston, and which was the defendant here. I got that check from him. The defendant came into the store about the first or second day of April of this year, and bought a little bill of goods, some six or eight dollars' worth, and handed me this check for the payment. And I asked him who Mr. Edwards was, and he said that he was a farmer living in Fisher county, near Newman; and then I asked the defendant his name, and he said, 'Samuel Killston.' Then I asked a Mr. Young, a young man there in the store, if he knew Mr. Edwards, and

he stated that he did not. So ⁵² then I phoned down to the bank, and asked them if J. R. Edwards' check was good for this amount, and they said the check was all right, and then I cashed it. All this happened at Merkel, in Taylor county, state of Texas, on or about the second day of April, 1907. I saw the defendant write the signature, 'Samuel Killston,' on the back of the check. He made that indorsement on there."

J. R. Edwards, another witness for the state, testified as follows: "I live at Merkel, Texas. I live at a little place called Newman, in Fisher county, Texas, about the second day of April, 1907, was farming up there. I know the defendant here, J. R. Edwards. [Witness is handed a check, being same one set out in the indictment.] I did not write that check; that is not my signature to it. I did not give that check to the defendant. I neither signed that check or gave it to the defendant. The check is on the First National Bank of Merkel. At that time I had an account with that bank, and I was known to the bank officials there. That is the signature of the defendant on the check. That is his name; that is his initials to the check. I suppose he has a right to sign his name to that check or to anything that he wants to. At that time his home was with me at Newman or near there in Fisher county, Texas. He had been working there on the farm for me, picking cotton."

L. S. Martin, being recalled, testified as follows: "I do not know that the defendant said anything to me about where he got the check when he presented it to me. I simply asked him who Mr. Edwards was, and where he lived. I do not know whether I asked him if Mr. Edwards gave him the check or not. I have stated on my direct examination about all that was said between us, about his buying the bill of goods, etc. I asked about where Mr. Edwards was and where he lived, and he said he was a farmer living in Fisher county, near Newman. I asked him how long he had been with Mr. Edwards and he said about two months. He simply told me that was J. R. Edwards' name, of Newman, Fisher county, Texas, and I took the check on that."

R. O. Anderson, a witness for the state, testified: "I know J. R. Edwards here in the courtroom, but I do not know the defendant here personally. On or about the 2d of April, 1907, I was cashier of the First National Bank of Merkel, Texas. The defendant, J. R. Edwards, here, had no account with the First National Bank of Merkel."

The defendant to the last statement above, about the account, objected, because the same shows no connection with the alleged forgery. The indictment alleges that it "purports to be the act of another," and there is nothing in the allegation of the indictment that the defendant had an account there, or that this conviction could depend upon the defendant having an account there, which objection was overruled by the court. The witness continuing: "The other J. R. Edwards had an account there, and I am well acquainted with him." J. R. Edwards, being recalled, said he did not authorize defendant to sign his name to this check or any check.

⁵³ Thereupon, the state offered in evidence the check and appellant's counsel objected to same, for the following reasons: The first count in the indictment alleges that the instrument purports to be the act of another, while the evidence of the state conclusively establishes the fact that the name in the instrument is not the name of another, but is the name of the defendant himself; it is the defendant's own name. There is no evidence in this record that the defendant wrote that check. Again, appellant objected because it is not made to appear upon which count the state proposes to introduce this check in evidence. And, further, the check is not admissible in evidence, because it shows that it is not dated. If there is any date, it is "190," and it devolves upon the state to establish the date of it as alleged in the indictment, and it has not been done. Furthermore, appellant objected because the instrument does not purport to be the act of J. R. Edwards of Newman, Fisher county, Texas. Appellant further objects to the testimony of witness Martin, above detailed. The above is substantially all of the testimony and appellant's insistence in this record.

We note that the assistant attorney general suggests that probably the indictment is defective, in that same does not contain an innuendo averment to the effect that J. R. Edwards, whose act the instrument purports to be, is not alleged in the indictment to be another and a different party and a different man from the J. R. Edwards who is indicted in this case. As stated above, the verdict was upon the fourth count in the indictment, which charges knowingly and fraudulently passing as true a forged instrument, which was theretofore made without lawful authority. We hold that the indictment is sufficient. It will be seen from an inspection of the fourth count in the indictment that it states that the appellant represented, at the time he so passed the instrument, it was given

by J. R. Edwards of Newman, Fisher county, Texas, and he did so pass same with the intent to injure and defraud. In the first place, the indictment is sufficient. To constitute a valid indictment, the instrument must purport to be an act of another and the indictment must so allege, and must name the person whose act it purports to be. The indictment in the count under consideration is a fac-simile copy of the form of indictment laid down by the authorities of this court, with the exception that the indictment is against J. R. Edwards, and it alleges that the said J. R. Edwards forged the name to pass as true a forged instrument purporting to be the act of J. R. Edwards of Newman, Fisher county, Texas. Then the question arises, Can one forge another's name, which other has the same name with the party perpetrating the forgery, or passing the forged instrument? We hold that he can. If there are two persons of the same name, and one of them signs that name to a note with the intent that the note may be used in trade as the note of the other, the act is forgery: *Barfield v. State*, 29 Ga. 127, 74 Am. Dec. 49. One who signs his name to an instrument, though it be identical with the name of another, is guilty of forgery, if the intent be ⁵⁴ to have it received as the instrument of such other person, and the instrument may be of legal efficacy. Falsely personating another and signing his name is forgery. So it has been held that a forgery may be committed though the names are not identical but merely idem sonans: 13 Am. & Eng. Ency. of Law, 1089. The evidence in this case clearly shows that appellant passed as true, with a fraudulent purpose, the instrument in question, and received goods and money thereon; that he stated his name was different from what it was, and evidently held out the idea and conveyed the impression that the signature to the check was different from his own name. In fact, he gave the name of Samuel Killston, and represented to the party to whom he gave the check that the man who signed it was J. R. Edwards of Newman, Fisher county, Texas, who was known, according to the evidence, to be a man of means; and appellant had no means, but was merely a hireling and a nephew of the said J. R. Edwards, and the whole testimony discloses a fraudulent purpose and an intent to defraud, and comes within the clear purview of the statute. We hold that it is no defense to the charge that the name of appellant is the same as the name of the person whose name he forged: See *Peel v. State*, 35 Tex. Cr. 358, 60 Am. St. Rep. 49, 33 S. W. 541.

We find no error in this record to authorize a reversal of the case. The charge of the court is correct. The evidence amply supports the verdict, and the judgment is affirmed.

Forgery is Committed Where There are Two Persons of the Same Name, and one of them signs that name to certain notes with the intention that they shall be used in trade as the notes of the other: *Beattie v. National Bank of Illinois*, 174 Ill. 571, 66 Am. St. Rep. 318.

OWENS v. STATE.

[53 Tex. Cr. 105, 112 S. W. 1075.]

OCCUPATION TAX—Unconstitutional Discrimination.—A statute imposing an occupation tax upon persons engaged in the business of taking assignments of wages not yet due, but exempting persons who take such assignments in payment or as security for the purchase price of necessities, insurance premiums and homesteads, is unconstitutional. (pp. 774, 775.)

Onion & Henry and T. J. Newton, for the appellant.

F. J. McCord, assistant attorney general, for the state.

106 BROOKS, J. An information was filed against appellant in the county court of Bexar county, Texas, on the twenty-seventh day of January, 1906, charging her with unlawfully engaging in the business and occupation and procuring assignments and transfers of wages not earned and not due and payable at the date of such assignment and transfer, without having first paid to the state of Texas the sum of five thousand dollars as an occupation tax. The information alleges that appellant had taken and purchased more than three assignments of unearned wages not due and payable during the month of January, 1906, and further alleges that said purchases and transfers of wages were not necessities, or for any purpose legalized under the act of April 15, 1905. In the trial of the case a jury was waived and the facts support the allegations in the information.

Appellant's first insistence is, that the act of the twenty-ninth legislature, page 207, which imposes said tax, is unconstitutional, because said act exempts from its provisions any person, firm or corporation taking, accepting, purchasing or procuring such assignments or transfers to pay or secure the purchase price for the necessities of life for the family of the assignor, or of the purchase price of a homestead of the assignor, or of improvements or repairs thereon, or for any

article necessary for the use of the assignor in the pursuit of his employment, or for the payment of life or accident insurance premiums, dues or assessments, where such assignments or transfers are made directly to the person, firm or corporation from whom such purchases are made, or to whom such premiums, dues or assessments are payable. The exception, as appellant insists, from its said provisions of said persons, firms or corporations, constituting a privileged class, being grossly discriminative, and not an equal and uniform tax in violation of article 8, sections 1 and 2 of the constitution of the state of Texas.

Section 1 of said act reads as follows: "Be it enacted by the legislature of the state of Texas: There is hereby imposed an annual occupation tax of five thousand dollars for state purposes upon every person who, in his own behalf or as agent for another, shall engage in ¹⁰⁷ the business of taking, purchasing or procuring assignments or transfers of wages not earned or not due and payable at the date of such assignment or transfer, whether such assignment or transfer is made absolutely, conditionally or as security for each separate county in which such person may engage in such business, either in his own behalf or as agent for another."

Section 2 provides that the commissioners' court of each county shall have the right to levy one-half of the state tax above stated, and authorizes incorporated cities or towns to also levy one-half of the state tax.

Section 3 reads as follows: "Any person shall be deemed to be engaged in the business referred to in section 1 of this act, who shall take, accept, purchase or procure, directly or indirectly, either in his own behalf or as the agent of another, more than three such assignments or transfers during any calendar month. Provided, that this act shall not apply to or impose a tax upon any person, firm or corporation, taking, accepting, purchasing or procuring such assignments or transfers to pay or secure the purchase price of the necessities of life for the family of the assignor or the purchase price of a homestead of the assignor, or of improvements or repairs thereon, or for any article necessary for the use of the assignor in the pursuit of his employer, or for the payment of life or accident insurance premiums, dues or assessments where such assignments or transfers are made directly to the person, firm or corporation from whom such purchases are made or to whom such premiums, dues or assessments are payable, or where such assignment made for any such purposes shall not be taken or accepted at a discount."

The first ground upon which appellant insists that said act is unconstitutional is that the proviso in same constitutes a privileged class, being grossly discriminative, and not an equal and uniform tax, and in violation of article 8, sections 1 and 2 of the constitution of the state of Texas. Section 1, and article 8 of the constitution, reads as follows: "Taxes shall be equal and uniform." Section 2, article 8 of the constitution, states that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." It will be seen that the proviso of the act above cited exempts from its provisions all dealers in the necessities of life, the seller of a homestead, or dealers in the necessities for the use of the assignor in his employment, all persons making repairs on homesteads, and all life and accident insurance companies. We think appellant's objection to this law is well taken. Suppose, as appellant in his able brief insists, a wage-earner's wife is ill; the physician advises an operation as absolutely necessary to save her life; he has no money, his salary is not yet due; the surgeon refuses his services until the money is paid, or guaranteed; the wage-earner has no property save his own wages not yet due. When he tries to sell his wages to procure money to save the wife of his bosom and the mother of his children, the act of April 15, 1905, designed for his protection (?) stares him in the face and says, "Thou shalt not." However, reverting to the proviso under consideration, ¹⁰⁸ the legislature may classify the subject of taxation, and these classifications may, as they will, be more or less arbitrary, but where the classification is made, all must be subjected to the payment of the tax imposed, who, by the existence of the facts upon which the classification is based, fall within it, unless exempted under some other constitutional provision. Here we have parties exempted from this tax if they take a transfer of the wages for necessities of life, purchase of a homestead, or improvements thereon, for any article necessary for the use of the assignor in the pursuit of his employment, or the payment of life or accident insurance premiums, etc., where such assignment or transfer was made direct to the person, firm or corporation, from whom such purchases are made, or to whom such premiums, dues or assessments are payable. What difference would it make to the wage-earner whether he transferred his wages directly or indirectly for these matters? Why should one be forced to pay this tax if he bought the wage-earner's right to future pay any more than for any services or property

that he might see fit to transfer his wages for? In fact, the whole act is so unconstitutional it is not necessary to discuss it. It is discriminative, it is unjust, it is unequal, and we so hold. A long line of authorities support the constitutional provision that the taxes must be equal and uniform. Some of them are as follows: Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758; Rainey v. State, 41 Tex. Cr. App. 254, 96 Am. St. Rep. 786, 53 S. W. 882; Ex parte Overstreet, 39 Tex. Cr. 474, 46 S. W. 825; Hoeftling v. San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; Ex parte Jones, 38 Tex. Cr. 482, 43 S. W. 513; Fahey v. State, 27 Tex. Cr. App. 146, 11 Am. St. Rep. 182, 11 S. W. 108; San Antonio etc. Ry. Co. v. Wilson (Tex. Civ. App.), 19 S. W. 910.

We accordingly hold, as stated, that the tax is discriminatory, unjust and invalid, because it puts a tax upon a class and exempts other classes equally amenable to the tax, and no legal or just reason could be assigned that they were not so amenable.

We furthermore think said act is unconstitutional in that it violates the fourteenth amendment to the constitution of the United States, in that it is in restraint of the freedom of trade, denies equality before the law, is a denial of the right of a citizen to act, and is class legislation. As aptly said by Judge Snyder in the case of State v. Goodwill, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621: "A person living under the protection of this government has the right to adopt and follow any lawful industrious pursuit not injurious to the community which he may see fit. And as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. Is not a man's wages or his time 'property'? If so, has he not the right under the constitution to sell and convey such property? If a law be passed that prohibits the purchase of his 'time' or labor, does it not abridge his right of contract? Does it not deprive him of selling what is his? ¹⁰⁹ Does it not follow that a prohibitive tax upon parties who would buy his labor deprives the laborer of the right to sell 'original foundation of other property'? The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression." What possible good could flow from a statute of the kind under consideration we are at a loss to know. To say that

a man working for wages, whatever the amount of the wages may be, can only sell his time for certain purposes, and if he does sell for those purposes not authorized by the statute, the party to whom he sells must pay a five thousand dollar tax to the state, is a ruthless invasion of the right of free contract, an abridgment of personal liberty and the right of property, since the laborer's muscle is all the property he has, in many instances, and an invasion of the constitution of this state and of the United States, and we so hold. Authorities supporting the last proposition, in addition to the one last cited, are the San Antonio etc. Ry. Co. v. Wilson (Tex. Civ. App.), 19 S. W. 910; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; Ritchie v. People, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79.

In passing upon these questions we wish to express our indebtedness to the able counsel who prepared the brief in this case. It is full of authorities and replete with arguments showing the unconstitutionality of the act in question.

For the reasons suggested, we hold that the act is unconstitutional, and the judgment is reversed and the prosecution ordered dismissed.

A Statute Imposing an Occupation Tax upon cotton, wool or hide buyers, but exempting from its operation merchants who pay a different occupation tax, is unconstitutional, as not being equal and uniform taxation: Rainey v. State, 41 Tex. Cr. 254, 96 Am. St. Rep. 786. And a statute exacting licenses from peddlers and hawkers, but exempting therefrom and from payment of the license fee every resident of the town having a place of business therein, owning and paying taxes to the amount of twenty-five dollars on his stock in trade, is unconstitutional: State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, and see the cases cited in the cross-reference note thereto. As to the constitutionality of statutes exempting veterans from the operation of license tax, see City of Laurens v. Anderson, 75 S. C. 62, 117 Am. St. Rep. 885.

JONES v. STATE.

[53 Tex. Cr. 131, 110 S. W. 741.]

HOMICIDE in Commission of Felony.—An Indictment for Murder Committed in the Perpetration of Burglary and Arson need not define and set out the constituent elements of the offenses of burglary and arson, nor allege what the defendant was doing at the time he committed the homicide, further than that the same was committed in the perpetration of arson and burglary. (p. 779.)

HOMICIDE in Commission of Felony.—In Instructing the Jury in a prosecution for murder committed in the perpetration of arson and burglary, the court is not required to give a detailed definition of burglary and arson. (pp. 779, 780.)

HOMICIDE.—An Instruction on Express Malice, Even if Erroneous, furnishes the defendant with no just cause of complaint where he has been acquitted of murder in the first degree. (p. 780.)

ALIBI—Sufficiency of a General Instruction.—The Defense of alibi is sufficiently embraced in a general charge to the effect that the defendant is presumed innocent until his guilt is established by competent evidence beyond a reasonable doubt, where no additional instruction is requested more explicitly amplifying the law. (pp. 780, 781.)

ALIBI—Necessity for Particular Instructions.—A conviction should not be reversed for the failure of the court particularly to charge on alibi, unless the action of the court was excepted to at the time, and a full and more particular submission of the issue of alibi sought. (p. 785.)

ALIBI—Absence of Special Charge.—A Case will not be Reversed for the mere failure of the court to charge on the subject of alibi, unless a special charge submitting this issue is requested or an exception reserved at the time. (p. 786.)

CRIMINAL LAW—Reversal for Technical Errors.—Article 723 of the Code of Criminal Procedure of Texas is a remedial statute, designed to prevent reversals for mere technical errors. (pp. 783-786.)

Uvalde Burns, for the appellant.

F. J. McCord, assistant attorney general, for the state.

135 **RAMSEY, J.** Appellant was convicted in the criminal district court of Harris county of murder in the second degree, and his punishment assessed at twenty-five years' confinement in the penitentiary.

Appellant was indicted for the murder of one Philip Preager. The indictment was in two counts, the second count charging, in substance, that appellant "did then and there unlawfully and fraudulently break and enter a house then and there situated, occupied and controlled by Jacob Preager and while in the perpetration, and in the attempt at the perpetration of burglary in said house, did then and there set fire to said house, and did then and there and thereby cause Philip Preager, who was then and there in said house, to be burnt by means of said fire; so that the said Philip Preager was killed by reason thereof and departed this life because of the injuries inflicted upon him by said fire, and so the grand jurors say, that the said Charles Jones did then and there with **136** malice aforethought kill said Philip Preager, by said means, and that said killing and murder was committed while the said Charles Jones was so engaged as aforesaid." On conviction counsel for appellant filed a motion in arrest of judgment which, in substance, suggested to the court that the judgment of conviction rendered should be arrested, for the reason that the indictment upon which appellant was tried did not put him upon notice of what he

was charged with, and that the same was too vague, uncertain and confounding in its allegations, and set forth no statutory crime. This same issue and question is also presented in appellant's motion for a new trial, and insistence is here made that the indictment is defective, in that it does not in terms set out the constituent elements of burglary and of arson. It is our judgment that this contention cannot be sustained. Article 711 of our Penal Code is as follows: "All murder committed by poison, starving, torture or with express malice, or committed in the perpetration or in the attempt at the perpetration of arson, rape, robbery or burglary, is murder in the first degree, and all murder not of the first degree is murder of the second degree."

This statute has been not infrequently considered and passed on by this court, and it has been held that where an indictment in the usual form charges murder, it charges all kinds or species of murder that could be committed by the means alleged, and if the party used the means and committed the homicide in the perpetration or in the attempt at the perpetration of arson, rape, robbery or burglary, all this may be proved without specific allegations, and a conviction be had therefor under such indictment: See *Tooney v. State*, 5 Tex. Cr. App. 163; *Roach v. State*, 8 Tex. Cr. App. 478; *Reyes v. State*, 10 Tex. Cr. App. 1; *Sharpe v. State*, 17 Tex. Cr. App. 486; *Mendez v. State*, 29 Tex. Cr. App. 608, 16 S. W. 766. It has also been held that, although an indictment charged the killing was with express malice aforethought, a conviction under it will not be disturbed, because the proof showed not only such malice, but also that the killing was done in the perpetration of burglary or robbery: *Mitchell v. State*, 1 Tex. Cr. App. 194; *Wilkins v. State*, 35 Tex. Cr. 525, 34 S. W. 627. Under this statute, it has also been held that when the indictment charges a murder committed in the perpetration or attempt at the perpetration of arson, rape, robbery or burglary, and though such murder is ipso facto murder in the first degree, it is characterized by malice aforethought as much as is murder committed upon express malice; and hence, since without malice aforethought no homicide can be murder, in all such cases it is essential that the indictment should allege that the killing was upon malice aforethought: *Pharr v. State*, 7 Tex. Cr. App. 472; *Johnson v. State*, 30 Tex. Cr. App. 419, 28 Am. St. Rep. 930, 17 S. W. 1070; *May v. State*, 33 Tex. Cr. 74, 24 S. W. 910; *King v. State*, 34 Tex. Cr. 228, 29 S. W. 1086. The question here presented by appellant is, that the indictment should

have defined and set out the constituent elements of burglary and arson. There is no authority supporting this contention. The statute does not so require, and it is worthy ¹³⁷ of note that the form laid down in White's Annotated Penal Code does no more than state that the murder was done while the person so charged was unlawfully engaged in the perpetration of arson, rape or burglary, as the case might be. It is sufficient, we think, for the indictment to have alleged, as it did in the different counts, that the murder was committed in the perpetration of arson, and in the second count, as stated, in the perpetration of burglary. In both counts of this indictment malice aforethought was expressly alleged, and taken altogether, it sufficiently advised appellant of the nature and character of the charge against him. It is not, therefore, necessary for the pleader to define with particularity the constituent elements of the offenses of burglary or arson, or what the defendant was doing at the time he committed the murder, further than that same was committed in the perpetration of arson and burglary.

It is contended, however, by appellant in his motion for a new trial that in any event the court should have in his charge defined arson and burglary. We think the court did this so far as was required. In that portion of the court's charge defining murder in the second degree we find the following instruction: "But if you should find and believe from the evidence, beyond a reasonable doubt, that in Harris county, Texas, and about the second day of July, A. D. 1907, that Jacob Preager occupied and controlled a house, and that the defendant, Charles Jones, broke and entered the same, with the intent to fraudulently take corporeal personal property, of value, then and there in said house and without the consent of said Jacob Preager; and you should further find and believe from the evidence beyond a reasonable doubt, that the defendant, Charles Jones, did, acting with implied malice aforethought, as that expression has been herein defined and explained, did, set fire to said house of Jacob Preager, and that by reason of said act of said defendant, Charles Jones, in setting fire to said house said Philip Preager was burned and died therefrom, and that said act of said defendant was reasonably calculated to kill said Philip Preager, then find said defendant guilty of murder in the second degree, and assess his punishment by confinement in the state penitentiary for any length of time not less than five years." In view of the fact that appellant was charged with murder committed in the perpetration of the crime of burglary, we

think the charge above quoted contained all the demands of the law, and that he (appellant) was without complaint that the court did not give a more detailed definition of the offense of burglary.

Complaint is also made of the court's charge in submitting express malice, on the ground, as claimed by counsel for appellant, that there is no evidence of express malice in the record. While we do not accede to this view, still, inasmuch as appellant was acquitted of murder in the first degree, the charge on express malice, even if erroneous, could furnish him with no just cause of complaint.

Again, it is contended the court should have charged on accidental burning and unintentional homicide. We do not think this issue is ¹³⁸ raised by the evidence. The entry and burglary of the house was shown to be premeditated, and that the cash drawer was rifled, and there is nothing, as we read the record, to even suggest that the burning of the house was accidental and not purposeful.

Again, it is contended that the court erred in not charging the jury on the subject of alibi. In this connection, it may be stated that the testimony of appellant distinctly raises the issue of alibi, and there was direct testimony to the effect that he was not present at the house at the time when the fire was discovered, and it is strongly asserted and suggested by this testimony that he (appellant) did not set fire to the house. On the other hand, the testimony of Mrs. Preager unequivocally and distinctly identifies him (appellant) as being in her room at the immediate time when the house was discovered to be on fire. While contradicted somewhat by one witness on this issue, her testimony of identification is positive and complete. In this state of the record the court gave the following charges: "If defendant did not break the house of the said Jacob Preager and set fire thereto, he would not be guilty of the offense charged, and if you so find, or if you have a reasonable doubt thereof, find him not guilty." Again, the court charged: "The defendant is presumed to be innocent until his guilt is established by legal evidence to your satisfaction beyond a reasonable doubt, and if you have a reasonable doubt of the defendant's guilt, find him not guilty." It is well settled in this state by repeated decisions of this court that the defense of alibi is sufficiently embraced in a general charge to the effect that a defendant is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, where no additional instruction is requested more explicitly amplifying the

law upon that subject: *Oxford v. State*, 32 Tex. Cr. 272, 22 S. W. 971; *Davis v. State*, 14 Tex. Cr. App. 645; *Ninnon v. State*, 17 Tex. Cr. App. 650; *McAfee v. State*, 17 Tex. Cr. App. 131; *Ayres v. State*, 21 Tex. Cr. App. 399, 17 S. W. 253; *Hunnicut v. State*, 18 Tex. Cr. App. 498, 51 Am. Rep. 330; *Quintana v. State*, 29 Tex. Cr. App. 401, 25 Am. St. Rep. 730, 16 S. W. 258. In this case the court not only gave the usual and proper charge on the subject of reasonable doubt, but in express terms instructed the jury that, if appellant did not break the house and set fire to it, or if they had a reasonable doubt as to whether he did so, they would find him not guilty. This was all that the court was required to do.

We have gone carefully over the facts of the case, and think same clearly point to defendant as being guilty of the murder of Philip Preager, and, believing there was no error committed on the trial of the case, the judgment of the court below is accordingly affirmed.

ON REHEARING.

RAMSEY, J. This case was by this court affirmed at the recent Dallas term, and is now before us on motion for rehearing.

¹³⁹ It is earnestly insisted by counsel for appellant that the court erred in holding that the trial court was not in error in failing to grant a motion for a new trial on the ground that the defense of alibi was not submitted in express terms to the jury, and in support of his motion we are referred to the cases of *Wilcher v. State*, 47 Tex. Cr. 301, 11 Tex. Ct. Rep. 520, 83 S. W. 304, *Allen v. State*, 45 Tex. Cr. 468, 8 Tex. Ct. Rep. 322, 76 S. W. 458, and *Bird v. State*, 48 Tex. Cr. 188, 13 Tex. Ct. Rep. 295, 87 S. W. 146. In the original opinion of this court in affirming the case it was stated: "It is well settled in this state by repeated decisions of this court that the defense of alibi is sufficiently embraced in a general charge to the effect that a defendant is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, where no additional instruction is requested more explicitly amplifying the law upon that subject." In this case, as stated in the original opinion, not only did the court below charge the jury the doctrine of reasonable doubt, but gave also the following charge: "If defendant did not break the house of the said Jacob Preager and set fire thereto, he would not be guilty of the offense charged, and if you so find, or if you have a reasonable doubt

thereof, find him not guilty." In the case of *Oxford v. State*, 32 Tex. Cr. 272, 22 S. W. 971, this court, speaking through Judge Simkins, said: "The court did not err in failing to charge on alibi. It was not an issue in the case, and no charge was requested on such a defense, nor was there an exception to the failure to charge thereon. It is settled in this court that such a defense is sufficiently embraced in the general charge that a defendant is presumed by law to be innocent until his guilt is established by competent evidence, beyond a reasonable doubt, and if such a charge is desired, it must be requested." In the case of *Quintana v. State*, 29 Tex. Cr. App. 401, 25 Am. St. Rep. 730, 16 S. W. 258, Judge Davidson, of this court, says: "But the omission of the trial court to charge with reference to alibi is not such error as will, ordinarily, cause a reversal of the conviction, unless the charge be excepted to because of such omission, or unless special instruction upon that subject be requested and refused." In the case of *Ayres v. State*, 21 Tex. Cr. App. 399, 17 S. W. 253, the court say: "Unless requested to do so, the trial judge is not required to charge specially upon the defense of alibi. It is ordinarily a defense sufficiently embraced in the general charge that a defendant is by law presumed innocent until his guilt is established by competent evidence beyond a reasonable doubt. In *State v. Reed*, 62 Iowa, 40, 17 N. W. 150, it is held that alibi is not a defense within the accurate meaning of that word, but a mere fact shown in rebuttal of the state's evidence, and it does not, therefore, demand a specific instruction from the court." In the case of *Davis v. State*, 14 Tex. Cr. App. 645, Judge Willson, speaking for the court, says: "Another objection made to the charge is, that it fails to instruct the jury as to the rules of law applicable to the defense of alibi. We are not aware of any statute or decision which requires the trial judge to instruct the jury specifically upon this defense when not requested to do so. It is sufficiently embraced, we think, in the general ¹⁴⁰ charge that the defendant is presumed by law to be innocent until his guilt is established by competent evidence beyond a reasonable doubt." Again, in the case of *Rider v. State*, 26 Tex. Cr. App. 324, 9 S. W. 688, it is stated: "If an alibi had been the only defense, then, perhaps, the court should have charged specifically with reference to it. Where it is not the sole defense, it is not necessary that the court should charge specially upon it, unless requested to do so, and the omission in the charge upon the subject in such a case will not be error, unless the charge is

specifically excepted to upon that ground." It will be observed that the cases cited above uniformly lay down the rule that it is not reversible error for the trial court to fail to specifically submit the issue of alibi in the absence of a requested instruction so to do, or in the absence of an exception made at the time of the court's failure so to do. In this case, not only did the court give an instruction upon the subject of reasonable doubt, but, as stated above, in express terms, told the jury that if appellant did not break the house and set fire to it, or if they had a reasonable doubt that he did not so do, they would find him not guilty.

Appellant, however, insists that since the enactment of article 723 of the Code of Criminal Procedure, the rule laid down herein is no longer the law of this state. Article 723, approved March 12, 1897, is as follows: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, which error shall be excepted to at the time of the trial, or on motion for a new trial." The article as it theretofore stood was as follows: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall be reversed; provided, the error is excepted to at the time of the trial." The cases cited in the original opinion were delivered before the adoption of article 723 as it now stands. That article was in the nature of remedial legislation, and its purpose was to prevent a reversal of criminal cases for mere matters of form where there had been no invasion of any substantial right of a defendant, and to require, in matters of procedure, that counsel for defendants should give the court below an opportunity to correct any error into which by inadvertence or otherwise they had fallen. It certainly was never intended that article 723 of the Code of Criminal Procedure would institute a more rigorous or technical rule than had existed aforetime, and we cannot see any reason why, in respect to the matter complained of, a case should be reversed that would not have been the subject of reversal under the law as it stood before the adoption of the article in question. It must be confessed that in tendency, if not in effect, the decisions cited by appellant antagonize, and are out of harmony with, the decisions herein rendered, and with the earlier decisions of this

court. In the case of *Allen v. State*, 45 Tex. Cr. 468, 8 Tex. Ct. Rep. 322, 76 S. W. 458, the case was ¹⁴¹ reversed because the court failed to charge on alibi. In that case it appears that counsel for appellant claimed that they excepted to the failure of the court to so charge at the time, and in his motion for a new trial refers to bill of exceptions taken at the time. The opinion discloses the fact that there was an affidavit filed in the case by counsel for appellant to the effect, in substance, that he presented to the court his bills of exception Nos. 1 and 2, which raised the question of the failure of the court to charge on alibi, to the judge during the term; that the judge, without the consent of appellant, took said bills of exception and kept them until after court adjourned, and then carried them with him to Knox county, and sometime thereafter returned them to the clerk, and they were filed by him on July 21st. However, it appears that the court certified that he refused said bills, because exception was not made and the attention of the court was not called to the objection until after the jury returned their verdict. In this state of the case Judge Henderson says: "The question presented is, Does this procedure sufficiently raise the question as to the failure of the judge to give a charge on alibi? We hold that it does. Unquestionably, when appellant filed his motion for new trial he referred to his two bills of exception Nos. 1 and 2, which set up the error of the court in failing to charge on alibi. These bills were in the hands of the judge at the time, and appellant evidently believed, and had a right to believe, that they would be filed during the term in some shape, either with corrections or explanations by the judge. The statement of the judge that he refused them, giving his reasons that appellant did not call his attention to the failure of the court to charge on alibi until after the jury had returned their verdict, was really tantamount to an explanation by the judge that, in his opinion, the exceptions came too late. If it be conceded that the exceptions did come too late, still the motion for new trial was presented in time and referred to said bills, which called the court's attention to the failure of the court to charge the law, but which, in the opinion of the court, came too late for that purpose. We hold that we can look to the refused bills in order to determine the character of appellant's objections to the court's charge, as presented in his motion for new trial. It is accordingly the opinion of the court that the exception in the motion for new trial to the court's charge, thus explained, sufficiently raises the question of failure on

the part of the court to charge on the question of alibi; and for this failure the judgment is reversed and the cause remanded." It is therefore, we think, obvious that in effect these exceptions, though refused, were treated for all practical purposes as having called the attention of the court to his failure to charge on the subject of alibi. In the case of *Wilcher v. State*, 47 Tex. Cr. 301, 11 Tex. Ct. Rep. 520, 83 S. W. 304, it was held by this court that a failure to charge upon the issue of alibi when raised by the testimony is error, and ground of reversal under article 723, and it is stated: "Before the enactment of article 723, Code of Criminal Procedure, it was held that it was necessary to request a charge or except to the court's failure to ¹⁴² charge on alibi by bill of exceptions," and reference is made to the case of *Quintana v. State*, 29 Tex. Cr. App. 401, 25 Am. St. Rep. 730, 16 S. W. 258. Again, in the case of *Bird v. State*, 48 Tex. Cr. 188, 13 Tex. Ct. Rep. 295, 87 S. W. 146, it is said that the court's charge upon another trial should give the law with reference to alibi fully. That the cases last cited, and possibly others, do conflict with the earlier rule referred to in the original opinion is obvious by comparison, and will be readily seen from the statement we have made. Neither of these cases cited above, however, except the *Wilcher* case, refer to any of the older decisions of the court, nor do they in terms overrule them. We believe, as stated in the original opinion, that the true and correct doctrine is that where the defense of alibi arises in a case, and the court submits the issue of defendant's guilt and charges the doctrine of reasonable doubt, that this includes of necessity a finding by the jury on the issue as to whether the defendant was present and in fact committed the crime charged, and that a case ought not to be reversed for the failure of the court to particularly charge on alibi, unless the action of the court was excepted to at the time, and a full and more particular submission of the issue of alibi sought. This was the rule in Texas time out of mind, and so laid down repeatedly in an unbroken line of decisions until the case of *Allen v. State*, 45 Tex. Cr. 468, 8 Tex. Ct. Rep. 322, 76 S. W. 458. The only reason given in any of the cases why a different rule should be instituted is based upon construction and consideration of article 723 of the Code of Criminal Procedure. As stated, that was a remedial statute designed to prevent reversals for mere technical errors, and to hold, as seems to have been done in the cases last cited, that a reversal must follow for the failure

of the court to charge on alibi, solely because the issue was raised on motion for a new trial is, in effect, to nullify the statute and make our last statute worse than the first. This we do not believe was the intention of the legislature, nor do we believe that this construction is correct. So believing, we hereby in express terms overrule the cases of *Allen v. State*, 45 Tex. Cr. 468, 8 Tex. Ct. Rep. 322, 76 S. W. 458, *Wilcher v. State*, 47 Tex. Cr. 301, 11 Tex. Ct. Rep. 520, 83 S. W. 304, and *Bird v. State*, 48 Tex. Cr. 188, 13 Tex. Ct. Rep. 295, 87 S. W. 146, cited above, and reaffirm and redeclare the old rule which so long existed in this state that a case will not be reversed for the mere failure of the court to charge on the subject of alibi, unless a special charge submitting this issue is requested or an exception reserved at the time. We are the more constrained to do so in this case for the reason that the charge of the court herein in effect submitted the doctrine and issue of alibi, and that same was reasonably included in the charge herein copied. In any event, the failure of the court to charge on the law of alibi was not calculated to injure the appellant.

The motion for rehearing is, therefore, overruled.

Homicide in the Commission of a Felony is discussed in the note to *Johnson v. State*, 90 Am. St. Rep. 578. That one who commits a homicide while attempting robbery or burglary may be guilty of murder in the first degree, see *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582; *Andrews v. People*, 33 Colo. 193, 108 Am. St. Rep. 76.

Instructions of the Court on the Defense of Alibi should be given when there is any evidence to support it, but the omission to give such instructions will not cause a reversal, unless a special instruction upon the subject was asked and refused, or the omission of the court to charge upon it was excepted to at the time: *Quintana v. State*, 29 Tex. App. 401, 25 Am. St. Rep. 730. See, also, *Legere v. State*, 111 Tenn. 368, 102 Am. St. Rep. 781.

THOMAS v. STATE.

[53 Tex. Cr. 272, 109 S. W. 155.]

HOMICIDE—Accidental Killing of Third Person.—One who with express malice shoots at a person with intention to kill him and accidentally kills a third person is guilty of murder in the second degree. (pp. 788-791.)

HOMICIDE—Instruction as to Degree of Offense.—Where the evidence in a homicide trial shows on the part of the state an assassination, and on the part of the defendant an accidental killing in self-

defense against a third person, an instruction is not erroneous which tells the jury that if they find from the evidence that the killing was not upon express malice, or if they have a reasonable doubt as to whether the killing was upon express malice, but do not find that it was unlawful or intentional, they should find the defendant guilty of murder in the second degree. (p. 789.)

Rolston & Ward, for the appellant.

F. J. McCord, assistant attorney general, for the state.

273 RAMSEY, J. In this case appellant was charged in the district court of Camp county with the murder of one Mary Ivey, alleged to have been committed in said county on the fifteenth day of July, 1907. He was tried on the sixteenth day of December, 1907, and was found guilty of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

The motion for a new trial raises two questions only, both of which relate to supposed errors in the charge of the court. The facts show, briefly, that on the evening of the 15th of July, 1907, the state's witness, Will Jingles, left the house of Nelse Thomas, in company with this woman, Mary Ivey. When they left the house appellant was sitting on the gallery talking to old man Thomas. The testimony further shows that this woman, Mary Ivey, had sometime prior thereto been appellant's mistress, or at least he was the father of her child born out of wedlock. It was proven by more than one witness that a very short time before the killing, appellant had stated that if Mary Ivey and Jingles left the house together he would kill them both. They did soon after this leave the house together, and were some one hundred yards or more from the house when the killing occurred. The witness Jingles testified that he and Mary had gotten something like one hundred yards from Thomas' house when he heard a pistol fire, and heard the deceased scream and fall. That before this he had not been aware of the presence of appellant, and was not apprehending any danger; that when the pistol fired he looked around and saw appellant, who at once fired on him, shooting two or three times, wounding him in the arm, and one ball grazing his stomach and the other passing through his hat. The deceased was shot in the back and died almost instantly. There was evidence of powder burns on her clothing, showing that the pistol was held at the time she was shot very near her person. The theory of the defense was, that appellant went down the road following Jingles and the deceased, for the purpose **274** of talking

with deceased; that when he caught up with them he called deceased off, and was standing and talking to her when the witness, Will Jingles, attacked him with a knife, and he shot at him in self-defense, and that the killing of Mary Ivey was accidental. All these theories and defenses were submitted by the court. The court also submitted murder of the first degree, murder of the second degree and manslaughter. It seems to be well established in this state that, where a defendant who, in attempting to kill another on express malice, accidentally kills a third party, the offense is murder in the second degree: *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Taylor v. State*, 3 Tex. Cr. App. 387; *McConnell v. State*, 13 Tex. Cr. App. 390; *Musick v. State*, 21 Tex. Cr. App. 69, 18 S. W. 95; *Breedlove v. State*, 26 Tex. Cr. App. 445, 9 S. W. 768. This rule was distinctly given in the court's charge. With this statement, we will now consider the matters upon which appellant's counsel rely for a reversal.

The first matter complained of is the supposed error in the following portion of the court's charge: "Now, if you shall believe from the evidence beyond a reasonable doubt that the defendant unlawfully shot Mary Ivey, intending to kill her, and that he did then and there by shooting her with a pistol, kill said Mary Ivey, in Camp county, Texas, on or about the fifteenth day of July, A. D. 1907, and if you further find that such killing was not upon express malice, as hereinbefore defined, or if you have a reasonable doubt as to whether such killing was upon express malice, then you will find him guilty of murder in the second degree." It is claimed that this charge is erroneous, in that the jury were required to find affirmatively that the killing was not upon express malice before they could find the defendant guilty of murder in the second degree; that the charge in effect was an instruction that they must find by a preponderance of the evidence that the killing was not upon express malice, before they would be justified in finding that he was guilty of murder in the second degree, and that said charge is an infringement on the doctrine of reasonable doubt, and was calculated to mislead the jury to the injury of appellant, and in this connection they submit the following proposition: "The defendant is entitled to the benefit of the reasonable doubt throughout the entire case, and in order to have the benefit of the lower grade of homicide, the law does not require that the jury shall believe affirmatively the facts that are necessary to reduce the killing to the lower grade of the homicide. But before the conviction can be for the higher grade, the evi-

dence must satisfy the minds of the jury beyond a reasonable doubt that the killing was of the higher grade, and any failure of the evidence to so satisfy them entitled the defendant to the finding of the lower grade of the offense." In support of this proposition, and as authority for their contention that the charge of the court was erroneous and hurtful, they refer to the cases of *Morgan v. State*, 16 Tex. Cr. App. 593; *White v. State*, 23 Tex. Cr. App. 154, 3 S. W. 710; *Casey v. State*, 14 Tex. Ct. Rep. 818. We have carefully examined these ²⁷⁵ cases. In the case of *Morgan v. State*, 16 Tex. App. 593, the charge considered was as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree." This charge was held erroneous in that it affirmed in substance: "That when an unlawful killing is shown, the homicide is presumed by law to be upon malice, and in order to meet and overcome this legal presumption, the evidence—circumstances—must make it evident that the killing was justifiable, or so mitigated as to reduce the offense below murder in the second degree." In construing this charge, Judge Hurt holds that this language infringed the doctrine of reasonable doubt. We think, however, that this case is not in point here, and has little, if any, analogy or bearing upon the charge complained of. The charge in the *Morgan* case was clearly wrong, because, in substance, it required the jury to find defendant guilty unless the proof was evident that he was justifiable. In this case the court tells the jury that if they find from the evidence that the killing was not upon express malice, or if they have a reasonable doubt as to whether such killing was upon express malice, but do find that it was unlawful and intentional, that they would find him guilty of murder in the second degree. We think this charge is sufficient, and so far from being condemned in the case of *White v. State*, 23 Tex. Cr. App. 154, 3 S. W. 710, that it substantially follows the rule laid down in that case.

Again, appellant complains of the following portion of the court's charge: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, Hardee Thomas, did in Camp county, Texas, on or about the fifteenth day of July, A. D. 1907, with express malice aforethought, as hereinafter defined, with a pistol, being a deadly weapon, and with a

sedate and deliberate mind, and formed design to kill William Jingles, did unlawfully shoot at William Jingles, and that in his effort to so shoot said William Jingles, if you find he did, he accidentally and unintentionally shot and killed said Mary Ivey, you will find him guilty of murder in the second degree." It is claimed that this charge is erroneous, in that the jury were required to find beyond a reasonable doubt that the defendant accidentally and unintentionally shot and killed Mary Ivey while shooting at William Jingles. It is claimed that the jury should have been told, in this connection, that in the event they failed to believe beyond a reasonable doubt that the defendant intentionally shot and killed Mary Ivey on his malice aforethought, then they would be bound to find him guilty of murder in the second degree, and that if they had a reasonable doubt as to whether he intentionally shot and killed Mary Ivey or accidentally shot and killed her, that they would be bound to give the defendant the benefit of such doubt, and find that he accidentally shot her, and find him guilty of no higher grade of homicide than murder in the second degree, ²⁷⁶ the claim being that said charge shifted the burden of proof and changed the rule of reasonable doubt from the defendant to the state, and required the jury to find beyond a reasonable doubt that the shooting of Mary Ivey was accidental before they would be justified in giving him the benefit of the accidental feature of the case. The entire charge, in this connection, was as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, Hardee Thomas, did in Camp county, Texas, on or about July 17, 1907, with express malice aforethought as hereinbefore defined, with a pistol, being a deadly weapon, and with a sedate and deliberate mind and formed design to kill William Jingles did unlawfully shoot at William Jingles, and that in his effort to so shoot William Jingles, if you find he did, he accidentally and unintentionally shot and killed Mary Ivey, you will find him guilty of murder of the second degree and assess the proper punishment therefor. Or if you shall believe from the evidence that defendant shot at William Jingles with a pistol, same being a weapon reasonably calculated to inflict death or some serious bodily injury from the mode and manner of its use, and that he intended thereby to kill said Jingles, and that in his attempt to so shoot William Jingles, if he did, he unintentionally and accidentally shot and killed Mary Ivey, then if you shall find beyond a reasonable doubt that when he shot at Jingles he was not act-

ing in his self-defense under the law of justifiable homicide hereinafter charged, and if you further so find that when he so shot at Jingles, if he did, his mind was not by some adequate cause aroused to such a degree of anger, rage, sudden resentment or terror rendering it incapable of cool reflection, hereinafter explained under the charge upon manslaughter, then you will find him guilty of murder in the second degree, and assess the proper punishment therefor." Besides the above-quoted charge, the court submitted the issue of manslaughter to the jury by appropriate instruction, and the law of self-defense, both upon actual and apparent danger in a manner not complained of in the charge. In addition to this, the court further instructed the jury as follows: "If you find beyond a reasonable doubt that the defendant is guilty of murder, but you have a reasonable doubt as to whether he is guilty of murder in the first or murder in the second degree, you will give him the benefit of such doubt, and convict him of no higher offense than murder in the second degree, or if you find that beyond a reasonable doubt that the defendant is guilty of murder in the second degree or manslaughter, but you have a reasonable doubt as to whether he is guilty of one or the other of these offenses, you will give him the benefit of the doubt and convict him of no higher offense than manslaughter." We think that the charge complained of, taken in connection with the other portions of the charge of the court quoted and referred to, was not subject to the objections and criticisms made by counsel for appellant. Again, it is apparent that this charge had, and could have had, no effect on the jury, for the reason that, if under any charge given by the court they believed that the shooting of Mary Ivey was unintentional ²⁷⁷ or accidental, they could have found him guilty of no higher offense than murder in the second degree, even though they may have believed that in shooting at the witness, William Jingles, he was acting with malice aforethought. The charge complained of has been approved by this court, and the doctrine often announced that where one party with express malice shoots another with deliberate intention to kill him, and kills a third innocent party accidentally, he is guilty of murder in the second degree.

We think the charge of the court was not subject to the criticism made by counsel for appellant, and there being no other error assigned, and finding none in the record, the judgment of the court below is affirmed.

Homicide in Accidentally Killing a Third Person while shooting at another is discussed in the note to *Johnson v. State*, 90 Am. St. Rep. 575. If a person shoots at one person with intent to kill him, but accidentally shoot another, he cannot be convicted of an assault with intent to kill the latter: *State v. Williamson*, 203 Mo. 591, 120 Am. St. Rep. 678.

YOUNG v. STATE.

[53 Tex. Cr. 416, 110 S. W. 445.]

SELF-DEFENSE.—If One Provokes a Difficulty in order to have a pretext to kill an adversary or inflict upon him serious bodily injury, he cannot justify such killing when subsequently it becomes necessary in order to save his own life. (p. 795.)

SELF-DEFENSE.—If One Provokes a Difficulty in order to have a pretext to inflict some unlawful injury upon an adversary, but not for the purpose of killing or seriously injuring him, he cannot thereafter justify such killing on the ground of self-defense, but the offense will ordinarily be only manslaughter. (p. 795.)

SELF-DEFENSE.—Where One, with No Intention to Provoke a Difficulty, does an act which induces another to assault him, he does not thereby lose his right of self-defense. (p. 795.)

SELF-DEFENSE.—Provoking Attack.—The Mere Fact that One does a Wrongful or Inconsiderate Act which provokes another to attack him does not deprive him of the right of self-defense. (p. 796.)

SELF-DEFENSE.—Provoking Difficulty.—An Instruction to the Jury in a homicide case that if what was said or done by the defendant was reasonably calculated to and did provoke the deceased to attack him, that he could not justify killing him, though, as a matter of fact, he did not intend to provoke the attack, is erroneous. (p. 797.)

HOMICIDE.—Intoxication not Amounting to temporary insanity is not admissible in evidence, even for the purpose of determining the degree of murder. (p. 799.)

Potter, Culp & Giddings, for the appellant.

F. J. McCord, assistant attorney general, and R. E. Thomason, for the state.

417 RAMSEY, J. The appellant was indicted in the district court of Cooke county for the murder of Jesse Jordan. He was, on trial, convicted of the offense of manslaughter, and his punishment assessed at confinement in the state penitentiary for the period of two years and six months.

There are substantially only two questions presented on the appeal, in respect to both of which we have been aided by able briefs both by counsel for appellant and for the state. The following condensed statement taken from the brief of

the appellant will be sufficient to illustrate the issues and questions involved in the appeal: The appellant was a youth less than twenty-one years of age. The deceased was a young man with a family living as a tenant on the farm of appellant's father. About 4 or 5 o'clock in the afternoon of the killing appellant went to the house of the deceased. He carried with him a bottle of whisky and a pistol. The wife of the deceased was away from home. The parties soon got to drinking and during the time appellant fired off his pistol. While at deceased's home, the testimony is that appellant became very much intoxicated; he and deceased got into a scuffle, and deceased, who seems to have been the larger man, got appellant down but did not injure him and made him promise to go home. In some way, during the scuffle appellant got both his dress coat and overcoat pulled off and also lost his hat. About dark the deceased's brother, who had come upon the scene, attempted to take appellant over to another brother's house near by, in order, as he says, to keep down trouble between the parties. Shortly after leaving deceased's house appellant threw a stick at deceased but did not hit him. Appellant followed deceased and when about a hundred yards from the house of his brother, appellant, waving his clenched hand above his head, said: "Run up against this," holding up his hand. Some of the parties testify they thought appellant ⁴¹⁸ had a club in his hand. Deceased's brother turned him loose and he and appellant ran together and deceased got appellant down. His brother pulled him off of appellant and thought at the time that deceased had cut appellant. It was found, however, that appellant had cut deceased on the neck, the cut being rather shallow but deep enough at one place to cut the jugular vein. Appellant managed to get home, but seems to have been rather too drunk to have given a very intelligent account of what had happened; had blood all over him, his clothes were badly torn, and he had a slight cut across the hand. The testimony of appellant given on a former trial was offered by the state in evidence, in which appellant testified that he was too drunk to recollect what happened. His testimony discloses, however, that he did remember going to deceased's house and that they got to drinking. He remembered, too, that deceased had him down and, as he says, was beating him over the head. His testimony tended to show that he was at the time of the killing, or soon thereafter, in a decided state of intoxication.

1. The first complaint and assignment of error made is that the court erred in the nineteenth paragraph of this

charge to the jury in respect to the issue of provoking a difficulty. That paragraph of the court's charge is as follows:

"If you find that the defendant killed Jesse Jordan by cutting him with a knife, yet if you further find that just before such cutting the defendant, by words or actions or by both, calculated to do so, provoked said Jordan to attack him, in order to have a pretext to kill said Jordan or inflict upon him a serious bodily injury, and if in consequence thereof he killed said Jordan, then the defendant cannot justify such killing on the ground of self-defense, but it would be murder, although you should find that it became necessary for defendant to kill said Jordan in order to save his own life.

"But if you find that defendant provoked such difficulty in order to have a pretext to inflict upon said Jordan some unlawful injury, but not for the purpose of killing him or inflicting upon him a serious bodily injury, then he would not be justified in said killing, although it may have been necessary for him to do the killing in order to protect his own life, but in that event he would be guilty of manslaughter.

"If you find that the defendant, by words or acts, or both, did provoke said Jordan to attack him, and that such words or acts, or both, were reasonably calculated to and did provoke said Jordan to attack him, and that in consequence thereof defendant killed said Jordan, then the defendant cannot justify such killing on the ground of self-defense, but he would be guilty of manslaughter, although you may find that, in fact, he did not intend to provoke said Jordan to make an attack upon him." To correct the supposed error in the last paragraph of the court's charge quoted above, the following special instruction was requested: "No mere words that may have been used by defendant prior to the difficulty which resulted in the death of deceased would justify deceased in attacking defendant unless such words upon the part of defendant were reasonably calculated and intended by defendant to produce ⁴¹⁹ in the mind of deceased a reasonable fear of injury, or to provoke the deceased into attacking defendant. And you are therefore instructed if defendant killed the deceased while defending himself from attack by the deceased, then you will find defendant not guilty, even though deceased was provoked by words used by defendant at the time unless defendant used them with the intent stated above."

No complaint is made as to the first two clauses or paragraphs of the court's charge quoted above. It is, however,

contended that it cannot be the law that an intentional and an unintentional act amounts to the same grade of crime and calls for the same character of punishment. Appellant's contention is that it is beyond reason for the court to tell the jury in one clause of an instruction that if the defendant intentionally provoked the difficulty for the purpose of having a difficulty with the defendant (though not to kill him or inflict serious bodily harm on him), that it would be manslaughter if he killed his adversary, and in the next clause tell them that if by acts or words appellant provoked the difficulty without intending to provoke it, and without any intention of having a difficulty with the deceased, and that deceased attacked him and he killed him in self-defense in repelling the attack, then such killing would also be manslaughter. These two propositions, it is clear, were inconsistent, and are illogical and that the latter is not the law. We think, in substance, that the contention and claim of the appellant must be sustained. It is not to be denied that there is some uncertainty, if not confusion, in the books in respect to the doctrine of provoking a difficulty. It is undoubtedly the law of this state that if one provokes a difficulty in order to have a pretext to kill an adversary or inflict upon him serious bodily injury, he cannot justify such killing on the ground of self-defense, although it may subsequently be necessary for him to kill his adversary in order to save his own life. It is the law, too, that if one provokes a difficulty intentionally, in order to have a pretext to inflict some unlawful injury upon him, but not for the purpose of killing him, or inflicting upon him some serious bodily injury, he cannot thereafter justify such killing on the ground of self-defense, but that offense will not be murder, but will ordinarily be manslaughter. Where, however, with no intention of provoking a difficulty to kill or do other unlawful violence, but it is found that the acts and conduct of an appellant, though not intended by him so to do, had the effect of inducing his adversary to assault him, it cannot be held that he thereby loses his right of self-defense, or that such right is in any respect impaired. This doctrine seems to be fully recognized and to have been expressly decided in the case of *Franklin v. State*, 34 Tex. Cr. 286, 30 S. W. 231. In that case Judge Hurt, speaking for the court, says: "Again, and as we have already said, one may be guilty of a wrongful act, which produces the necessity to kill, and be guilty of no offense, though he take life. If the act, though wrongful, be not illegal, and be not intended to provoke a difficulty,

nor reasonably calculated to produce the occasion and necessity for taking life, and the party kill to save himself, he is 420 justified. As in this case, if the defendant was at the house of the deceased for the purpose of securing a place to lodge, and while awaiting the husband's return, with the permission of the wife, lay upon the bed, and deceased finding him there attacked him, and defendant, to save his own life, killed deceased, he would be guilty of no offense; he would be justified. His acts, though imprudent, were not illegal, nor was he guilty of any moral wrong. He may not have been entirely blameless, and such acts may have been the occasion of the attack upon him, but from the defendant's standpoint, under this state of case, they were not reasonably calculated to produce that result, and not being so intended, his right of self-defense remains complete." The earlier report of the same case—30 Tex. Cr. App. 628, 18 S. W. 468—seems to lay down the distinction that if the act of appellant, which, in fact, provoked the difficulty, is in itself a violation of the law, and was reasonably calculated to produce the occasion of the killing, then such defendant's right of self-defense would be abridged without reference to his intent. The right of self-defense is sometimes said to be an inalienable right, nor should it ever be abridged, except and unless it is so done to prevent it being made a means of offense, or, as it is sometimes stated, a weapon of offense and not of defense. We think that it is illogical to say that the mere fact that some act or declaration, though not intended to have such effect, does bring on a difficulty or provoke an attack, that whether so intended or not, this should in every case abridge the right of self-defense, nor that such act should have this effect except upon the principle and in case the original act was unlawful. The mere fact that it was wrongful or inconsiderate should not have the effect to deprive a citizen of Texas of his right of self-defense. This rule seems to have been clearly recognized in the case of *Winters v. State*, 37 Tex. Cr. 582, 40 S. W. 303. The charge of the court in that case was criticised and held to be erroneous, for the reason that it "leaves out of view altogether the character or wrongful act, or the intent which may have actuated the defendant in doing the act. As an abstract proposition, it is true that a party cannot avail himself of a necessity which he has knowingly brought upon himself; and if a party wrongfully produce a condition of things, wherein it becomes necessary for his safety that he should take life or do serious bodily injury, then the law

imputes to him his own wrong. But the charge fails to inform the jury what wrongful acts deprive a party of the right of self-defense." Proceeding further, the court say: "The character of provocation in connection with the intent should have been defined and set out in a separate and affirmative charge given on behalf of the state." The appellant's contention is even more directly sustained by the opinion of the court in *Vann v. State*, 45 Tex. Cr. 434, 108 Am. St. Rep. 961, 77 S. W. 813. In that case, Judge Davidson, speaking for the court, says: "In every charge on self-defense, appellant's right of self-defense was limited by a charge on provoking the difficulty. The charge is further criticised because it nowhere informs the jury what is necessary to constitute provoking the ⁴²¹ difficulty. The language is, as above quoted, 'If the jury do not believe the defendant provoked the difficulty.' Under all the authorities, and under the law, in order to constitute provoking the difficulty, there must be something said or done by the accused with intent to produce the occasion or bring about the difficulty which makes him responsible criminally. The jury are nowhere told, in regard to the law of provoking the difficulty, that defendant must have said or done something which produced the occasion, or brought about and provoked the difficulty." Again, in *Garza v. State*, 48 Tex. Cr. 382, 88 S. W. 231, the same principle is expressly recognized. In that case the court say: "The charge on provoking the difficulty is further criticised by appellant on the ground that it fails to inform the jury that it was required Pedro must have used some language or done some act with intent to provoke a difficulty before he and those with him would be deprived of the right of self-defense. The charge of the court seems merely to cut off the right of self-defense if Pedro and those with him sought the occasion regardless of the doing of some act calculated to bring the difficulty about. This character of charge has been frequently condemned: *Airhart v. State*, 40 Tex. Cr. 470, 76 Am. St. Rep. 736, 51 S. W. 214; *Winters v. State*, 37 Tex. Cr. 582, 40 S. W. 303; *McCandless v. State*, 42 Tex. Cr. 58, 57 S. W. 672." The charge in this case is probably more subject to criticism than any of the charges reviewed in the foregoing cases, for the reason that the jury are in terms instructed that if what was said or done by appellant was reasonably calculated to and did provoke deceased to attack him, that he could not justify such killing, though, as a matter of fact, he did not intend to provoke deceased to make the attack upon him. We do not desire

to be understood, however, as holding that the special charge requested should have been given. In fact, we think that it should not have been given. It contains some matters that were not proper to be given in charge to the jury.

2. The next complaint of the court's charge is that the court erred in the twentieth paragraph of his charge to the jury wherein the jury were instructed as follows: "You are charged that intoxication produced by the voluntary recent use of ardent spirits constitutes no excuse for the commission of crime. However, in a case where the defendant is accused of murder, as in the case before you, you may, if you find that defendant killed Jess Jordan, take into consideration the mental condition of the defendant for the purpose of determining the degree of murder, if you should find him guilty of murder." Article 41 of the Penal Code is as follows: "Neither intoxication nor temporary insanity of mind, produced by the voluntary recent use of ardent spirits, shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime, but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which he is being tried, and in case of murder, the purpose of determining the degree of murder ⁴²² of which the defendant may be found guilty. It shall be the duty of the several district and county judges of this state, in any criminal prosecution pending before them, where temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was brought about by the immoderate use of intoxicating liquors, to charge the jury in accordance with the provisions of this article." It has been uniformly held since the adoption of this statute that intoxication which does not amount to or produce temporary insanity is not admissible in evidence even for the purpose of determining the degree of murder: *Clore v. State*, 26 Tex. Cr. App. 624, 10 S. W. 242; *Kelly v. State*, 31 Tex. Cr. 216, 20 S. W. 357; *Gonzales v. State*, 31 Tex. Cr. 508, 21 S. W. 253; *Delgado v. State*, 34 Tex. Cr. 157, 29 S. W. 1070. Undoubtedly, if the court was required to charge the law with reference to temporary insanity, he should have instructed the jury that not only should they take into consideration the mental condition of the defendant for the purpose of determining the degree of murder, if they should find him guilty of murder, but that they might consider such temporary insanity in mitigation of the penalty attached to

the offense for which he was being tried. It may, however, in our opinion, well be doubted whether, under the facts of this case, the issue of temporary insanity was in the case. Appellant's testimony given on the former trial demonstrates that he knew practically everything that transpired up to and including the time of the killing. There was no effort to prove that he was incapable of distinguishing right from wrong. That he was intoxicated to some extent at the time of the killing is incontestably proven, but there is, as we conceive, a wide difference between a mere drunkenness and insanity produced therefrom. The law is, as we conceive, that mere intoxication which is not insanity is not to be regarded by the jury as affecting either the grade of the offense or the punishment to be assessed. At least, the court is not required so to charge. Being of the opinion that temporary insanity was not raised by the evidence, it follows from necessity that we should hold that appellant is without just ground of complaint in respect to the charge of the court criticised.

For the error of the court above noted, the judgment of the court below is reversed and the cause remanded.

Brooks, J., absent.

The Law of Self-defense is considered in the notes to *State v. Gordon*, 109 Am. St. Rep. 804; *State v. Sumner*, 74 Am. St. Rep. 717. When one enters upon a difficulty for some unlawful purpose such as gratifying malice, there can be no right to self-defense: *State v. Feeley*, 194 Mo. 300, 112 Am. St. Rep. 511. Yet one does not necessarily forfeit the right of self-defense merely because he voluntarily engages in a difficulty: *State v. Gordon*, 191 Mo. 114, 109 Am. St. Rep. 790. One has a right, whether in a peaceable manner or not, to go and seek out another and obtain from him an explanation of any conduct that reflects upon him; it is not necessary that he should go in a friendly spirit: *King v. State*, 51 Tex. Cr. 208, 123 Am. St. Rep. 881.

WASHINGTON v. STATE.

[53 Tex. Cr. 480, 110 S. W. 751.]

HOMICIDE Inflicted by Weapon not Deadly—Instruction.—Where the evidence in a homicide trial shows that death was probably caused by a blow from a stick of stove-wood, and the court charges that every person is presumed to intend the natural consequences of his own acts, it should further instruct the jury that if the instrument was one not likely to produce death, it was not to be presumed that death was designed unless from the manner in which the instrument was used such intention evidently appears. (p. 804.)

No brief on file for the appellant.

F. J. McCord, assistant attorney general, for the state.

⁴⁸⁰ RAMSEY, J. On the nineteenth day of January of this year the body of Mittie Washington was found in Buffalo bayou, in the city of Houston, in an advanced state of decomposition, clad only in an undershirt. A short time after this appellant was indicted for the murder of the said Mittie Washington, who was his wife. The parties had for some years been married, and until a short time before the death of the wife had lived in Colorado county. From the evidence they seemed not to have gotten along very well, and there was some proof that the deceased had carried on illicit relations with other men, particularly with one Buck Wicks, and that appellant had moved with his family to Houston with a view of escaping and avoiding the attentions of Wicks. It is his claim and contention that soon after their removal to Houston that one Chat Allen became too attentive to his wife. On the trial the state offered in evidence a written confession made by appellant under the statute in which he stated in substance that he had killed his wife about the 6th of January, 1908; that he struck her with a round stick of stove-wood twice on the left side of the head; that soon after she died he and one Wells Gafford carried her body to the bayou and put it in the bayou. On the trial he became a witness in his own behalf, and testified, among other things, that he had had frequent disturbances with ⁴⁸¹ his wife growing out of her improper conduct in respect to other men; that on the day of her death he saw Chat Allen go out of his back gate, and he had talked about this incident with his wife; that on the night that he killed her they had had a considerable discussion of their former differences; that she returned about dark, and they talked until between 9 and 10 o'clock, and finally his wife said, "Well, we might just as well settle this thing right now; I am going to kill you to-night or you will kill me," and at that time she got the razor

and came after him with the razor in her hand; that he run around on the other side of the stove, and she came around upon that side; that he was on first one side and then the other of the stove, and while in this position he reached around and got a stick of stove-wood, and at this moment she was right close up to him, right along by his side, and he hit her twice on the head, the second lick knocking her down. The testimony contains three references to this stick of stove-wood with which it is claimed the blow was inflicted. In one place in the statement of facts it is referred to as "a stick of stove-wood"; at another time it is stated, "It was a small piece of dry stove-wood, about as large around as my wrist, about two feet long." In the written confession offered in evidence the stick is referred to as a round stick of stove-wood. The statement further is that about the time or soon after he killed his wife the witness Gafford came along, and that the two carried the body of his wife to the bayou into which it was thrown.

In his charge to the jury the court, under appropriate instructions, submitted murder in the first degree, murder in the second degree, manslaughter, self-defense, and the issue of aggravated assault. In general, the charge of the court is correct, and is in many respects an exceptionally clear charge.

We think, under the facts of the case, there is one error for which the case must be reversed. After submitting the issues of murder in the first degree, murder in the second degree, manslaughter, and self-defense, the court instructed the jury as follows: "Every person is presumed to intend the natural and probable consequences of his own acts; and if you believe the defendant intended to kill the deceased, and used means reasonably calculated to effect that end; then if you find his act was not justifiable, it was one or the other of the offenses concerning which you have been heretofore instructed, according to the state of mind in which the killing was done; but if you have a reasonable doubt whether the defendant meant to kill his wife, or have a reasonable doubt whether he used means which were naturally and ordinarily calculated to kill her, but believe that his act in striking her was not justifiable, and that he struck her with a weapon which was calculated to inflict upon her great bodily injury, you will find him guilty of the offense of aggravated assault and battery, and assess his punishment at a fine of not less than twenty-five dollars nor more than one thousand dollars,

or by imprisonment in the county jail for not less than one month nor more than two years, or by both such fine and imprisonment." We believe that this ⁴⁸² charge is erroneous in that the court failed to give in connection therewith the substance of article 717 of the Penal Code of this state. That article is as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." This view is supported by the decision of this court in the case of *Nichols v. State*, 24 Tex. Cr. App. 137, 5 S. W. 661. In that case Nichols was indicted for the murder of one Lewis Schmidt, and was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life. It was shown that he threw a rock at Schmidt, which struck him and from which he died on the following day. The blow produced concussion of the brain, from which death resulted. There was proof in the case of threats by Nichols and some prior altercation between the parties. It was in evidence that this rock was about the size of a man's hand. In passing on that case Judge White, delivering the opinion of the court, says: "A rock or stone about the size of a man's fist was the weapon with which appellant struck the deceased the blow which caused the death, and, whilst it is proven that the death ensued from the means used, it is not proven that the stone was necessarily a deadly weapon, and the fact that appellant intended to kill can only be deduced from antecedent circumstances and the result of effects of the blow he inflicted. In brief, these antecedent facts are that defendant had threatened to get even with Schmidt because he refused to pay the full amount defendant claimed to be due him. Defendant followed him several blocks, and, when an opportunity offered, he threw the stone, striking deceased on the back of the head, and at a time when deceased did not see or know of his whereabouts.

"Under the facts developed, we are of opinion that the jury should have been instructed in conformity with the provisions of article 612 (now 717) of Penal Code, which declares that 'the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed death was designed, unless from the manner in which it was used such

intention evidently appears.' It was the intent which was the essential point in the case, and the jury, in arriving at it, should have been instructed fully in the provisions of the law which furnished the criterion by which it should be ascertained." Now, in this case not only was there no charge containing the substance of article 717, but the jury were in terms instructed, that every person is presumed to intend the natural and probable consequences of his own acts. The proof showed that there was no sign of any wound on the body of deceased, though there is some suggestion in the record that decomposition was so advanced that signs of a blow might not have been observable. It is elementary and thoroughly well settled that the court must charge on every theory having any support ⁴⁸³ in the evidence, and that, too, without reference to the probability or improbability of such testimony. In view of the character of the weapon used by which the death of deceased was inflicted, it cannot be said that the stick was necessarily a deadly weapon. This court has held that a black-jack fence pole, although used for a rail, is not necessarily a deadly weapon: *Wilson v. State*, 15 Tex. Cr. App. 150. It is stated that such pole might have been so large and heavy as to be harmless in the hands of a man, or it might have been so small or so rotten as to be not at all dangerous. Under none of the definitions of a deadly weapon was the court below justified, nor would we be justified, in holding that a stick of stove-wood, described as large around as one's wrist and about two feet long, would of necessity be a deadly weapon. The only cases in which it has been held that it was not necessary to give in charge the substance of article 717 are those where of necessity the weapon, considered with reference to the manner and means of its use, as, for instance, a loaded pistol fired into the body of deceased, was a deadly weapon. In the case of *Connell v. State*, 46 Tex. Cr. 259, 81 S. W. 746, Judge Henderson, speaking for the court, seems in terms to recognize that a stick is not to be classed as a deadly weapon. In that case he says: "If the weapon is not deadly, the intention to take life cannot be inferred, but must evidently appear, and where the weapon is not of a deadly character the court should always charge article 717, Penal Code of 1895." But he adds: "We know of no case where this article is required to be given in charge unless the weapon used was not of a deadly character, such as a club, a stick or a very small knife." In the case of *Campos v. State*, 50 Tex. Cr. 102, 95 S. W. 1042, Judge Davidson, speaking for the court, says:

"Usually it may be said that article 717 does not apply unless where the intent is to be judged in part from the instrument used. It is necessary sometimes to give the statute in charge in order to properly guard the legal rights of a defendant. If the weapon be not one per se deadly in its character, then the manner of its use may become a potent factor in regard to the intent. If there be an issue in the case as to whether the party intended to kill, or even if it was a deadly weapon that brought about the death, or if the weapon is not necessarily deadly, but death does result, then it may be necessary to give this in charge to guard appellant's rights in the case. As was said in *Burnett v. State*, 46 Tex. Cr. 116, 79 S. W. 550: 'Where a party uses an instrument not likely to produce death by the manner and means of its use, but death does occur, this statute may become a part of the law. But as we understand, it never applies unless the intent is an issue in the case.' " This language was used in connection with a death caused by the use of a bowie-knife which was recognized and treated as a deadly weapon: See, also, *Newsome v. State* (Tex. Cr.), 75 S. W. 296; *Shaw v. State*, 34 Tex. Cr. 435, 31 S. W. 361.

We think, in view of all the facts, and particularly in view of the charge of the court to the effect that every person is presumed to intend ⁴⁸⁴ the natural consequences of his own acts, that the court should have instructed the jury in substance that if the instrument was one not likely to produce death, it was not to be presumed that death was designed, unless from the manner in which the instrument was used such intention evidently appeared. There is, as we believe, no other error in the charge of the court or in the proceedings on the trial, but for the reason indicated we think appellant is entitled to a trial in which the substance of article 717 as applied to the facts should be given. Therefore, the cause should be, and the same is hereby, reversed and remanded.

Murder may be Committed Through an Assault and Battery, although there was no formed design to take life: See the note to *Johnson v. State*, 90 Am. St. Rep. 576. Murder may be committed by killing another by striking him a blow with the fist: *State v. John*, 172 Mo. 220, 95 Am. St. Rep. 513.

CASES
IN THE
SUPREME COURT
OF
UTAH.

PUGMIRE v. OREGON SHORT LINE RAILROAD COMPANY.

[33 Utah, 27, 92 Pac. 762.]

MASTER AND SERVANT—Relation of, When does not Exist Between a Railway Corporation and the Wife of an Employé in Charge of a Cooking Outfit.—Where a man is employed as a manager of the outfit or hotel cars of a railway corporation, and his duties include cooking for its employés, and a woman represented to be his wife is permitted to remain, and does remain, with him in such cars to do such cooking, with the knowledge and consent of the corporation, she is entitled to be regarded as its employé or servant, and to recover as such for personal injuries received through the negligence of other employés of the corporation. This is true though she does not receive pay for her services. (pp. 810, 811.)

RAILWAY CORPORATION, Duty of to Persons Working for its Outfit or Hotel Cars.—Where outfit cars are fitted up and stationed on a sidetrack for the use of employés of a railway corporation, one in such cars with its consent and engaged in the business of cooking for employés has the right to assume that the corporation will exercise ordinary and reasonable care to prevent the cars from being run into by switch-engines and passing trains. (p. 811.)

NEGLIGENCE on the Part of a Railway in Running into Outfit Cars.—If outfit cars are stationed on a sidetrack for the use of the employés, and without warning or signal a locomotive is run onto such track and into such outfit cars, a jury is justified in finding that the corporation was guilty of negligence, and on such finding is liable to an employé injured while in such outfit train. (p. 811.)

APPEAL AND ERROR.—The findings of a jury, under proper instructions from the court, are final and cannot be reviewed on appeal, where there is sufficient evidence to warrant the submission of a question of fact to them. (p. 811.)

MASTER AND SERVANT—Contract Undertaking to Waive Right to Recover for Future Negligence.—A master cannot by contract in advance absolve himself from liability for injuries to a servant caused by the master's negligence. Such contract is void as against public policy. (p. 812.)

EVIDENCE—Cross-examination as to Marriage.—In an action by a woman to recover for injuries received by her on an outfit train where she had been permitted to be for the purpose of cooking on her representation that she was the wife of the manager of such train,

it is not material whether she was in fact such wife, and the trial court properly sustained an objection to a question asked her on cross-examination as to whether she and such manager were married. (pp. 812, 813.)

PLEADING—Damages not Alleged in the Complaint.—In an action for personal injuries alleged to be due to the negligence of the defendant corporation, wherein the plaintiff specified several classes of injuries from which she had suffered, with the consequences claimed to have resulted, and without referring to any injury to her eyes, it is improper, against objection, to receive testimony of injury to the plaintiff's eyes and its effect upon her sight up to the time of the trial, and the further injurious effect reasonably apprehended. (p. 815.)

PLEADING, Injury to Eyesight, When not Put in Issue by General Allegation.—Where, in an action by a woman to recover for personal injury, she alleges that by reason of such injury she has been incapacitated from performing her daily work and household duties, this general allegation does not justify the reception of testimony showing injury to her eyes and impairment of her sight, where the complaint specifies different injuries suffered by the plaintiff and the consequences resulting from them, but does not state any injury to her eyes or any loss of her sight. (p. 815.)

P. L. Williams, George H. Smith and Jno. G. Willis, for the appellant.

Kinney & Wilson, for the respondent.

31 McCARTY, C. J. A rehearing was granted in this case, and we have again given the questions involved careful consideration. While we are still of the opinion that the result announced in the decision heretofore filed is correct, and that the judgment must be reversed, we are convinced that the opinion, in some particulars, ought to be modified. In view of such fact, the case is decided, ruled and controlled by this opinion only.

The action in question was brought to recover for personal injuries alleged to have been sustained by plaintiff at Williams, in the state of Montana, where she was at work for defendant as a cook in one of its outfit, or hotel, cars. The complaint alleges that plaintiff was the servant of defendant, and as such was required to work and remain in its car as the same was situated on a sidetrack; that while working and remaining therein, the defendant, without notice or warning to plaintiff, negligently and suddenly ran one of its engines into said car, whereby plaintiff "suffered a violent blow upon the head, cutting the scalp in four places, necessitating the cutting of all the hair from her head, and rendering plaintiff unconscious for several hours, back sprained and wrenched, so that the same is still sore and lame, arms bruised and sprained, right limb injured and sprained, and internal in-

juries causing serious injuries to female organs; that by reason of said injuries the said plaintiff has suffered, and for all time will continue to suffer, great bodily pain, . . . and has been incapacitated, and for all time will be incapacitated from performing her daily work as a cook and housewife, and has been, and for all time will be, permanently crippled and scarred." The answer denies the allegations of negligence in the complaint, and affirmatively alleges contributory negligence on the part of the plaintiff. The answer further alleges that plaintiff was not a servant of the defendant; that she was permitted to be upon the car in question solely because plaintiff and one William Liffon Pugmire, represented ³² themselves to be husband and wife, and defendant, having employed said William Liffon Pugmire as manager of certain outfit cars, permitted plaintiff to accompany said Pugmire and be upon the cars with him as his wife, upon the belief that she was his wife; that, in consideration of said permission, the plaintiff agreed to release defendant from all damages on account of any injury she might sustain during her residence on said cars.

It appears from the record that on July 19, 1905, at Pocatello, Idaho, the William Liffon Pugmire referred to in defendant's answer was employed by defendant company as manager of one of its outfit cars. At the time Mr. Pugmire was employed he and plaintiff signed a release, of which the following is a copy: "Whereas, William Liffon Pugmire is employed by the Oregon Short Line Railroad Company as manager Outfit 76 on its outfit cars and lives on and about said cars, and has with him Christine Pugmire, his wife; and whereas, they agree to waive and release the said railroad company from any and all rights they might otherwise have to sue and recover for damages on account of any injury to the said William Pugmire and Christine Pugmire during the continuance of such employment and residence on said cars: Now, therefore, in consideration of the permission to said William Liffon Pugmire and Christine Pugmire to be upon said cars as aforesaid, we do hereby release and forever discharge the said railroad company and its successors from any and all claims and liability for damages resulting from injuries which may be received by the said William Liffon Pugmire and Christine Pugmire while in and about the cars, trains and railroad of said company, whether received through accident or carelessness on their own part, or on the part of any employé or person, or otherwise; this release being intended to embrace and include all claims for

loss of service and for disability, pain or suffering resulting directly or indirectly from any kind of injury or death."

In the evening of the same day on which he was employed, Pugmire, accompanied by his wife, the plaintiff, went with ³³ the outfit cars mentioned to Williams, Montana, where the outfit cars were placed on a sidetrack by defendant company. As stated by appellant in its brief: "There were several cars composing the entire outfit, some being fitted up as sleeping-cars for the workmen, and then there were three cars consisting of a dining-car, a kitchen or commissary car, and a bedroom. The commissary and bedroom were one car partitioned off for this different use. Pugmire was manager of the outfit, so far as the cooking and feeding was concerned. Plaintiff did the cooking, and Pugmire waited on table, and they together occupied the bedroom arranged in the commissary car as their sleeping quarters." Plaintiff did not receive any wages for her work from the defendant, nor did her name appear upon its payroll. At the time of the accident, the outfit was located at Williams' Siding, Montana, with the bedroom on the south end of the outfit. This room had two windows in it, one on each side, and both open at the time in question. It was about 9 o'clock in the evening, and dark. Mr. Pugmire, plaintiff, and a timekeeper named Smuttger had, for some fifteen minutes prior to the accident, been engaged in making some changes about the bed in the bedroom end of the car; and, just before the accident, the timekeeper had carried some part of the bedding or bunk out of the car. The plaintiff followed him to the west door of the commissary part of the car. There she left him and Mr. Pugmire outside of the car, and returned to the bedroom. As to what then transpired, plaintiff, whose testimony is not disputed, testified as follows: "Immediately after he [referring to Smuttger] got out of the car, I heard him say, 'My God! They are running into us. Jump!' And I, being near the window, looked out and saw the headlight of the engine and heard the engine coming. . . . It did not look to me to be more than fifty or seventy-five feet away at the time. It looked as if it was coming pretty fast. I started for the door, but before I got there I was knocked unconscious. I don't remember getting to the door at all. . . . I did not get out of the room. I heard no whistle ³⁴ or bell. I heard nothing sounded. I just heard the rustle of the train as it was coming. . . . I was in perfect health prior to this accident. When I came to in the baggage-car my head was bound up. I had severe pains in my back,

limbs and head, and was helpless. There were bruises on my body, and my clothes were torn, and my face and head was covered with blood. Prior to this accident, I could not see with my right eye distinctly, but my left eye was all right. Since the accident I cannot see to read or sew, and suffer pain in my eye. . . . It [referring to her eyesight] has been failing pretty fast since this accident." Dr. Henry La Motte, an oculist by profession, testified that some six months after plaintiff received the injuries complained of he made an examination of her eyes, and found them to be afflicted with a painful disease known as glaucoma; that in his opinion she would become totally blind in both eyes unless a successful operation upon them were performed; that at the time he made the examination the left eye appeared to have been affected for about five or six months. After describing various causes which produce glaucoma, the doctor testified: "The next most frequent cause is some form of nervous shock. This may be either mental or physical, but it has to be a pretty severe nervous shock. The next most frequent cause is an injury to the eye itself. Sometimes a slight injury is enough to cause an acute attack of glaucoma." In answer to the question, "Judging from her condition, what was the cause of that condition, to your best opinion?" the doctor answered: "That I couldn't say. Any one of those causes could have been." He further testified that the disease could have been produced by a blow on the head such as the evidence showed plaintiff received in the collision hereinbefore mentioned.

The case was tried to a jury, and a verdict of three thousand five hundred dollars returned in favor of plaintiff. To reverse the judgment entered on the verdict, the defendant has appealed to this court. After the plaintiff had introduced her evidence in chief and rested her case, the defendant moved the court for a judgment of nonsuit upon the following grounds: (1) That plaintiff ³⁵ had failed to show that the relationship of master and servant existed between her and defendant; and (2) that plaintiff was guilty of contributory negligence in not heeding the warning given her to get out of the car. This motion was overruled, and, at the close of the entire case, the defendant requested the court to direct a verdict for the defendant, which request was also refused. These rulings are now assigned as error.

The record shows that, when Pugmire applied to defendant company for employment, O. D. Gefেকে, who was, at the time, inspector of outfit cars for defendant, and who also had

charge of the employment of cooks and managers on such cars, inquired of Pugmire whether he had a wife, and if he wanted her to be on the cars with him. Pugmire answered that he had brought his wife (plaintiff herein) with him, and stated that he wanted her to accompany him, at the same time pointing her out to Gefeke. Gefeke then stated to Pugmire that if he wanted his wife to go along they would have to sign the release hereinbefore referred to. Gefeke was called as a witness by defendant, and testified, in part, as follows: "The duties of an outfit manager are: To cook, prepare meals, order supplies, etc. As a rule, we inquired whether the particular individual happened to be a cook or not. If he could not cook, then he had to furnish the cook. Where his wife accompanied him, it was taken for granted that she could cook and would assist in the work; and that was why the wife was permitted to go. When a man had his wife with him, if he could not cook, and she did the cooking, it was all right with me, and with the Short Line company. We would not have employed Pugmire if he had not provided the cooking in some way." Plaintiff testified that from the time she arrived at Williams on the outfit cars in question (July 19, 1905) until July 22d, the day of the accident, she "cooked the food for the men of the Oregon Short Line (defendant)"; that those men took their meals at the car; and that she "did the cooking, dish washing, and straightening up around there in general"; that on two occasions the foreman of this crew of men gave her orders ³⁶ respecting the kind of food she was to cook and prepare for the men; and that she carried out the orders.

It thus clearly appears—in fact, there is no conflict in the evidence on this point—that plaintiff cooked for the employés of the defendant, washed the dishes, cleaned up, and took care of the commissary and dining-car, and in so doing acted as a substitute for Pugmire, and that, too, with the knowledge and approval of the defendant, and that it received the benefit of her labor. The plaintiff was not a trespasser or mere licensee, but was rightfully in the car doing work for the defendant, and, as stated, with its knowledge and acquiescence. And furthermore, the evidence introduced by defendant shows that one of the conditions upon which it employed Pugmire was that, "if he could not cook, then he had to furnish a cook." The representative of the company whose duty it was to employ managers for defendant's outfit cars, and who employed Pugmire, testified: "We would not have employed Pugmire if he had not provided

the cooking in some way." In other words, under the terms of his employment, Pugmire was obliged to either do the cooking himself or get some one to do it for him. Whether the plaintiff was in the direct employment of defendant or indirectly as the assistant of Pugmire can have no bearing on the question, because, in either event, according to the great weight of authority, the relation of master and servant existed between plaintiff and defendant within the meaning of the rule requiring a master to exercise ordinary care to prevent injury to his employés. Therefore, under the facts and circumstances disclosed by the record in this case, defendant owed plaintiff the same duty for her safety that it owed to Pugmire and its other employés. And this, too, notwithstanding the fact that plaintiff was not entitled to pay from defendant for her services: *Wilson v. Sioux Con. Min. Co.*, 16 Utah, 392, 52 Pac. 626; *Ringue v. Oregon Coal Co.*, 44 Or. 407, 75 Pac. 703; *Tennessee Coal Co. v. Hayes*, 97 Ala. 201, 12 South. 98; *Rummell v. Dilworth*, 111 Pa. 343, 2 Atl. 355, 363; *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; ³⁷ *Aga v. Harbach*, 127 Iowa, 144, 109 Am. St. Rep. 377, 102 N. W. 808, 69 L. R. A. 255; 4 Am. & Eng. Ann. Cas. 441; *Anderson v. Guineau*, 9 Wash. 304, 37 Pac. 449; 1 *Shearman & Redfield on Negligence*, 182.

The contention that there was no evidence introduced to show that the accident in which plaintiff received the injuries complained of was due to the negligence of the defendant company is not borne out by the record. The undisputed evidence shows that the outfit cars in which plaintiff was injured were fitted up and placed and stationed by defendant on one of its sidetracks for the use and occupation of plaintiff and certain employés of the company. And plaintiff had a right to assume that defendant would exercise ordinary and reasonable care to prevent these cars from being run into by its switch engines and passing trains. The record, as it now stands, shows that an engine propelled on defendant's railroad tracks was, without warning or signal, run onto this sidetrack and into the outfit cars. It also appears from the undisputed evidence that, when plaintiff discovered that the engine mentioned was about to collide with the outfit cars, she immediately endeavored to leave the car, but was unable to do so before the collision. Under these facts and circumstances, the question of negligence on the part of the defendant company and of contributory negligence on the part of the plaintiff were questions of fact

for the jury to determine; and the jury having, under proper instructions by the court, found against defendant on these issues, the findings are final, and cannot be disturbed by this court.

The defendant requested the court to instruct the jury that, in case they found that the release hereinbefore mentioned was "entered into without fraud or deceit on the part of the defendant, then the plaintiff would be bound by the terms of said release and would not be entitled to recover in this action," etc. The refusal of the court to so instruct the jury is now assigned as error. We think this assignment is without merit. The law is well settled that a master cannot, by contract in advance, absolve himself from liability ³³ (which would exist if no contract were made) for injuries to his servant caused by the master's own negligence. The ground upon which such contracts are held to be void is that they are against public policy. The reason for the rule is well stated in the case of *Lake Shore & U. S. Ry. Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467, wherein it is said: "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employés, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employés simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements."

The same question was before this court in the case of *Stone's Admr. v. Union Pac. R. R. Co.*, 32 Utah, 185, 89 Pac. 715, and in an opinion written by Mr. Justice Straup it is said: "The decided weight of authority in this country sustains the proposition that a contract whereby an employé agrees in advance to relieve his employer from liability for injuries resulting from the latter's negligence, or that of his employés, when he is, by the law of the jurisdiction, responsible for their negligence, is void as against public policy."

Numerous authorities are cited in the opinion, which declare the same doctrine.

During the progress of the trial the plaintiff was asked, upon cross-examination, if she and Pugmire were married. Objection was made to this question and others of like character on the ground that they were immaterial and not cross-examination. The objections were sustained, and exceptions

were noted by defendant. The rulings of the court in sustaining the objections are assigned as error. We think the court did right in sustaining the objections. The defendant's liability or nonliability in no way depended upon the marital relationship existing between plaintiff and Pugmire, but depended upon the question of defendant's negligence and upon the relationship existing between it and plaintiff at the time the accident occurred. If Pugmire were suing the company ³⁹ to recover damages for the loss of services of Mrs. Pugmire as his wife, the relationship existing between them might be material; otherwise not.

The next error assigned relates to the admission of evidence, over defendant's objection, of the diseased condition of plaintiff's eyes since the collision. It is contended that since plaintiff enumerated in her complaint the injuries for which she claimed damages, and made no averment of any injury to her eyes, it was error for the court to admit evidence of their diseased condition. The injuries alleged in the complaint are: (1) A violent blow upon the head, cutting the scalp in four places; (2) back sprained and wrenched, so that the same is still sore and lame; (3) arms bruised and sprained; (4) right limb injured and sprained; and (5) internal injuries causing serious injury to the female organs. And the result or consequences of these injuries, as alleged in the complaint, are: (1) That the plaintiff has suffered, and for all time will suffer, great bodily and mental pain and anguish; (2) that she has been, and for all times will be, incapacitated from performing her daily work as a cook and housewife; and (3) plaintiff has been, and for all time will be, permanently crippled and scarred. Here we have each specific injury, as well as the consequences flowing therefrom, upon which plaintiff relies for recovery, set out in detail and minutely described. It will be noticed that no mention is made of any injury to plaintiff's eyes; nor is there any allegation in the complaint from which it could be reasonably inferred that her eyes were injured at the time the collision in question occurred, or that they afterward, as a result of the injuries received, became diseased and the sight impaired. When the evidence on this point was offered, and objections made thereto, counsel for plaintiff stated to the trial court that they did not claim that there "was any direct injury to her eyes"; and, further, that "the disease has developed even since this suit was commenced with more or less rapidity." If plaintiff, at the time she commenced her action, was not aware that she had received

injuries which later on would produce a disease to her eyes, how can it be said ⁴⁰ that defendant was bound to anticipate that consequences of this character might result from the injuries described, and damage be claimed therefor, especially in view of the fact that plaintiff had specifically pointed out in her complaint the injuries received and had in detail alleged the particular consequences flowing therefrom upon which she based her claim for damages? The very purpose of written pleadings on the part of the plaintiff is to advise the defendant of the nature and extent of the claim made against him, and thereby give him an opportunity to prepare to meet it at the trial if he so desires. This doctrine is well illustrated by Mr. Pomeroy, in his work on Code Remedies, at section 554, in the following language: "The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it, if possible, at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action or the affirmative defense must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading."

Tested by this rule, which is founded upon the fundamental principles of written pleadings in civil actions, the complaint, as framed, was no notice to the defendant that damage for injuries to plaintiff's eyes would or might be claimed. Therefore, defendant was not bound to anticipate and be prepared to meet a claim of such a character. We do not wish to be understood as holding that in personal injury cases the plaintiff must in his complaint describe in detail every bruise, sprain, and wound he may have suffered because of the wrongful act complained of in order to introduce proof thereof. Nor do we mean to say that the plaintiff cannot, under the general allegations of his complaint, introduce proof of all damages that usually and ordinarily result from the wrongful act alleged, or from the nature and kind of injuries ⁴¹ described. What we do say is this: Where, as in this case, the particular injuries and the consequences resulting therefrom upon which the plaintiff relies for a recovery

are specifically alleged and pointed out, he cannot prove and recover for an element of damages not alleged, and which could not be reasonably inferred as flowing from the injuries described in the complaint. Respondent, however, insists that the evidence in question was admissible under the general allegation that the plaintiff "has been incapacitated from performing her daily work as a cook and housewife." The loss of respondent's eyesight would, it must be conceded, incapacitate her from performing her daily work as a housewife. So would the amputation of her arms, which she alleges were bruised and sprained. But we do not think it would be seriously contended that if, as a result of the injuries to plaintiff's arms, amputation had become necessary to save her life, this could be proved under the allegations of the complaint as framed. And yet, as we view the complaint, proof of amputation would be more nearly within the issues than the evidence under consideration, because injury to the arms is alleged, whereas there is no mention of any disease or injury to the eyes, nor is there any allegation from which such injury can reasonably be inferred. It is therefore an element of damages which the defendant could not reasonably be expected to have anticipated and be prepared to meet from the facts alleged.

Counsel for respondent, in support of their contention that the evidence was admissible, cite and rely on the case of *Croco v. O. S. L. R. Co.*, 18 Utah, 311, 54 Pac. 985, 44 L. R. A. 285. In that case, which was an action for personal injuries, the plaintiff was permitted to testify that his memory was not so good after the accident as it was before, and that he could not see out of his right eye. On appeal, this court held that, under the allegations of the complaint, it was not error for the trial court to admit evidence of this character. By an examination of the record in that case, it will be seen that the allegations of the complaint were general in character, and not specific, as in this case. The complaint in that ⁴² case, after reciting the facts constituting the alleged negligence of the defendant, contained the following general allegation: "The said plaintiff became greatly and permanently injured, cut and disfigured in and upon his head, back, arms and legs, and received injuries in other parts of his body, and was internally injured in the region of his back and abdomen, and thereby . . . plaintiff became sick, sore, and disordered and crippled for life, from which injuries the said plaintiff suffered great mental distress and physical pain," etc. According to the great weight of authority, the plain-

tiff, under these allegations, was entitled to prove all damages suffered by him that ordinarily and usually flow from injuries of the character therein described, and it was proper for the trial court to admit evidence of the impairment of plaintiff's memory and injury to his eyes which were the natural and direct result of the wrongful acts alleged and of the injuries described. But the complaint under consideration does not contain averments of such general character. What counsel contend are such general averments are allegations which relate to and specifically point out the consequences of the injuries described. We recognize and approve the well-settled rule that, where a complaint in a personal injury case contains general as well as specific allegations of the injuries received and of the damages resulting from such injuries, the plaintiff is not limited in his proof to the injuries specifically alleged, but may prove any and all damages which usually and ordinarily flow from injuries of the kind and character described in the general averments of the complaint. In the case under consideration, however, as we have hereinbefore pointed out, the injuries received, as well as the consequences resulting therefrom for which damages are claimed, are specifically alleged and enumerated, and there being no general averments of the character indicated, in fairness to the defendant, the plaintiff should have been limited in her proof to the injuries alleged in her complaint. This was not done. Permitting the plaintiff to introduce the evidence objected to naturally tended to take the defendant by surprise and to prove an element of damages of which it ⁴³ had no notice: 2 Sutherland on Damages, 3d ed., 421; Thompson v. St. Louis & S. Ry. Co., 111 Mo. App. 465, 86 S. W. 465; Arnold v. City of Maryville, 110 Mo. App. 254, 85 S. W. 107; International & G. N. R. Co. v. Thomson (Tex. Civ. App.), 37 S. W. 24; Gulf C. & F. Ry. Co. v. Warlick, 1 Ind. Ter. 10, 35 S. W. 235; Piltz v. Yonkers R. Co., 83 App. Div. 29, 82 N. Y. Supp. 220; Sealey v. Metropolitan St. Ry. Co., 78 App. Div. 530, 79 N. Y. Supp. 677; Dittman v. Edison Elec. Illum. Co., 87 App. Div. 68, 83 N. Y. Supp. 1078; Goeghegan v. Third Ave. R. Co., 51 App. Div. 369, 64 N. Y. Supp. 630; Kleiner v. Third Ave. R. Co., 162 N. Y. 193, 56 N. E. 497.

It follows from what we have said that the court erred in admitting the testimony in question, and, as it could not have been other than prejudicial to the interests of appellant, the case must be reversed. It is so ordered. The trial court is directed to permit the parties to amend their pleadings should

they so desire. Costs of this appeal to be taxed against respondent.

Straup and Frick, JJ., concur.

Master and Servant.—*One Voluntarily Undertaking to Perform Services* for another, who assents thereto, stands in the relation of servant to the latter while so engaged: See the note to *Brown v. Smith*, 22 Am. St. Rep. 463. A servant, though a mere volunteer, and not expecting compensation for the work done, is, if engaged at the request of the man in charge of the work, for the time being, the servant of the master, and entitled to the same protection as his other servants: *Johnson v. Ashland etc. Co.*, 71 Wis. 553, 5 Am. St. Rep. 243. See, too, *East Line etc. R. R. Co. v. Scott*, 71 Tex. 703, 10 Am. St. Rep. 804. It has been held, however, that a master owes no contract obligation to one voluntarily assisting his servants, and that such volunteer assumes all the risks incident to the situation: *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141, 45 Am. St. Rep. 460. A substitute servant or helper employed and paid by a regular servant with the knowledge or acquiescence of the master is not a trespasser or mere volunteer, and the master is bound to exercise reasonable care for his safety: *Aga v. Harbach*, 127 Iowa, 144, 109 Am. St. Rep. 377.

MANTI CITY SAVINGS BANK v. PETERSON.

[33 Utah, 209, 95 Pac. 566.]

JURY TRIAL—*Effect of Contract, When Should not be Left to the Jury.*—Where the testimony tends to show that several parties leased sheep to a person now deceased, to be returned with a specified percentage of the increase, and of the wool, the court should not submit to the jury the question of determining whether the contract constituted a sale or a bailment. (p. 822.)

CONTRACT, *Meaning of, When a Question for the Court.*—If the terms of a contract, whether oral or written, are established by proper evidence, it is for the court to declare the effect of such contract, and not to submit that question to the jury. (p. 823.)

MORTGAGE of Sheep Held Under a Lease.—One holding sheep under a lease requiring their return, with ten per cent of the increase and a specified amount of wool, cannot give a binding mortgage on such sheep without the consent of the lessor. (pp. 823, 824.)

ESTOPPEL, *When not Proper for the Consideration of the Jury.*—Where neither the pleadings nor the evidence raises the question of estoppel, the court should not submit that question to the jury. (p. 824.)

MORTGAGE of Leased Sheep, When does not Give the Mortgagee a Right of Possession.—If sheep are leased, to be returned with ten per cent increase yearly and a specified amount of the wool for each sheep, and the lessee executes a mortgage thereof to a person having no knowledge that the sheep did not belong to the mortgagor, the mortgagee does not acquire any right to the possession of the sheep, for the reason that the leasing is personal to the mortgagor, and the lessee cannot assign his right without the consent of the owners or lessors. (p. 825.)

LEASED PERSONAL PROPERTY, Administrator of Lessee, When Acquires No Interest Therein.—If sheep are leased, to be returned with ten per cent of the increase and a specified amount of the wool for each sheep, the contract is personal, so that on the death of the lessee no interest or right of possession passes to his executor or administrator. (p. 826.)

TENANCY IN COMMON Arising from the Confusion of Leased Sheep.—If a lessee of sheep causes them to be mingled with sheep of his own, so that his animals cannot be distinguished from those leased to him, he and his lessor become tenants in common of the whole flock thus rendered incapable of identification and segregation. (p. 826.)

MORTGAGE of Flock of Sheep of Which the Mortgagor is a Tenant in Common Only.—If a mortgage is made of a flock consisting partly of sheep of the mortgagor and partly of sheep leased by him of others, which he has mingled with his own so as to be no longer capable of identification and segregation, and because of this fact the lessee and the lessor must be deemed tenants in common, the interest of the mortgagor passes to his mortgagee. (p. 826.)

COTENANCY—Replevin.—Generally one tenant in common cannot maintain replevin against another for his individual interest in the common property, but this rule is not applicable where the subject of the cotenancy consists of intermingled property alike in quality and value and readily divisible by measurement or weight. (pp. 826, 827.)

J. W. Cherry, E. Hansen and Thurman, Wedgwood & Irvine, for the appellants.

W. D. Livingston and Willard Hanson, for the respondent.

211 STRAUP, J. This is an action of replevin. On December 5, 1902, one Peter Thompson gave a mortgage to the plaintiff on sixteen hundred head of stock sheep to secure the payment of a promissory note for fifteen hundred and ninety-four dollars and sixteen cents, payable August 1, 1903. The note and mortgage evidenced a renewal of a loan theretofore made by plaintiff to Thompson. Peter Thompson was engaged in the business of running sheep and farming. He died August 2, 1903. No part of the note had been paid. The mortgage contains a provision giving the mortgagee the right to take possession of the sheep on default of payments or breach of the mortgage **212** covenants. The sheep described in the mortgage were "stock sheep marked with two upper bits in the left ear and an upper bit and under bit in the right, and branded with a 'T' wool brand on the back." On September 2d, the sheep then being in the possession of the defendants, the plaintiff demanded possession, which was refused. It then commenced this action, and the sheriff, under the order of seizure, took possession of two thousand one hundred and sixty head of sheep marked as described in the mortgage, and delivered them to the plaintiff. The defendants, in their answer, de-

nied plaintiff's ownership and right of possession, and alleged ownership and right of possession in themselves to two thousand one hundred and sixty-three head of sheep, marked as described in the mortgage. The case was tried before the court and a jury. A verdict was rendered in favor of plaintiff. The defendants appeal.

The plaintiff gave evidence showing the execution and delivery of the note and mortgage and nonpayment of the note; that Peter Thompson, at the time of his death, was in the possession of about two thousand nine hundred head of sheep; that about two thousand one hundred and sixty-three head, including increase, were marked as described in the mortgage; a demand on, and a refusal by, the defendants to give possession; and that the plaintiff sold of the sheep so taken from the defendants and out of the herd two thousand one hundred and forty-one head, in satisfaction of the mortgage. The defendants gave evidence that of the two thousand nine hundred head of sheep in the possession of Peter Thompson at the time of his death something over two thousand head belonged to them, and which had been leased to him by them. With respect to the number owned by the defendant Fisher, he testified that he first leased sheep to the deceased in 1897; that in 1901 he leased three hundred and eighty-seven head to him; and that the terms of the lease were evidenced by a writing signed and delivered by the deceased, as follows:

"Ephraim, Utah, October 1st, 1901.

"This certifies that I have leased and received of C. J. Fisher of Ephraim, Utah, three hundred and eighty-seven head of stock sheep for one year, and agree to pay to said C. J. Fisher ten head of sheep increase on each one hundred, also one and one-half pounds of wool on each head for the lease and use of said sheep. Said 387 sheep, together with ²¹³ the ten on each hundred increase when returned to said C. J. Fisher, to be an average of all the sheep in my herd, and to be received by him or delivered to him within thirty miles of Ephraim, Utah, on October 1st, 1902; said sheep to be separated from my herd in the presence of said C. J. Fisher or a representative duly authorized by him to receive them.

"[Signed] PETER THOMPSON."

He further testified that the contract was renewed in the fall of 1902; that he had received the wool rentals, but not any sheep, from the deceased; that in the fall of 1903 he was entitled to and owned four hundred and sixty-eight head

in the herd; that the deceased was to have the care and management of the sheep and pay the taxes on them, but that he was not to sell any of them without his permission; that the sheep and their increase were to be marked with Peter Thompson's mark (the same mark described in mortgage), and that the sheep were to be mixed with Thompson's sheep; and that the witness could not identify his sheep nor distinguish them from the rest of the herd.

The defendant Niels Thompson testified: That he leased sheep to the deceased commencing in 1896 on the same terms as testified to by defendant Fisher, but that his lease was verbal. Each year they had a settlement and determined the number of sheep belonging to him. In the fall of 1901 he had eight hundred and thirty-two head. In 1902 a settlement was had, and he had nine hundred and fifteen head, and in 1903 he was entitled to and owned about one thousand head.

The defendant Albert Thompson testified that he also leased sheep to the deceased commencing in 1896, upon terms similar to those of the other defendants; that at the end of each year a settlement was had; that in 1901 he leased four hundred and eighty-nine and two-tenths head, which was evidenced by a writing, signed and delivered to him by the deceased, as follows:

"Ephraim, Utah, October 1, 1901.

"This certifies that I have 489.2 sheep on shares belonging to Albert Thompson, for which I agree to pay $1\frac{1}{2}$ pounds of wool and ten sheep increase per hundred, the sheep when delivered to be at or near Ephraim, Utah, and to be an average of my herd.

"[Signed] PETER THOMPSON."

He further testified that in the fall of 1902 the contract was renewed.

²¹⁴ The defendant Caroline Linberg testified that she leased sheep to the deceased under the following terms:

"Ephraim, Utah, July 6, 1897.

"This certifies that I have 21 head of sheep on shares belonging to Caroline Linberg and agree to pay $1\frac{1}{4}$ lbs. of wool per head and one increase on ten head. Received said sheep October 1, 1896, from Ezra Madsen.

"[Signed] PETER THOMPSON.

"Sheep due October 1, 1898, 25.4 and to be kept one year for ten increase per hundred and $1\frac{1}{2}$ pounds of wool per head. Sheep due October 1, 1899.

"[Signed] PETER THOMPSON.

"Sheep due October, 1900. 30.74 head, to be kept one year from October, 1900, at above terms.

"[Signed] PETER THOMPSON."

"Ephraim, July 1, 1902.

"Have 37.19 head of sheep in herd of Caroline Linberg. Due October 1, 1902, and if left in herd to be on above terms, one in ten increase and one and one-half pounds of wool.

"[Signed] PETER THOMPSON."

The defendant Johnson testified that he leased sheep to the deceased commencing in 1896 on the same terms as those of the other defendants; that the contract was renewed each year; that in the fall of 1902 the deceased had one hundred and seventy-six head of sheep, and in the fall of 1903, one hundred and ninety-three head.

All of the defendants testified that they received the wool rentals but no sheep from the deceased; that the sheep leased by them were mingled with Peter Thompson's sheep, and were marked with his mark for convenience and identification. The defendants also introduced in evidence book entries made by the deceased, and accounts kept by him between the defendants and himself from 1896 to 1901. Among others were the following:

"Oct. 1, 1901. Albert Johnson. Sheep on shares: 160.9."

"Oct. 1, 1901. N. Thompson. Sheep on shares: 915."

"Oct. 1, 1901. Albert Thompson. Sheep on shares: 489.2."

²¹⁵ "Oct. 1, 1901. C. J. Fisher. Sheep in herd: 320. John Linberg 27.95."

The defendants further testified that they had no knowledge or notice that the deceased had given a mortgage on the sheep.

The case was here on a former appeal upon substantially the same facts: 30 Utah, 475, 116 Am. St. Rep. 862, 86 Pac. 414. On the first trial, which was before the court, all the evidence of the defendants as above set forth was stricken on the theory that, as the identical sheep leased by them to the deceased were not to be returned, and were not capable of identification, the transactions were to be regarded as sales, and not as bailments or as creating a tenancy in common, and that the title of the sheep passed to the deceased, and he therefore conveyed mortgage title to the plaintiff, who thereafter became entitled to the possession of them. In so ruling and in striking the evidence we held the court erred, for which, among other reasons, the judgment was reversed, and

the cause remanded. On a retrial of the case, the court instructed the jury as follows: "The defendants assert title to the sheep in controversy in this action, and each of them claim to have delivered certain sheep to Peter Thompson before the execution of plaintiff's mortgage, upon the terms that Thompson was to run them and allow a certain percentage of increase and pay a certain amount of wool each year as rent, and return the original number, with the increase added, at the termination of the lease, and that for convenience the sheep were all to be marked with Peter Thompson's mark. You are instructed that if you find from the evidence that the defendants did deliver any sheep to Peter Thompson upon those terms, the title to any such sheep would remain in the defendants, unless you find from the evidence that the parties to the transaction intended the contract as a sale and not a lease. In order to determine the right of possession in this action you should determine the intention of the contracts, whether verbal or in writing, between the defendants and Peter Thompson, the mortgagor of the plaintiff. In so doing you may consider all the circumstances attending the making ²¹⁶ of the same and the effect given to them by the parties thereto. If you find from the evidence that it was the intention of the parties to the respective contracts to pass the title to the sheep therein described to Peter Thompson, then such contracts are contracts of sale, and they give the ownership and also the right of possession of said sheep to Peter Thompson. If, on the other hand, you find that the intention of the parties was not to pass the title of said sheep to Peter Thompson, but that the delivery of the same to him, if there was ever such a delivery, was merely for the purpose of ranging and caring for the same, then such contracts are contracts of bailment, and do not give the right of ownership to Peter Thompson." By these instructions the court permitted the jury to determine whether the deceased and the defendants, by the terms of their contracts, intended to pass the title of the sheep to the deceased, or whether they intended them as mere contracts of bailment. It was in effect casting the duty on the jury to determine whether the contracts were contracts of sale or bailment. In this we think the court erred.

Upon this question the case of *Spragins v. White*, 108 N. C. 449, 13 S. E. 171, is very pertinent. There an action was brought to recover the price of shoes sold. The defendant testified that, after having a conversation with the plaintiff's representative, he "agreed to buy a bill of shoes upon his

promise to have them in Aulander in two weeks. Without this promise I would not have taken the goods. I had a contract to fill within two weeks. Plaintiff sent me an invoice of the goods and shipped them." The trial court there charged the jury: "If you should believe that this agreement and bargain were made, then you must inquire and determine what was meant and understood by it by the parties making it. Did it mean that the plaintiffs were to insure at all events the delivery by the transportation company of the goods in two weeks, and that in failure of such delivery in two weeks the sale was to be void at the option of the defendant, and he might return the goods to plaintiffs? If so, plaintiffs are not entitled to recover. But if it meant that plaintiffs were to use all due diligence in forwarding the order, in packing and ²¹⁷ shipping the goods by the common carrier, and plaintiffs did all these things, then plaintiffs are entitled to recover the bill and interest, as before stated." In reviewing the charge, the appellate court, in quoting from *Young v. Jeffreys*, 20 N. C. 357, said: "Where a contract is wholly in writing, and the intention of the framers is by law to be collected from the document itself, then the entire construction of the contract, that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law, and the whole office of the jury is to pass on the existence of the alleged written agreement. Where the contract is by parol—that is, oral—the terms of the agreement are of course a matter of fact, and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written agreement."

It was there further stated that, if there be no dispute as to the terms of oral contracts, and they be precise and explicit, it is for the court to declare their effect, and in such case the rule is the same as if the contract were in writing. To the same effect is *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193.

The terms of the contracts here were necessarily to be ascertained from the evidence. Some of the contracts were in writing. Others were oral. But in all the terms were precise and explicit; the language used, clear and unequivocal. There was not anything doubtful or ambiguous about them which required explanation by resorting to extraneous cir-

circumstances. It was the duty of the court to instruct the jury that, if they found the existence of the contracts as testified to by the defendants, the effect of such contracts did not constitute a sale of the sheep; that the title did not pass to the deceased (*Manti Sav. Bank v. Peterson*, 30 Utah, 475, 116 Am. St. Rep. 862, and cases there cited, 86 Pac. 414); and that he, as against the defendants, could not, without their consent, give a binding mortgage upon the sheep which he had received and held under the terms disclosed by such contracts.

²¹⁸ The court further charged the jury: "You are instructed that, as a general rule of law, Peter Thompson could not, by his mortgage, convey to the plaintiff a better title to the sheep in controversy than he himself may have had; or, in other words, no one without title can convey a title to any property and defeat the claim of the rightful owner. But under some circumstances the owner of property is estopped to assert his title to such property against an innocent purchaser or mortgagee for value, and in such circumstances the rights of innocent third parties do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the acts of the real owner, which preclude him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear vested in the party making the mortgage or other conveyance. In other words, where one of two innocent persons suffers from the wrong of a third person, he must suffer by the wrong who puts it in the power of the wrongdoer to cause the loss." This charge should not have been given. Neither the pleadings nor the evidence raised a question of estoppel. It was not alleged, nor was it proven, that the defendants had knowledge of the execution of the mortgage, or that they misrepresented or concealed any fact with respect to their title or ownership, or that they induced the giving of the mortgage, or that the plaintiff in any particular was misled or deceived by any act or conduct on their part or by anything said or done by them. The giving of the instruction may well have led the jury to believe that there was evidence in the case upon which they were at liberty to find that the defendants were estopped from asserting their title or right of possession to the sheep.

The court also instructed the jury (No. 13) as follows: "You are instructed that the plaintiff herein, as mortgagee of Peter Thompson, succeeded to his rights of ownership and

possession in the sheep in controversy upon default of the conditions of the mortgage under which the plaintiff claims its right of possession, and for the purpose of enforcing and defending such rights the plaintiff enjoys the same rights, both ²¹⁹ of ownership and possession, which Peter Thompson had." And (13a) as follows: "I instruct you that any contracts in relation to the running of sheep between Peter Thompson and any of the defendants in force at the time of Peter Thompson's death would not be terminated by reason of his death alone, but the same would remain in force and effect, and the obligations thereof would have to be performed by his executor or administrator, who also would receive the benefits of such contracts for and in behalf of said estate." If by instruction No. 13 the court meant to, and did only, say that the plaintiff succeeded to whatever ownership the deceased had, and to his right of possession arising from such ownership, the instruction would not be open to criticism. But when it is read in connection with 13a, the jury might well have understood it to mean that, inasmuch as the deceased was given the right of possession of the sheep under the contracts or leases between him and the defendants, the plaintiff, under its mortgage, also had such a right of possession. To that extent the instruction was misleading and erroneous. The only right of possession which the plaintiff had was dependent upon its mortgage, and upon the title and ownership of the deceased. It was entitled to the possession of whatever sheep the deceased owned and was mortgaged to it by him. It was not, however, entitled to the possession of any sheep which the defendants had leased to him. Because the deceased was in possession of the defendants' sheep under the terms of the leases, the plaintiff, by virtue of its mortgage, did not succeed to such a right of possession. The leasing of the sheep by the defendants to the deceased was personal to him. His right thereunder was not assignable to a third party without the consent of the defendants: *Lewis v. Sheldon*, 103 Mich. 102, 61 N. W. 269; *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165, 9 N. W. 429. His right of possession, depending upon the leases, ended with his death. It was wholly unnecessary to inform the jury as to what rights possessed by the deceased would or would not be succeeded to by his executor or administrator, as was done in instruction No. 13a.

²²⁰ Furthermore, we very much doubt the correctness of the law as therein stated. While the administrator undoubtedly succeeded to whatever interest the deceased had in and

to the sheep, yet it would seem the leases, being personal with the deceased, and calling for his personal care and attention, ended with his death, and that the administrator would not be authorized, against the consent of the defendants, to step into the shoes of the deceased and run the sheep as he might have done had he lived. Edwin Booth's administrator might quite as well have claimed the right to play Hamlet under a part performed contract of his intestate, or the executor of James Whistler to paint an unfinished painting of his testator. If the testimony of the defendants concerning the leases and the number of sheep leased by them to the deceased is believed and found to be true, then the deceased at the time of his death had in his possession something like two thousand one hundred head of sheep—the exact number we do not undertake to say—belonging to the defendants. The remainder of the herd of two thousand nine hundred head of sheep belonged to the deceased. If the sheep which the defendants had leased were mixed with the sheep of the deceased so as to be incapable of identification, the deceased and the defendants, as to the herd, became tenants in common. Whatever interest the deceased as such tenant in common had in and to the herd the plaintiff succeeded to under its mortgage. Generally, one tenant in common cannot maintain replevin against his cotenant for his individual interest in the common property. Such undoubtedly is the rule where the common property consists of a specific chattel or a single piece of property, as was the case in *Hill v. Seager*, 3 Utah, 379, 3 Pac. 545, or where the things in their nature are so far indivisible that the share of one is not susceptible of delivery without the whole. But it has been frequently held that the rule should not obtain in a case where the intermingled property is alike in quality and value and readily divisible by measurement or weight. It has been quite generally held that tenants in common, or persons who are separate owners of articles stored in mass, such as corn, wheat, coal, logs, etc., each article being of like nature and ²²¹ quality with the others, may have replevin for his proportionate part of the intermixed chattels if the same is wrongfully detained and the action is necessary for the maintenance of his rights, subject to deductions for any loss or waste properly falling to his share while the property remained in mass: 20 Am. & Eng. Ency. of Law, 493, and cases; Shinn on Replevin, sec. 183, and cases.

If the testimony of the defendants is true, and the sheep were intermingled and incapable of identification, they and

the plaintiff at the time of its demand were tenants in common, but before it was entitled to maintain the action it was necessary to show that the property was alike in quality and value; was easily divisible; that the defendants asserted ownership to the entire herd, or attempted to remove or convert the common property, or otherwise wrongfully held it antagonistic and hostile to the rights of the plaintiff, that they refused, on plaintiff's demand, to deliver; and that the action was necessary for the maintenance of plaintiff's rights. When such is shown it is entitled to the possession of whatever interest the deceased, as tenant in common, had in and to the herd at the time of his death. It is entitled to no more. It in no event was entitled to the possession of the interests which the defendants, or either of them, had in and to the herd.

The judgment of the court below is therefore reversed, and the cause remanded for new trial. Costs to appellants.

McCarty, C. J., and Frick, J., concur.

The Distinction Between a Sale or Lease and a Bailment is discussed in the notes to *Fleet v. Hertz*, 94 Am. St. Rep. 209; *Andrews & Co. v. Sav. Bank*, 46 Am. St. Rep. 295. A lease of sheep under a contract that they shall be branded with the lessee's mark and mingled with sheep of his own bearing the same mark, the lessor to be paid a certain amount of wool per sheep and a certain rate of increase per year, is a bailment and not a sale: *Manti City Sav. Bank v. Peterson*, 30 Utah, 475, 116 Am. St. Rep. 862. A lease of personal property for a term of years, in consideration of a fixed sum, to be paid in monthly installments, containing an agreement, in case of default, to execute a bill of sale of the property, constitutes the contract a bailment, and not a conditional sale: *Lippincott v. Scott*, 198 Pa. 283, 82 Am. St. Rep. 801. Sales and leases are further distinguished in the recent cases of *Kelly Springfield Roller Co. v. Schlimme*, 220 Pa. 413, 123 Am. St. Rep. 707; *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453. The distinction between conditional sales and chattel mortgages is discussed in the recent cases of *Studebaker Brothers Co. v. Mau*, 13 Wyo. 358, 110 Am. St. Rep. 1001; *Freed Furniture Co. v. Sorensen*, 28 Utah, 419, 107 Am. St. Rep. 731; note to *Fleet v. Hertz*, 94 Am. St. Rep. 234.

BROWN v. SALT LAKE CITY.

[33 Utah, 222, 93 Pac. 570.]

MUNICIPAL CORPORATION—Claim for Damages Resulting in the Death of a Human Being, Presentment of, When Necessary.—Where a statute provides for the presentment to the city council of claims for damages within a time specified after the happening of the damage, such presentment is a condition precedent to the maintenance of an action against such city. (p. 834.)

MUNICIPAL CORPORATION—Damages, Claim for, When Need not be Presented—Negligence.—Under a statute providing that all claims against a city for damages alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, culvert or bridge, or other negligence of the city authorities in respect to such street, culvert or bridge, shall be presented to the city council, in writing, within ninety days after the happening of such injury or damage, a claim need not be presented if it is for the death of a human being arising out of a defective condition of city property, owned and maintained in its corporate capacity merely and over which its dominion is the same as any other property owner. (p. 834.)

MUNICIPAL CORPORATION, Liability of for Negligence in the Maintenance of Waterworks and Their Appliances.—If a municipality acquires and maintains a system of waterworks voluntarily and with a view of obtaining revenue therefrom, including a supply for fire protection, and the supplying of water for all uses and purposes, it is not to be regarded as acting in its governmental capacity, so as to relieve it from liability for the death of a human being due to negligence. (p. 835.)

MUNICIPAL CORPORATION—Liability for a Conduit Connected with Its Waterworks System.—Where a city maintains, in connection with its waterworks system, a conduit through which water is conducted for irrigation, for which no charge is made, it is required to exercise the same degree of care as any private owner would be. (p. 836.)

NEGLIGENCE.—The Doctrine of the Turntable Cases is Adopted in Utah in favor of children of immature years and discretion. If an owner places something upon his premises which is easily accessible to children, alluring and attractive to their childish propensities, and excites their curiosity and desire for play, it, in effect, amounts to an implied invitation to them to come upon the premises, and if it is inherently dangerous to a person of immature judgment, the owner of the premises may, under peculiar circumstances, be held liable for his neglect of duty to a child coming thereon by reason of such allurement. (pp. 837-840.)

APPEAL AND ERROR—Verdict of the Jury, When will not be Set Aside on Appeal.—Though the judges of the appellate court, upon a consideration of the established facts, would have reached a conclusion different from that of the trial jury, yet their verdict will not be set aside if reasonable men, on consideration of the facts and circumstances, might arrive at different conclusions. (pp. 841, 842.)

MUNICIPAL CORPORATION, Liability of for the Death of a Child Playing in a Conduit Connected with the Waterworks System.—Where a city maintained a conduit in connection with its waterworks system into which flowed the waters of a canal or stream, and boys, to the knowledge of the city authorities, resorted to such conduit to play games, though the conduit was dark for several hundred

feet, and a boy entering such conduit was drowned, a verdict finding the municipality liable for his death will be permitted to stand. (p. 842.)

Ogden Hills and H. J. Dininney, for the appellant.

Dey & Hoppaugh and E. A. Walton, for the respondent.

227 FRICK, J. The plaintiff brought this action to recover damages for the death of her son, a lad about eight years of age, alleged to have been caused through the negligence of the defendant in failing to guard the entrance into a certain waterway or conduit constructed and maintained by it. The pleadings require no special attention. The allegations of the complaint were sufficient to admit proof of all the facts hereinafter stated, and the answer set forth all the matters in defense referred to in this opinion. The evidence coming from both sides fairly tends to establish the following facts: The city, in September, 1904, and for many years prior thereto, owned and maintained a system of waterworks, together with a source of water supply which came from the mountains lying to the north and east of the city. It furnished water to the inhabitants for domestic purposes through a system of pipe-lines, and for the water so used it collected pay in accordance with established rates. It also, through the same pipes, furnished the inhabitants water for fire protection, for which no special charges were made. It also, by means of open ditches and laterals, distributed, without charge, certain ²²⁸ water among the inhabitants for irrigation purposes. One source of water supply came through what is known as "City creek," which enters the city from the north and flows in a southwesterly direction through the northwesterly part of the city, and finally empties into the Jordan river west of the corporate limits. City creek, like all mountain streams, has considerable fall, and the water flows rather swiftly and with considerable force. Some distance north of the city dams are placed across the stream, and by means of gates and weirs the water is forced into pipe-lines for distribution. In the low-water season all the water is forced into these pipes, and none flows down the creek below the intake of the pipes; but in the spring and early summer months there is more water in the creek than the pipes will carry, and, when such is the case, the surplus flows down the stream through the city as stated above. In case of heavy rains, or when the tanks are flushed, or if for any reason water is not wanted in the pipes, it is likewise permitted to flow down the creek. This flow of water through

the creek in its natural state has a tendency to erode or wash away the banks of the stream, and, to prevent this, the city, in 1891 or 1892, constructed a conduit or underground waterway of solid masonry five and one-half feet in diameter on the inside, and cylindrical in form. The entrance to this conduit was immediately east of the east margin of State street. From there the conduit passed underground to the corner of State and North Temple streets, thence west along and under that street to the west margin of Main, or West Temple street, at which point it terminated. The water thence flowed in an open stream to the Jordan river. The entire length of the conduit was nine hundred and fifteen feet. At a point six hundred and twenty-eight feet from the entrance the Jordan canal, which was also underground, emptied its water into the conduit. The conduit, by reason of its sharp turns, was quite dark on the inside. There was one place about two hundred and twenty-five feet from the entrance where, by means of a covered manhole, a little natural light came through into the conduit. Below this point the remainder of the distance was dark, except when the gates were up at the west end. These gates, however, were usually down, for the reason that the water ²²⁹ at that point, by means of them, was diverted into irrigating ditches to the north and south. It may be stated, therefore, that the conduit represented a practically dark cavern or tunnel for a distance of about four hundred feet below the manhole referred to, and to the point where the Jordan canal entered it. Along the east margin of State street the city had constructed a tight board fence, and this fence was continued on the north bank of the stream, and also on the south bank, for some little distance up the stream, and beyond the entrance to the conduit. There were two passageways leading from the street—one on the north of the entrance, the other to the south. Immediately across the street from the entrance, and a little north of west, a large school building was erected, at which a large number of children attended during the school year. This school was opened to the public early in September, 1904. About five years before the latter date the city placed strong bars of iron vertically across the entrance, which were fastened at the top by means of clamps to another bar of iron placed horizontally across the top of the entrance. The lower ends of the vertical bars were driven into the bed of the stream. The spaces between the bars were five and one-half inches at the top and six inches at the bottom. One of these bars in some way became loose

at the top and was shifted against another so that the space between the two bars was such that boys, or even adults, could pass into the conduit. For a number of years the boys in the neighborhood, which was somewhat thickly settled, in playing around the entrance of the conduit in the bed of the stream during the dry or waterless season, would enter the conduit and play "jail" or "train" therein. Sometime during the year 1903 different delegations of citizens living near the entrance of the conduit went before the city council and complained of the condition of the entrance, and called the council's attention to the danger to which the boys were exposed. An employé of the city, who for some years had charge of the entrance of the conduit, testified that he saw some boys in the conduit, drove them out, and replaced and fastened the bar. On numerous times thereafter he saw the boys about the ²³⁰ entrance, found the bar again misplaced, and replaced it, but did not fasten it nor have it fastened. There is no evidence, however, that Marcus Brown, the deceased, or any of the boys who testified at the trial, was ever driven from the conduit or warned by an employé of the city, or anyone in its behalf, to keep out of it. During the early part of September, 1904, after the fall term of the school had opened, Marcus Brown, the son of the plaintiff, without her knowledge or consent, entered and played in the conduit with quite a number of other boys. On the evening of the twenty-first day of that month he was last seen in the conduit about 6 or half-past 6 o'clock. He could not be found that night, but the next morning his body was found at the west gate of the conduit. The water from the Jordan canal entered the conduit in large volume and with considerable force, and, while it could not be seen in the conduit, it, on account of the loud noise from rushing into the conduit, could be heard for some little distance before reaching it. The inference is that Marcus Brown either went into the water, or in some way fell into it and met death. Marcus was a bright boy, and above the average in intelligence and physical development for boys of his age. It developed at the trial that the boys had a lantern which they used in playing in the conduit, and by means of the light obtained from it they would go down to where the water rushed in from the Jordan canal; that they had been doing this for a period of about three years; and that the bar was in its displaced condition for about a year before the accident occurred. The plaintiff had moved into the neighborhood about four months before the accident, and did not know anything about the

conduit. During the spring or high water season the conduit required the constant attention of one man to remove the floating debris in the stream, which, if not removed, would cause the entrance to be clogged and the water to back up in the stream. During the dry season it required no special guarding nor attention. We have stated the foregoing facts in detail, so that all questions raised by counsel and discussed in the opinion may be better understood. Upon substantially the foregoing facts the court submitted the ²³¹ case to a jury. A verdict was returned in favor of plaintiff. From the judgment entered upon the verdict, this appeal is taken.

The defendant requested the court to direct a verdict in its favor, which the court refused to do. While numerous errors are assigned, all that are important may be considered upon the alleged error based upon the refusal of the court to direct a verdict. The reasons argued by counsel why a verdict should have been directed in this case may be stated as follows: (1) That the plaintiff at no time, nor in any manner, presented a claim to the city council as required by the statutes of this state; (2) that the city conducted its system of waterworks, of which the conduit was a part, in a governmental capacity; (3) that if it be held that the city conducted its system of waterworks in its corporate capacity merely, then, under the undisputed facts, the city is not shown to have been guilty of any negligence to warrant a recovery as matter of law; (4) that if such negligence existed on the part of the city, then both the boy and his mother were guilty of contributory negligence as matter of law; and, further, that the boy was a trespasser, and as to such a person the city was not liable for mere passive negligence.

Referring to the first reason stated, the record discloses that the plaintiff neither alleged nor proved the presentation of a claim to the city council. Counsel for the city assert that she was required to allege and prove such presentation as a condition precedent to her right of recovery. The statute in force at the time of the accident, so far as material, provides as follows: "All claims against a city or town for damages or injury alleged to have arisen from the defective, unsafe, dangerous, or obstructed condition of any street, alley, cross-walk, sidewalk, culvert or bridge of any city or town, or through the negligence of the city or town authorities in respect to any such street, alley, cross-walk, sidewalk, culvert or bridge *shall within ninety days after the happening of such injury or damage* be presented to the city council, . . . in writing, signed by the claimant or by some authorized person,

properly verified, describing the time, place, cause and extent of the damage or injury; and no action shall be maintained against any city for ²³² injury to person or property, unless it appears that the claim for which the action was brought was presented to the council as aforesaid, and that the council did not, within ninety days thereafter, audit and allow the same. Every other claim against the city must be presented to the city council within one year after the last item of the account or claim accrued." (Italics ours.)

The section following provides, in substance, that it should be a sufficient bar to any action against a city that any claim mentioned in the preceding section had not been presented to the city council in the manner and within the time specified. Upon these provisions it is asserted that the claim upon which this action is based should have been presented to the city council, and as no allegation nor proof of such presentation was made, there is no right of action. Is this contention sound? It has been frequently held that, under statutes similar to the foregoing, the presentation of claims falling within the provisions of such statutes is a condition precedent, and unless presented no recovery can be had. We have no disposition to modify the rule so announced, or depart from it. Does the claim in question here come within the provisions of the section above quoted? We think not. It will be observed the claims that require presentation are of two kinds: (1) Claims arising out of defective or obstructed streets, alleys, cross-walks, sidewalks, culverts or bridges, or for negligence of the city authorities with respect thereto; (2) claims consisting of various items of account or otherwise that may arise out of transactions with the city, and not arising in tort. This seems manifest from the language used with respect to the character of the claims that must be presented to the city council under the second class mentioned in the statute. It seems reasonably clear to us that, in view of the case of *Dawes v. City of Great Falls*, 31 Mont. 9, 77 Pac. 309, the claim in this case does not belong to the class last above noticed. Does it come within the first class? It is not a claim which arose out of any matters specially enumerated in the first class. Those are limited to defects in, or the obstructed condition of, streets, alleys, cross-walks, sidewalks, culverts or bridges. All these pertain to places and things which the city is bound by law to maintain in a reasonably ²³³ safe condition, and the statute makes

it liable for a neglect of duty with respect thereto. The claim in question does not come within this class. It is one which arose out of the defective condition of the city's property, which is owned and maintained in its corporate capacity merely, and over which it had dominion the same as any property owner. Moreover, the language of the statute does not cover such a claim. A claim included within the statute is one pertaining to a personal injury or damage to property, and must be presented "within ninety days after the happening of such injury or damage." In an action to recover damages for negligently causing the death of one a presentation of a claim is not required, for the right of action does not arise until the injury results in death. While the injury may be said to be the cause of death, the injury without death would not give a right of action such as we are now considering. If we should assume a case where the injury did not result in death until the ninety-first day after the injury, or thereafter, no claim could be presented at all, for the reason that the time runs from the date of injury, and not from the time the full consequences resulting therefrom are known. The words "or damage" relate to the damages that arise immediately out of the injury to the party or to his property, and not to such as may be sustained by a third person as a secondary result, although caused by the original injury. The statute must receive a reasonable construction, and such as will make it possible to present a claim. If, therefore, a claim may not arise until the time has elapsed in which it must be presented, the statute should not be held to apply, unless the language used therein permits of no other construction. We are firmly of the opinion that it was not the intention of the legislature to include within the statute secondary claims or damages arising out of death, which are suffered by third parties by reason of such death. This view, we think, is amply sustained by the authorities: *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *Pye v. Mankato*, 38 Minn. 536, 38 N. W. 621; *Moran v. City of St. Paul*, 54 Minn. 279, 56 N. W. 80; *Dawes v. City of Great Falls*, 31 Mont. 9, 77 Pac. 309; *Maylone* ²³⁴ *v. City of St. Paul*, 40 Minn. 406, 42 N. W. 88. The cases cited by counsel for the city to the contrary are all based upon statutes the terms of which are much broader than our own. In many states all claims must be presented before action can be maintained; in other states, like Utah, claims need be presented only in specified instances. An examination of the authorities will disclose that, where specific matters are mentioned in a stat-

ute for which a claim must be presented as a condition precedent to a right of action, claims arising out of matters not so mentioned are excluded, and require no presentation before an action may be maintained. The claim in the case at bar falls clearly within the latter class, and therefore the court did not err in refusing to direct the jury as requested upon this ground.

Recurring now to the second reason advanced by counsel for the city, namely, that the city owned and conducted its waterworks in a governmental capacity, and for that reason is not liable, we think, under the authorities, it is likewise untenable. It may be conceded, for the purposes of this discussion, that, in so far as the city provides apparatus and water for fire protection, it acts in a governmental capacity. The city, however, was not required to assume the duty of furnishing its inhabitants water for all uses and purposes. When it acquired property, and constructed the system of waterworks for that purpose, however, it did so voluntarily, and with a view of deriving revenue therefrom. It, therefore, acquired, owned and conducted its water system and the property connected therewith, except as stated above, as any other private corporation or owner would, and is liable in like manner and to the same extent as such owners would be. Mr. Thompson, in his Commentaries on the Law of Negligence, volume 5, section 5788, clearly shows that it is optional with a municipal corporation whether it will assume certain duties or exercise certain powers or not, and that it cannot be called to account in any way for not assuming or exercising them. After stating the law in this regard, the author proceeds to state the rule in case the duties are in fact assumed and the power is exercised as follows: ²³⁵ "But if it [the city] undertakes to open, improve, or grade the highway, street, or sidewalk, dig the sewer or drain, build the bridge, construct the culvert, open the park, plant the shade trees, light the street or bridge, erect the public building, or waterworks, or wharf, or pier, or dock, and its officers and agents do the work negligently or unskillfully, or negligently suffer it to get out of repair, and in consequence of such negligence or unskillfulness and not in consequence of the mere fact that the work was done, damage accrues to a private person, he may maintain an action against the city therefor."

The rule with regard to the liability of municipal corporations is stated in conformity with the foregoing quotation in 20 American and English Encyclopedia of Law, second edition, 1205. The distinction with respect to the liability of the

municipal corporation to provide water and apparatus for fire protection and in the ownership and control of waterworks for general purposes is clearly pointed out by the supreme court of Minnesota in the case of *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788. The following well-considered cases clearly demonstrate that the waterworks system of the city and the property connected therewith are not owned, maintained nor operated in a governmental capacity, and the text as quoted from Thompson, *supra*, is illustrated and applied therein: *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871; *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. 735; *Lloyd v. Mayor*, 5 N. Y. 369, 55 Am. Dec. 347; *City of Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. E. 484, 27 L. R. A. 206; *Briegel v. Philadelphia*, 135 Pa. 451, 20 Am. St. Rep. 885, 19 Atl. 1038; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; *Ogden City v. Bear Lake etc. Irr. Co.*, 28 Utah, 25, 76 Pac. 1069. Nor does it make any difference that the conduit in which the accident occurred was not a part of the waterworks system which was used in the distribution of water to the inhabitants for pay. It was still a part of the system, and a necessary part thereof. That the water flowing through the conduit was used for irrigation without charge to the user makes no difference. When the city assumed the right of conducting the water and of distributing it, it was required to exercise ²³⁶ the same degree of care with respect to the maintenance and use of property devoted to that purpose as any private owner would have been: *City of Ysleta v. Babbitt*, 8 Tex. Civ. App. 432, 28 S. W. 702; 2 Dillon on Municipal Corporations, 4th ed., sec. 980. We are of the opinion that the court committed no error in refusing to direct a verdict for the city upon this ground.

The third ground upon which the city based its request for a directed verdict in its favor is one that is not entirely free from difficulty with respect to the law, nor is it free from doubt with regard to the sufficiency of the facts to sustain the verdict. The trial court submitted the case to the jury upon the doctrine announced in what are termed the "turntable" cases. *Sioux City & P. R. R. Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. ed. 745, *Keffe v. Milwaukee, St. P. Ry.*, 21 Minn. 207, 18 Am. Rep. 393, and *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 25 Am. St. Rep. 186, 27 Pac. 666, may be classed as some of the leading cases upon that subject, and as presenting a fair illustration of the principles upon which the doctrine of the turntable cases rests. Since the first of the

foregoing cases was decided, a large number of states have followed the doctrine therein announced, and it has become so generally known and recognized by both bench and bar that it is not deemed necessary to cite or refer to the numerous cases wherein the doctrine is illustrated and discussed. In some states, however, namely, Massachusetts, New Hampshire, New York, and perhaps a few others, the doctrine has not been adopted by the courts. In some states where the doctrine prevails the courts have sought to limit its application to open and dangerous machinery and appliances. Of this class *Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L. R. A., N. S., 263, *Overholt v. Veiths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74, *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, and *Stendal v. Boyd*, 73 Minn. 53, 72 Am. St. Rep. 597, 75 N. W. 735, 42 L. R. A. 288, are fair examples. The more recent adjudications, however, seem to apply the doctrine of the turntable cases to artificial structures and things other than machinery, when such structures and things are in themselves dangerous, ²³⁷ and are alluring or attractive to children of immature judgment and discretion. This class is well illustrated by the following, among other, cases: *City of Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 39 N. E. 484, 27 L. R. A. 206; *Brinkley Car Works & Mfg. Co. v. Cooper*, 60 Ark. 545, 46 Am. St. Rep. 216, 31 S. W. 154. A large number of cases of each class might be cited in which the various grounds upon which the courts rest their decisions are stated, but the foregoing cases are deemed sufficient as illustrative of each class. In this connection, however, we desire to present a quotation from the opinion of Chief Justice Beatty, found in the case of *Peters v. Bowman*, 115 Cal. 356, 56 Am. St. Rep. 106, 47 Pac. 599, which briefly and clearly states the grounds upon which the cases last above referred to are based. He says: "The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care.

But with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different."

If the doctrine of the turnable cases is to be adopted in this jurisdiction—and we think it should be—it seems to us that it should be applied in accordance with the principles laid down by Chief Justice Beatty. We are not unmindful of, nor do we underestimate, the difficulty that may arise in the application of the doctrine to all kinds of cases and under all circumstances. Neither are we willing to relax the general rule of law which permits owners of property to use it in accordance with their own judgment, and to place upon the surface, or otherwise, structures, machinery and appliances in such manner and to such extent as to them may seem proper ²³⁸ and necessary, or convenient in the conduct of their own affairs. So long as such use, whatever it may be, does not interfere with nor injure another's property, or in some way interfere with his personal or property rights, the law does not, and cannot, interfere. As against mere intruders or licensees, the owner need not maintain his premises in a reasonably safe condition; but as to those who come upon them by invitation, express or implied, he owes the duty of reasonable care for their safety. That is the general rule, and to depart from it in favor of adult persons would cast a burden upon the ownership and dominion of private property which would be intolerable. But is this right of dominion and use really invaded when an exception is made in favor of children of immature judgment and discretion? We have already pointed out that, as to adults or children who may come upon another's premises either by express or implied invitation, the law imposes the duty upon the owner to exercise reasonable care for their safety. If, therefore, the owner places something upon his premises which is easily accessible to children, and which is alluring and attractive to their childish propensities, and excites their curiosity and desire for play, it in effect amounts to an implied invitation to them to come upon the premises. If, in connection with the attractiveness, the thing is inherently dangerous to a child of immature judgment, it may well be that the owner of premises may, under particular circumstances, be held liable for his neglect of duty to the child going thereon by reason of such allurements. It is true that a child has no greater legal right to intrude upon another's premises than has an adult; but duties may and, under particular conditions, do

arise even in favor of adults who are exposed to danger at places where they have no legal right to be. While a child may know that it ought not to go on another's land, it cannot resist the childish instincts that lead it to inspect and play with what is attractive. It is wholly unmindful of the danger, and has little, if any, real appreciation of the consequences that may come from its acts. These propensities and instincts are known to all, and hence must be guarded against by all. It is no answer to say to a ²³⁹ child: "This property is mine. I can do with it as I please so long as I do not interfere with another's personal or property rights. You are a mere intruder. I have not infringed upon your rights. Therefore, you have no claim upon me." The question in such a case is, Has the owner made his property so attractive as to allure children? Did he leave the attractive thing so that it was easily accessible to them? And did it expose them to uncommon and peculiar dangers? These, as a general rule, are questions of fact for a jury to pass on. We are aware that there are some courts that severely criticize the doctrine when applied in this class of cases.

It is urged that the rights of property cannot be burdened or curtailed in this way. Moreover, it is said by some courts that to follow the doctrine to its logical conclusion leads to absurdity; that if it is applied to one instrumentality, it should be applied to all; and that this would lead to holding owners of property liable if a child were attracted by a wheelbarrow, a plow, a fruit tree, and many other common implements and objects. But this does not follow. All of these things are common. Neither are they specially attractive nor dangerous. That some may attract and be of some danger it is true. But it is not an uncommon danger, and not such as must be guarded against. As to all such and like things no court would permit a recovery as matter of law. This is well illustrated in the case of *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537, where the supreme court of Washington refused to permit a child to recover for an injury received by it while playing with a revolving door. But it is otherwise with respect to unusual dangers and specially attractive things such as are artificial and uncommon—such as are pointed out by Chief Justice Beatty in the case quoted from. Indeed, that case is a practical illustration of the extent of the rule. A recovery was denied in that case upon the ground that, while the pond or pool of water in question was artificially produced, and while it was alluring and attractive, it was no more so than a natural pond would

have been, and because it was not practical to guard against bodies or streams of water. It is, however, pointed out that, if the thing is artificial, uncommon, ²⁴⁰ attractive and dangerous, and may, with reasonable effort and expense, be guarded and made reasonably safe, then the duty to make it so may not be disregarded, and the jury, under all the facts and circumstances of a particular case, may so find. It seems to us that these principles underlie the doctrine of the turntable cases, and if that doctrine is sound—and we think it is—it should not be limited to turntables and machinery of like character. To so limit it, in effect, applies one standard of care to one kind of dangerous things and a different standard to another equally attractive and equally dangerous, which is placed upon premises and there maintained under similar circumstances and conditions. We are unwilling to either promulgate or adopt such a rule. We are constrained to hold, therefore, that the doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner. Applying this doctrine to the facts of this case, is the city liable?

The trial court (whose instructions are generally well considered), in an exceptionally full and explicit charge, directed the jury's attention to the particular matters that they were required to find in order to return a verdict for the plaintiff. Among other things the court specially emphasized that before they could find for the plaintiff they must find from the evidence that the inside of the conduit was attractive and dangerous; that the danger relied on by the plaintiff arose out of the flow of water into the conduit from the Jordan canal some six hundred and twenty-eight feet distant from the entrance of the conduit; and that the officers and agents of the city, in the exercise of reasonable care and prudence, should have foreseen that the inflow of such water was dangerous, and that some such injury might be occasioned to the boys, or some of them, entering into the conduit and playing therein. The jury, with all the facts and circumstances before them, found all these in favor of the plaintiff. We have no hesitancy in saying that, if the facts ²⁴¹ were for us to pass upon, we should be forced to arrive at a conclusion different from that reached by the jury; for it would be quite difficult for us to see how the officers of the city, as

reasonably prudent men, should have foreseen that boys would go down a dark passageway of over six hundred feet in length, nearly four hundred feet of which was totally dark, and play therein, and that although they did so, they would go or fall into the water coming into the conduit from the Jordan canal. And if childish instincts induced them to resort to the conduit to play "jail" or otherwise, one would naturally assume that they would instinctively avoid going into the dark passageway to the length of nearly two ordinary city blocks. In the statement herein made that, were we permitted to pass on the facts and determine the question, not as matter of law but of fact, we would arrive at a conclusion different from that found by the jury, the chief justice authorizes us to say that he is not prepared to say that, if he were a trier of the fact, he would find in favor of the defendant on the question of negligence (upon this question he expresses no opinion); but that he is, however, clearly of the opinion that the facts amply justified the court in submitting the question of negligence to the jury. In this connection it must, however, be said that the entering into and playing in the conduit by the boys continued for quite a number of years; that the employés of the city knew the boys were doing so; that the city council, about a year before the accident, was advised by delegations of citizens living in the neighborhood of the actual conditions; and that the defendant knew, or ought to have known, that the boys, in view of their familiarity with the conduit, might lose their native fear and might finally go and continue to go to the point of danger, as the testimony disclosed they did. Notwithstanding all this, in view of all the facts and circumstances, as triers of the facts, the majority of this court would still be impelled to hold that the accident could not reasonably have been anticipated by ordinarily careful and prudent men. But is the question so clear and free from doubt that reasonable men cannot differ upon it? May ²⁴² not reasonable men, in considering all the facts and circumstances, arrive at different conclusions? The mere fact that the men who passed upon the facts have found against the city upon this point is not conclusive. But such a finding always requires a close scrutiny of the record to ascertain whether or not there may not be some inferences arising out of the particular facts upon which reasonable men may draw different conclusions. While the mere finding is not conclusive that there is evidence in support thereof, nor conclusive that all reasonable men should agree with it or dissent there-

from, it presents a question that merits a most careful consideration; and after giving it such consideration, and after much reflection, we have been forced to the conclusion that we cannot say, as a matter of law, that there is no evidence which reasonably tends to support the verdict. We cannot say that all reasonable men ought to have declared a result different from that reached by the jury. To authorize this requires a clear case, and not one where there is a serious doubt. The jury in some cases may misjudge the facts. Courts might do likewise. Members of the court may arrive at different conclusions even upon undisputed facts. While we are satisfied that the facts present what may be termed a "border-line case," and upon them a majority of this court should find for the city, yet we are equally well satisfied that the facts and circumstances, together with all the inferences that may be deduced therefrom, did not leave it so clear that we have a right to say, as matter of law, that the findings of the jury are wholly unsupported. In this regard we are also required to give some weight to the judgment of the trial court in sustaining the verdict by overruling the motion for a new trial. If we should interfere with the verdicts in all doubtful cases simply because upon the evidence we would have arrived at an opposite conclusion, then the proposition would be reduced to this: In any doubtful case, if we agreed with the findings of the jury, we would approve the verdict, but if we did not, we would set it aside. If we have no authority to do this in cases where there is a strong conflict in the evidence, which would support a verdict either way, what greater right have ²⁴³ we to do so in a case where there is doubt as to whether the jury should have found a particular act or omission to act, or particular conduct, to have constituted negligence, or otherwise? We, therefore, cannot disturb the verdict upon this ground.

The last question presented, namely, that of contributory negligence upon the part of the mother and the deceased, was peculiarly a question of fact for the jury. The instructions upon this question were full and clear, and in accordance with the law upon the subject.

The question that the boy was a trespasser, and therefore no recovery can be had, was involved in the third proposition discussed, and needs no further consideration.

There are other questions presented, but no error as to any of them is perceived; nor are they of such character or importance as to require discussion.

In view of what we have said, it follows that the judgment should be, and it accordingly is, affirmed with costs to plaintiff.

McCarty, C. J., and Straup, J., concur.

A Provision in a City Charter Requiring Claims Against the Municipality to be presented to the common council before suit thereon is reasonable and valid: *Winter v. City of Niagara Falls*, 190 N. Y. 198, 123 Am. St. Rep. 540, and cases cited in the cross-reference note thereto.

A City Engaged in an Enterprise of a Private Nature, such as the furnishing of light to its inhabitants for compensation, is held to the same responsibility for injuries received on account of the negligence of its officers or agents as would an individual operating an electric light plant: *Eaton v. City of Weiser*, 12 Idaho, 544, 118 Am. St. Rep. 225; *Fisher v. New Bern*, 140 N. C. 506, 111 Am. St. Rep. 857. And a municipal corporation is liable to a fireman for injuries sustained through its negligence in not furnishing him a reasonably safe place to work in one of its fire stations: *Bowden v. Kansas City*, 69 Kan. 587, 105 Am. St. Rep. 187.

The Liability of Owners of Property to Children who are injured while trespassing thereon is discussed in the note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 416. For recent cases on this question, see *Hobbs v. Blanchard & Sons Co.*, 74 N. H. 116, 124 Am. St. Rep. 944; *Henderson v. Continental Refining Co.*, 219 Pa. 384, 123 Am. St. Rep. 668, and cases cited in the cross-reference note thereto.

IN RE YOUNG'S ESTATE.

[33 Utah, 382, 94 Pac. 731.]

EVIDENCE—Privileged Communication—Personal Nature of the Privilege.—A communication made to an attorney is privileged or not at the option of his client. If the client waives the privilege, neither the attorney nor anyone else may invoke it. (p. 845.)

EVIDENCE—Privileged Communication—Effect of Statute.—The mere fact that common-law privilege is declared in a statutory form does not extend the scope of its operation. (p. 846.)

EVIDENCE—Privileged Communications to an Attorney—Disclosure in Will Contests.—Where the grounds for contesting a will are duress, undue influence or incapacity, the attorney who prepared the will may be called by either side and examined as a witness and compelled to disclose communications made to him by the testator during the preparation of the will, including the contents of former wills, where such communications are relevant to any of the issues. (pp. 849, 851.)

EVIDENCE—Privileged Communications—Physicians.—At the common law the privilege did not extend to physicians. (p. 849.)

EVIDENCE—Privileged Communications—Construction of Statute.—If the statute respecting privileged communications is merely

declaratory of the common law, the statute should be applied under the rules in force at the common law. (p. 851.)

EVIDENCE in Will Contests.—The contents of former wills may be admitted in will contests as tending to establish fraud, duress or undue influence in the will contested. (p. 852.)

APPEAL AND ERROR.—The Fact that the Excluded Evidence does not Necessarily Appear to have been Material will not sustain the action of the trial court in excluding it in the case of a contested will, where the witness altogether refuses to answer on the ground of privilege, and it was therefore not possible for the attorney representing the contestants to know what the testimony, if admitted, would be. (p. 855.)

Samuel A. King and William H. King, for the appellants.

Grant C. Bagley and Thurman, Wedgewood & Irvine, for the respondents.

383 FRICK, J. This proceeding was begun in the district court of Utah county to establish a writing purporting to be the last will and testament of Branch Young, deceased. Objections were filed to the allowance of the proposed will by some of the children of the deceased upon the ground that it was made under coercion, duress and undue influence, which were alleged to have been exerted upon the mind of the deceased by his wife, who was a beneficiary named in the will, and that such undue influence was exerted at a time when the testator was old, infirm and of feeble mind.

On the hearing of the contest before the court the protestants called as a witness one A. B. Morgan, an attorney at law, who prepared the proposed will under the directions of the deceased. The witness testified that while the will was being prepared he had several conversations with the deceased and his wife concerning the provisions contained therein; that the deceased at the time presented to the witness a former will which had not been formally executed; that there was some **384** change made in the bequests by the new will; that the witness had prepared several wills at the request of the deceased immediately preceding his death, and that his wife, one of the principal beneficiaries of the proposed will, was present and took part in a number of conversations between the witness and the deceased with respect to the proposed will. The protestants then propounded some questions to the witness in which they asked him to state how many wills he had prepared for the deceased; what was said by the deceased with respect to the changes that were made in the proposed will as compared with the former one; and to state what was said by the witness, the deceased, and the wife of the deceased with regard to the proposed will. The witness refused

to answer upon the ground that all the matters inquired about were privileged. The court sustained the witness with regard to all statements made by the witness and the deceased, both with respect to the former and the proposed will, and denied the request of the proponents to require the witness to answer, except as to statements the wife may have made. The witness, however, said that he could not select from the conversations all the matters stated by the wife without also disclosing some things said by the deceased, and refused to answer, over the protestants' objections. The court did not compel the witness to answer, but in effect permitted him to determine for himself when any statement made by the wife could or could not be answered without violating the privilege. During the hearing it was also made to appear that the former will was either lost or destroyed, and that the witness had read it and knew in a general way, at least, the contents thereof. For the purpose of showing that some changes had been made in the proposed will in some of the bequests, and what those changes were, the proponents asked the witness to state the contents of the former will in that regard. This testimony sought to be elicited was excluded by the court as privileged, to which rulings of the court contestants duly excepted. Judgment was entered sustaining the will, from which the protestants have appealed, and now present the foregoing, among other matters, for review. The contestants ³⁸⁵ contend that the matters inquired about were not privileged, and assign the rulings of the court as error.

One question presented for review is, To what extent does the privilege between attorney and client prevail where the question arises in a will contest after the death of the client? Is the privilege the same in such a case as it is between an attorney and client with respect to all other matters arising before or after the death of the client? Subdivision 2 of section 3414, Revised Statutes of 1898, so far as material to the present inquiry, provides as follows: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein in the course of professional employment." It will be observed that, under the foregoing provision, the privilege therein given, as at common law, is purely personal, and belongs to the client. If the client waives the privilege, neither the attorney nor anyone else may invoke it. It is likewise apparent that the privilege given by the statute is simply declaratory of that existing at common law. Without this statute, therefore, in view of section 2488, Revised Statutes

of 1898, in which the common law of England is adopted, the privilege would exist and be in force in this state. The mere fact that the common-law privilege is declared in statutory form does not extend the scope of its operation. The material question therefore is, Did the privilege at common law extend to will contests between heirs of the deceased ancestor, where the issues of duress, undue influence, or insanity are involved?

Professor Wigmore, in his work on Evidence, volume 4, section 2314, in concluding a discussion of the question of privilege, as applicable to an attorney and client in cases of will contests, states the rule as follows: "But for wills a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communications. It must be assumed that during that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much ³⁸⁶ less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain. That it appropriately explains the client's relation with an attorney drafting a will seems almost equally clear. It follows, therefore, that after the testator's death the attorney is at liberty to disclose all that affects the execution and tenor of the will. The only question could be as to communications tending to show the invalidity of the will, i. e., from which a circumstantial inference could be drawn that the testator was insane or was unduly influenced. It may be conceded that the testator would not wish the attorney to assist in any way the overthrow of the will. But the answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist, and therefore could not possibly be said to have communicated them. As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might

have intended had he known or reflected on certain facts which now bear against the will."

The supreme court of Iowa, in a well-considered case, entitled *Winters v. Winters*, 102 Iowa, in speaking of the privilege, at page 57, 71 N. W., at page 185 (63 Am. St. Rep. 428) says: "At common law, confidential communications to a physician were not privileged, and they are only so made by statute. Those to an attorney, however, were privileged, and it was held that the attorney might not divulge without the consent of the client while living, but that, after his death, in a contest between a stranger and an heir, devisee, or personal representative, the latter might waive the privilege and examine the attorney concerning the confidential communications, though the stranger was not permitted to do so; and in a controversy between heirs at law, devisees and personal representatives, the claim that the communication was privileged could not be urged, because, in such a case, the proceedings were not adverse to the estate, and the interest of the deceased, as well as of the estate, was that the truth be ascertained."

In the following cases the doctrine of privilege between an attorney and client is discussed, and it is held that communications or statements made by the deceased to the attorney ³⁸⁷ preparing the will with respect to the subject matter thereof and what the attorney heard or saw with respect thereto do not fall within the privilege: *Scott v. Harris*, 113 Ill. 447; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 31 N. E. 726, 17 L. R. A. 188; *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. Rep. 411, 41 L. ed. 760; *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202, 31 S. E. 100; *Graham v. O'Fallon*, 4 Mo. 338; *In re Semper's Estate*, 82 Minn. 460, 85 N. W. 217; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828, 55 N. W. 149; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175, 18 L. ed. 186; 3 *Jones on Evidence*, sec. 773; 2 *Rice on Evidence*, pp. 649-651; *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286. In some of the cases a distinction is sought to be made between a protestant and a contestant of a will, and it is accordingly held that the privilege does not apply when the attorney is called in support of a will. Such cases, however, are not numerous, and the reason for the holding is fairly stated in the case of *In re Nelson's Estate*, 132 Cal. 182, 64 Pac. 294. Where the grounds of contest are duress, undue influence, or incapacity, we cannot perceive upon what reason such a distinction can arise. The privilege belongs to the client, and he may waive it or enforce

it as to him may seem proper. The policy upon which the privilege rests is humane in purpose, practical in its application, and salutary in its results when applied as it was intended it should be under the rules of the common law. The sole purpose of the privilege was to protect the client's interest. Under it he could freely communicate to the attorney all matters relating to a controversy between himself and another without fear of having such matter divulged by his attorney. In this way the client could obtain the benefit of the advice and counsel of one learned in the law without being exposed to the danger of having his statements turned into a weapon against him. If such were not the law no man could safely seek or obtain advice and counsel from an attorney, and the very purpose for which such advice is usually sought would be frustrated. But do these reasons apply to will contests where capacity or undue influence are in issue? What ³⁸⁸ is the purpose of such a contest? It can have but one purpose, namely, to determine whether or not the document presented as the last will and testament of such a deceased person is really such. Can it be contended upon any reasonable ground that the testator had any interest in or desire to conceal his real intentions in such a matter when such intentions are called in question after his death? Did he not know when he had the will prepared that it would have to be made public and established as his will in a proper court before it could become effective? If, therefore, the document produced is not actually his will, but rather that of another who induced him by undue influence over him to make it, can it be said that the deceased wants such a will established as his own? Would not the law in holding to such a policy foster that which it abhors, namely, deceit and fraud? In this regard, who may raise the question? Certainly not strangers to the estate, but only those who are either heirs at law of the deceased or those who are beneficiaries of his bounty and made so by the will. If a particular beneficiary obtained the bequest through duress, deceit, or undue influence over the mind of the testator, should such beneficiary be permitted to invoke this most salutary privilege against the real heir, and thus, perhaps, be enabled to conceal the very thing the law abhors, and for which it wisely requires the probate of all wills? Moreover, is the right to invoke the privilege to be given to one heir who proposes the will, and denied to the other who opposes it?

The authorities cited above make it reasonably clear that the right to invoke the privilege was withheld from both at

common law when the issues involved affected the integrity of the will. If this be so, why should not the attorney who prepared the will be required to disclose all that he knows concerning the real state of mind of the testator? The attorney may know by whom and to what extent the testator was influenced. Again, he may know that the testator was not influenced at all, and may further know the very reasons that controlled him in doing what he did in making the will. In the first instance, should the person causing the will to be made be protected ³⁸⁹ by the privilege? And in the latter case should the one who claims undue influence be permitted to invoke it and thus make certain circumstances to which he points and which may be easily explained to stand as the real truth? The privilege was not extended to will contests at common law, and, as our statute is no broader than the common law upon the subject, we have no right, even if we were inclined to do so, to extend the privilege to will contests.

It is urged that the case of *In re Estate of Van Alstine*, 26 Utah, 193, 72 Pac. 942, is decisive of the question here presented; that in that case this court held that where the insanity of the testator was involved, the attending physician was incompetent to testify concerning the testator's mental condition; and that no distinction with regard to the privilege can be made between an attorney who is professionally consulted in preparing a will and an attending physician. It is true that in that case this court held that the contestants could invoke the privilege against the attending physician. The question, however, was not discussed; and the decision was based upon the authority of *Munz v. Salt Lake City Ry. Co.*, 25 Utah, 220, 70 Pac. 852. The later case referred to was an action for personal injury, and the doctor was called to testify against the injured person whom he had treated for the injury. At common law the privilege did not extend to physicians, and the statute upon which the *Munz* case is based was enacted to protect the patient in just such cases. All the other cases, except *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, 9 N. E. 320, cited in support of the decision in the *Van Alstine* case (26 Utah, 193, 72 Pac. 942), are cases involving the question involved in the *Munz* case (25 Utah, 220, 70 Pac. 852). In all the cases cited the doctor was called to testify against the patient, and the privilege was invoked and allowed in favor of the patient in a case in which he was a personal actor. The case in 103 N. Y. 573, 57 Am.

Rep. 770, 9 N. E. 320, was a will contest, and the decision was based upon a special statute which provided that the inhibition of the doctor to testify would apply to every examination, unless the inhibition was expressly waived by the patient. In *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 874, the same ³⁹⁰ rule was extended to an attorney who prepared the will, and this was likewise done in view of the New York statute. The statute upon which this rule is based is as follows: "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment": N. Y. Code Civ. Proc., sec. 835.

This is a positive inhibition enjoined upon the attorney, and he is prohibited from disclosing any communication made by the client to him in a professional capacity. At least, this is the view the New York court took of it. The client being dead, and not present to waive the privilege, if it were no more than that, the court held it could not be waived at all in such a case. The case in 111 N. Y. 239, 18 N. E. 874, is referred to in *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 31 N. E. 726, 17 L. R. A. 188, and it is there pointed out that the New York decision must rest upon the New York statute alone, since the rule adopted in the New York case was not the rule at common law. It was likewise held in *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279, that the deceased's physician could not testify in a will contest respecting the deceased's mental condition. This decision also rests upon the Indiana statute. The supreme court of that state subsequently held, however, in *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918, that the privilege could be waived by the personal representative of the deceased in a will contest, and that it was so waived by calling the physician as a witness. As we have pointed out, however, the distinction of permitting one side of a will contest to waive the privilege while denying such right to the other is purely arbitrary and without sound reason, and the weight of authority is against it.

In this connection it should not be overlooked that the courts whose decisions are cited in the *Van Alstine* case (26 Utah, 193, 72 Pac. 942) utterly repudiate the doctrine announced in that case when applied to will contests. As an instance of this we need only refer to the Iowa and Missouri cases cited in the *Van Alstine* case. The courts of both those states are uncompromisingly ³⁹¹ opposed to the doctrine announced in the *Van Alstine* case, as is evidenced in *Winters*

v. Winters, 102 Iowa, 53, 63 Am. St. Rep. 428, 71 N. W. 184, and Graham v. O'Fallon, 4 Mo. 338. The courts last referred to, however, are in thorough accord with the doctrine of privilege as applied in the Munz case and cases of that character. They, however, make and maintain a distinction between will contests and other cases, and we think such a distinction is sound and should be enforced. Whether there is, or should be, a distinction with regard to the privilege between a physician who attends a patient in his last sickness and an attorney who prepares his client's last will in testifying to the mental condition or state of mind of the testator, or in disclosing other matters that may affect the integrity of the will, is not directly before us, and need not be determined. As we have shown, the privilege with regard to physicians is a creature of the statute, while as to attorneys it is a part of the common law. If it is found in a statute and the statute is declaratory of the common law merely, as in this state, the statute should be applied under the rule in force at common law. If, therefore, the privilege as to attorneys did not apply at common law in the land of its birth, and the authorities we have cited clearly show that it did not, it should not be declared to be the law in any state where the common law has been adopted, and we are not disposed to do so. The rules of evidence as evolved by the courts never were intended to be so applied as to conceal the truth. Under modern jurisprudence the privilege extended to clients never can have that effect where the client is living and personally interested. He may be called as a witness at any time and place, and must, like every other witness, make full disclosure of all the relevant facts within his knowledge, whether for or against his interests. In will contests, however, where such contest is based upon the grounds of duress or undue influence, the influence usually consists of secret acts of another which speak only through the acts of the testator. If the testator made any disclosure of such acts, either by word or conduct, to the attorney preparing the will, no privilege is invaded, and no ³⁹² possible harm can come to anyone by compelling the attorney to testify concerning them. We are constrained to hold, therefore, that as between heirs or beneficiaries of a deceased person in a will contest, where undue influence or want of capacity are in issue, neither side can invoke the privilege as against the testimony of any attorney who prepared the will under the direction of the deceased, and the attorney should be required to disclose all matters

relevant to such issues the same as any other persons cognizant of the facts would be.

The proponents also offered to prove by the attorney the contents of a former will. This was objected to upon two grounds, namely, that it was immaterial and privileged. The court sustained the objection on both grounds. We do not think, for the reasons above stated, that the matter was privileged. Nor was it necessarily immaterial. Where a contest is based upon duress, fraud or undue influence, the provisions contained in a former will may become very important. If it can be shown that the bequests in favor of the person who is charged with having exerted the undue influence are the same, or substantially so, in the later will as they were in the former one, and that the influence was not present when the former will was made, it may be a conclusive answer to the charge of undue influence. If, however, it should appear that the bequests in favor of the person charged with having exerted undue influence are enlarged in the later will, and no reason for this is made to appear, while the surrounding conditions and circumstances are such as would make it probable that the person charged did exert undue influence over the mind of the testator, then again such facts may become very material in determining the issue. In this connection it should not be overlooked that any person not only has the legal right to make a will, but he has likewise the right to make as many different ones as he chooses, and to make them in accordance with the dictates of his own conscience and judgment. The mere fact that a change is made in a later will, of itself, may be no evidence whatever that the testator was unduly influenced to make such a change. But the triers of ³⁹³ the facts should be placed in possession of all of the facts and circumstances, as they may have affected the testator, and from them all determine the ultimate fact sought to be reached in such a contest. In this regard much may depend upon the length of time that elapsed between the prior and later will. The changes in the conditions as they may have affected the beneficiaries of the deceased's bounty; their conduct and demeanor toward him; the services or kindnesses they may have rendered or shown him in the later years of his life; and, in short, all the circumstances that may affect a person of feeble health or mind should be considered. Changes made in a later will may therefore be of some probative force, and should not be excluded from consideration, unless it is made clear beyond a reasonable doubt by all the evidence and circumstances that

the changes could in no event affect the result of the contest. Such changes, if any exist, merely go to the intention of the testator, and, like other declarations which in some way manifest these intentions, always are admissible if not too remote.

In 1 Underhill on Wills, section 134, the rule is well stated in the following language: "The testator may at any time revoke his will; and the fact that he does so arbitrarily and without giving his reason for so doing raises no presumption that a new will, executed to revoke the former or to take the place of it, was unduly procured. The force of proof of a change of testamentary disposition depends wholly upon the circumstances of the particular case. If the earlier will was a natural one, according to the circumstances surrounding its execution, the execution of a later instrument of a character directly contrary is material. And if the testator, at the time of the execution of the later will, which is not only unnatural, but directly contrary to his previous fixed and declared intention, is in feeble health, and is surrounded by those who are favored by the later will, a suspicion of undue influence, to say the least, is created. It would certainly be proper for the court, under such circumstances, to scrutinize all the evidence very closely to ascertain if the later will is the result of coercion or fraud, or if it was freely and voluntarily executed."

Upon this subject, Mr. Justice Campbell, in the case of *Beaubien v. Cicotte*, 12 Mich. 459, says: ³⁹⁴ "It is true, of course, that making one will does not, of itself, render it at all unlikely that another will may be substituted; but previous preferences and plans may have a plain bearing upon an issue, where the question arises whether the testator has understandingly, and of his own free will, changed his settled views. No case has been cited holding such proof inadmissible. It is of frequent occurrence in the cases reported."

In support of this he cites a number of both English and American cases. The doctrine is also supported by the following authorities: *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *In re Selleck's Will*, 125 Iowa, 678, 101 N. W. 453; *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258, 31 N. E. 726, 17 L. R. A. 188; *Schouler on Wills*, sec. 242.

In some of the foregoing cases the question was squarely presented as to whether the attorney who prepared the later will should be required to testify to the contents of a former will, and it is held that it was not a matter of privilege at common law, and that he should be required to testify. It is argued, however, that the protestants, in this connection,

made certain offers of proof respecting the contents of the prior will, and that it was made to appear what the changes were, and hence the proof offered was immaterial. In this connection the general rule is invoked that the evidence offered must appear to be relevant and material or no error can be predicated upon the ruling excluding it. It must be remembered that in connection with the changes in the last will the protestants also offered to prove the declarations of the deceased made by him at the time the changes were made. All this was excluded. It is true that as the offer stands nothing seems very material, except, perhaps, the declarations of the testator made in connection with the last will. Nor are we inclined to depart from the general rule that unless it appears from the offer the evidence is material, the ruling of the court will be upheld. The reason upon which the rule rests is that the party offering the testimony must know what it is, and if, upon his statement, it is not material, no error can be committed by its exclusion. But offers of proof need not be made in all cases, nor should they control in all cases where ³⁹⁵ the attorney chooses to make them. This case affords a practical illustration that the exception is as well founded as is the rule itself. The witness in this case refused to disclose to anyone what the testator said at any time concerning the will. He so refused upon the ground that it would be against the law and unprofessional to do so. How could the protestants, therefore, know that which was rigorously concealed from them? The best they could do was to hazard a guess as to what the attorney would testify to. This counsel undertook to do in making the offer. The mere fact that the offer included some matters that were not material, in view of the situation that confronted counsel, should not have precluded them from proving that which appeared material. The witness was determined not to disclose anything that was said or transpired between him and the deceased, and was of that state of mind all the time. Counsel plied him with numerous questions, but with no avail. The court upheld the witness in his attitude in so far as the questions related to anything the deceased said or did. Whether anything the deceased said or did with regard to the will, or the changes therein, as compared with the former one, would have affected the result, we cannot say; nor could the trial court say, because he refused to hear it. What, if any, effect shall be given it can only be determined after it is disclosed and weighed, compared and reconciled with all the other evidence in the case. The protestants were not per-

mitted to present their whole case, and the court did not hear it. This, as we have heretofore held in *Re Miller's Estate*, 31 Utah, 415, 88 Pac. 338, it was the duty of the trial court to hear and pass upon. We cannot say in advance what, if any, effect the excluded evidence should be given. From the record it is manifest that the witness should have answered the questions with respect to what passed between him and the deceased in the preparation of the last will, and he should also have disclosed the contents of the former will so far as he knew them, for the purpose of bringing them before the court; and he should likewise have stated all that was said and done by the wife of the deceased, which he did not do.

³⁹⁶ The judgment is therefore reversed, with directions to the lower court to grant the motion for a new trial, and to proceed with the case in accordance with the views herein expressed. Appellants to recover costs of this appeal.

McCarty, C. J., and Straup, J., concur.

An Attorney Who Draws a Will, whether he becomes the subscribing witness thereto or not, is not incompetent, after the death of his client, to testify of communications made to him by the testator in directing the preparation of the instrument, on the issue of testamentary capacity, undue influence, or the identity of beneficiaries: *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828; *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202; *Estate of Dominici*, 151 Cal. 181, 90 Pac. 448. See, also, *Winters v. Winters*, 102 Iowa, 53, 63 Am. St. Rep. 428.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

**BARTLETT ESTATE COMPANY v. FAIRHAVEN LAND
COMPANY.**

[49 Wash. 58, 94 Pac. 900.]

MORTGAGE, Assignment of by Transfer of the Indebtedness. A mortgage is a mere lien or security for the debt, and passes by the assignment of the debt without any formal assignment of the mortgage. (p. 860.)

MORTGAGE—Assignee of the Debt, Right of to Exercise an Option Reserved to the Mortgagee.—The assignee of a debt secured by a mortgage takes the security with the debt and all the rights thereunder possessed by his assignor. Such assignee has, therefore, the right reserved to the mortgagee to declare the whole debt due on default in the payment of interest, and this is true though the mortgage does not purport to run in favor of, or to reserve powers in favor of, successors in interest of the mortgagee. (pp. 860, 861.)

MORTGAGEE—Effect of Exercising an Option to Declare the Whole Debt Due.—If a mortgage provides that certain partial payments may be made and releases obtained on the doing of specified acts prior to the maturity of the mortgage, and because of a default on the part of the mortgagor, the assignee of the mortgage exercises an option to declare the whole of the indebtedness due, the mortgage is thereby matured for the purposes of foreclosure, and the right to make partial payments and receive releases terminates. (p. 861.)

MORTGAGES—Attorneys' Fees.—If the assignee of a mortgage declares the whole principal to be due for a default in the payment of interest and brings an action to foreclose, he is entitled to the allowance of attorneys' fees based on the entire amount of the indebtedness. (p. 862.)

WRITING.—Extrinsic Evidence to Aid in the Interpretation of a Mortgage is admissible only when the writing is ambiguous and capable of different constructions. (p. 862.)

Newman & Howard, for the appellant.

Black, Kindall & Kenyon and Dorr & Hadley, for the respondent.

59 FULLERTON, J. In this action the Bartlett Estate Company, plaintiff below, sought to recover from the defend-

ant, Fairhaven Land Company, upon six promissory notes executed by the last-named company, payable to one Richard B. Ayer, as executor of the last will and testament of Erastus Bartlett, deceased, and to foreclose a mortgage given to secure the notes. The notes and mortgage by assignment had become the property of the plaintiff. The notes were executed on September 13, 1902, the first being for \$27,000, payable on or before July 13, 1903, the second, third, fourth, and fifth being for \$20,000 each, payable consecutively on July 13th of the years 1904, 1905, 1906, and 1907; the sixth being for \$53,000, payable on July 13, 1908; each of said notes bore interest at the rate of five per centum per annum, payable, with the exception of the first, semi-annually. The mortgage was conditioned to secure the payments of the several notes according to their tenor and effect. It also contained a condition to the effect that if default should be made in the payment of the principal sum of any one of the notes or the interest due thereon at the time the same should become due, or if default should be made in the payment of the taxes assessed upon the mortgaged property within thirty days after the same became delinquent, then the aggregate sum of ⁶⁰ the principal and interest owing upon the notes should become immediately due and payable at the option of the "party of the second part [the mortgagee] without notice to the" mortgagor.

At the time of the execution of the notes and mortgage, and as a part of the same transaction, the mortgagee executed and delivered to the mortgagor an instrument, called by the parties a partial release agreement, by the terms of which the mortgagor agreed to release from the operation of the mortgage certain described tracts of land on the payment of certain fixed sums as set forth in a schedule attached to the agreement; the time when such partial payments could be made, and the effect of the same, is set forth in the agreement in the following language:

"And it is further agreed that any one or more such partial payments may be made at any time prior to maturity, and that all payments under this agreement may be made to the said Richard B. Ayer, as executor of the last will and testament of the said Erastus Bartlett, deceased, by paying the money therefor in cash to the said Richard B. Ayer, at Fairhaven, Whatcom county, Washington, or to such other person as the said Richard B. Ayer, as executor, may designate by written notice to the said Bellingham Bay Land Company, and said payments, when so made, shall be forthwith indorsed

upon the first note due described in the mortgage and credit shall be immediately given to the Fairhaven Land Company of such payment upon the first note due from it to said Ayer.

"It is further understood and agreed that nothing herein contained shall affect or vary the terms and condition of the original mortgage contract, or in any manner impair the lien thereby created on any of the property in said mortgage, otherwise than in this agreement contained. In the event of a foreclosure, nothing herein contained shall be construed to prevent the entry of a decree adjudging the entire amount due or to become due upon said notes described in the said mortgage as a valid first lien upon all the property described in said mortgage not theretofore released."

The action was brought on July 23, 1904. At that time there had become due by the terms of the mortgage, in principal ⁶¹ and interest and unpaid taxes, over and above payments, some \$31,000, and the holder of the mortgage sought to exercise the option therein given by declaring the whole sum of principal and interest due and payable, and brought the action to foreclose the mortgage for the entire amount.

The complaint was in the usual form. It set forth the notes and mortgage at length, stated the amount paid and the amount delinquent thereon, averred a breach of the condition of the mortgage, the holder's election to declare the entire sum of principal and interest due, and prayed a decree subjecting the mortgaged property to a sale in satisfaction of the amount due. The answer was not filed until nearly a year after the commencement of the action. It was long and complicated. After denying certain allegations of the complaint, it set forth three several affirmative defenses, followed by three several counterclaims, all growing out of matters arising subsequent to the commencement of the action of foreclosure. These defenses and counterclaims were based on what the defendant conceived to be breaches of the conditions of the terms of the mortgage and the terms of the partial release agreement. It was also contended that, since the right of election given to the mortgagee to declare the entire mortgage debt due and payable on failure to pay the installments of principal and interest and the taxes, as the same became due and delinquent, did not in terms extend to an assignee of the mortgage, the right was personal to the original mortgagee, and did not pass by assignment to the plaintiffs, and, as a necessary deduction from that principle, it followed that the mortgagor had the right to make partial payments on the mortgage and receive partial releases of the mortgaged

property up to the time of the maturity of the last installment of the principal. Acting pursuant to this contention, the defendant made tenders of payment in accordance with the terms of the release agreement, and demanded releases of property in consideration thereof. These tenders the plaintiff refused to accept, and such refusal constitutes the breaches ⁶² which give rise to the affirmative defenses and counter-claims. The amount of one of such tenders, namely, a tender of \$104.48, for the release of a strip of land described in the release agreement as the "Old Colony Wharf strip," the defendant brought into court by paying the same to the clerk at the time of filing its answer.

The trial judge accepted the defendant's view of the right of election given in the mortgage, and allowed a foreclosure for the sums due and unpaid in principal, interest and taxes, according to the terms of the mortgage at the time the decree was entered. He disallowed, however, the claims for damages arising out of the breach of the partial release agreement; disallowing also the defendant's demand for a release of the property for which tenders had theretofore been made, save and except the tender for the Old Colony Wharf strip, where the amount of the tender was brought into court and deposited with the clerk at the time of filing the answer. From the decree entered, both the plaintiff and the defendant, Fairhaven Land Company, have appealed.

The errors assigned on the part of the Bartlett Estate Company are three in number, namely: (1) that the court erred in refusing to adjudge the entire indebtedness represented by the notes and mortgage to be due and payable, and in refusing to enter a decree of foreclosure for the entire indebtedness; (2) that the court erred in releasing from the operation of the mortgage the tract known as the Old Colony Wharf strip; and (3) that the court erred in refusing to allow an attorney's fee based on the recovery of the entire indebtedness.

The record does not disclose the reason given by the learned trial judge for refusing to permit the present owner of the mortgage to exercise the option therein given to declare the entire debt due on a failure to pay the installments of principal, interest and taxes, as they matured, but it is said that he so held because the right to exercise this option was not granted in terms to an assignee of the mortgage, and hence ⁶³ held that the right was a personal privilege of the original mortgagee, which he could not pass to a third person by assignment. It seems to us that the conclusion does not neces-

sarily follow from the fact. At common law, and formerly in many of the states of the Union, a mortgage was regarded as a conveyance passing the fee of the property mortgaged to the mortgagee, and it was thought, following the analogy of an ordinary deed of conveyance, that words of inheritance or of succession were necessary if the instrument was to operate as anything more than a mere personal grant to the mortgagee. But in this state the rule that words of inheritance or of succession are necessary to pass a fee is no longer applicable even to deeds, where the purpose of the instrument is to convey title in fee: Bal. Code, secs. 4519, 4520, 4525 (Pierce's Code, secs. 4451, 4452, 4437). Much less is it applicable to a mortgage, which is nothing more than a mere lien or security for debt, and which passes to the assignee by an assignment of the debt without any formal assignment of the mortgage itself. It must follow from this, we think, that the assignee takes the security with the debt, having all the rights therein possessed by his assignor. It is possible, of course, to make a mortgage with covenants personal to the mortgagee which will not pass by assignment, but to do so the intent must be expressed in clear and unmistakable language; it is not so expressed by a mere omission to add words of inheritance or of succession to the covenants of the mortgage.

The cases where this question is presented and determined seem not to be many. It was before the court in *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883. In that case the covenant in the mortgage was as follows: "In case default be made in the payment of either principal or any installment of interest, as provided, then the whole sum of principal and interest shall be due at the option of the party of the second part (the mortgagee), and suit of foreclosure may be brought immediately"; and the court held that it inured to the benefit of the assignees of the mortgage, giving them the right to elect to ⁶⁴ consider the entire debt due on the failure to pay an installment of interest falling due prior to the maturity of the principal debt. To the same effect are the cases of *Brand v. Smith*, 99 Mich. 395, 58 N. W. 363, and *New England Loan & Trust Co. v. Robinson*, 56 Neb. 50, 71 Am. St. Rep. 657, 76 N. W. 415. So in 27 Cyc. 1309 it is said: "The assignee of a mortgage may maintain in his own name a bill in equity, or a statutory action for its foreclosure; and if the mortgage gives the right to foreclose on default in the payment of interest or of any installment of principal, an-

ticipating the maturity of the rest, this right may be exercised by the assignee as well as by the original mortgagee."

And in *Jones on Mortgages*, section 1182a, it is said that an assignee of a mortgage may exercise this option in the same way that the mortgagee himself may. Of the cases cited as maintaining the contrary doctrine we have found none directly in point. Those more nearly analogous are founded on the earlier view of a mortgage; namely, that it operated as a conveyance of the mortgaged property, and, as we have shown, are not applicable in a jurisdiction where a mortgage is regarded as a mere lien for the security of a debt. We conclude, therefore, that the court erred in refusing to hold the entire mortgage debt due and the mortgage ripe for foreclosure.

The second assignment is answered by the language of the release agreement itself. As shown by the quotation before made, it is provided that any one or more of such partial payments could be made "prior to maturity" of the mortgage debt. This must mean a time prior to the election of the mortgagee to declare the entire debt due and payable, for a mortgage due by election of the mortgagee is as fully matured as is one due by the expiration of the extreme limit of time fixed for payment. In other words, a mortgage due for the purposes of foreclosure is due for all purposes, and when the right of foreclosure for the entire debt exists, no right which must be exercised before maturity of the debt can be exercised ⁶⁵ after foreclosure has been begun. The court erred, therefore, in allowing a partial release after foreclosure proceedings had been begun.

It follows also from the foregoing that the third assignment of error is well taken, and that the court should have allowed an attorney's fee based on a recovery of the entire indebtedness.

The assignments of error on the part of the Fairhaven Land Company are, in the main, met by the conclusion we have reached on the question of the assignability of the right to exercise the election to declare the entire debt due, and the right to secure releases by making partial payments after the exercise of that election. The defendant, however, contends that the court erred in striking from its answers as immaterial certain paragraphs wherein it recited the history of the transaction between itself and one Erastus Bartlett, the predecessor in interest of the plaintiff, which gave rise to the creation of the indebtedness sued upon; the purpose being to aid in the interpretation of the writings between the par-

ties. But it is only where the writing is in itself ambiguous and capable of different constructions that the court is permitted to call upon extrinsic evidence to aid in its construction. The true meaning of the terms of a mortgage, like the meaning of the terms in other written instruments, must be gathered from the writing itself where it is plain and unambiguous; it cannot be added to or varied by showing extrinsic matters, or a prior or contemporaneous parol agreement.

It is urged also that the court erred in refusing to permit the appellant to prove the facts set forth in the third paragraph of its second affirmative defense, to the effect that, subsequent to the commencement of the foreclosure action, it contracted to sell portions of the mortgaged property for sums sufficient to pay all that was then in default upon the mortgage debt, and would have received such sums had the mortgagee executed releases as demanded. But this was after the mortgagee had exercised its option, and it was then ⁶⁶ too late for the mortgagor to demand releases as a matter of right. To prove, therefore, that it could then have sold enough of the mortgaged property to pay the amount of the debt in arrears constituted no defense to the action, and it was not error to exclude the proffered evidence.

Other questions suggested are met by what we have said in connection with the plaintiff's appeal, and require no separate consideration.

The judgment appealed from is reversed and the cause remanded, with instructions to enter the usual judgment foreclosing the mortgage for the entire mortgage debt, disallowing the application to release the tract known and described in the mortgage as the Old Colony Wharf strip, and allowing to the plaintiff a reasonable attorney's fee based on the recovery of the entire mortgage debt. The appellant, Bartlett Estate Company, will recover its costs on appeal.

Mount, Root and Rudkin, JJ., concur.

Hadley, C. J., and Crow, J., took no part.

The Provisions of a Mortgage are not personal to the mortgagee, but inure to the owner of any part of the debt secured: *New England Loan etc. Co. v. Robinson*, 56 Neb. 50, 71 Am. St. Rep. 657. But according to *Sanford v. Kane*, 133 Ill. 199, 23 Am. St. Rep. 602, a power of sale given to a mortgagee can be executed only by him, if there has been no transfer of the debt so as to pass the legal title thereto; but if the debt has been legally assigned, the assignee is the one authorized to make the sale.

BRECHLIN v. NIGHT HAWK MINING COMPANY.

[49 Wash. 198, 94 Pac. 928.]

CONTRACT, When Indivisible, and Void in Whole Because Void in Part.—A contract by a corporation to purchase certain real property and also certain shares of its capital stock for a sum specified, without stating what part is for the stock and what for the property, and void as to the stock because of the incapacity of the corporation to deal in or to acquire shares of its own stock, is indivisible, and therefore void as a whole, and no action can be sustained thereon. (p. 865.)

RES JUDICATA—Indivisible Demand.—If an action is brought to recover a sum claimed to be due as the purchase price of real property and of shares of stock and is determined in favor of the defendant on the ground that its agreement to purchase such stock is void, there can be no recovery in a subsequent action brought for the real property alone. The contract cannot be divided after suit. (pp. 865, 866.)

RES JUDICATA—Judgment, When on the Merits.—A Judgment Entered on the Ground that the Complaint does not State a Cause of Action is in the nature of a judgment on demurrer, and is, therefore, on the merits, and may sustain the plea of res judicata. (p. 866.)

E. W. Taylor and E. Fitzgerald, for the appellant.

G. V. Alexander, for the respondent.

¹⁹⁹ HADLEY, C. J. This action was brought to recover the sum of \$3,000, alleged to be due as the purchase price of a number of mining claims which the plaintiff claims were sold by him to the defendant corporation. The complaint alleges that on July 9, 1902, for and in consideration of \$3,000 to be paid by the defendant to the plaintiff, the latter agreed to sell, and did sell, the claims to the defendant, the said sum to be paid on or before February 1, 1903. It is further alleged that afterward, on the eleventh day of January, 1903, the defendant agreed to pay the \$3,000 as follows: \$1,500 on or before the fifteenth day of February, 1903, and \$1,500 on or before the fifteenth day of April, 1903, all of which it has failed to do. The agreement of July 9, 1902, to which the complaint refers, was in writing and was made with the plaintiff by one Wehe, who was at the time the president of the defendant company. The writing was drawn upon a printed letter-head of the defendant company, and omitting the names of the officers printed upon the page, the instrument was as follows:

“Night Hawk, Wash., July 9th, 1902.

“I agree herewith to pay Julius Brechlin Five Thousand Dollars for his five mining claims, and all land lying in be-

tween Night Hawk Mining Co. claims and all his holdings in the Night Hawk Mining Comp. in shares the payment to be two thousand on or before November first, 1902, and the balance of three thousand dollars on or before February first, 1907.

A. M. WEHE.

“Witness: A. GEORGE WEHE.”

Upon the above written agreement the plaintiff, in the year 1903, brought an action against the defendant, and alleged that at the time the agreement was made the plaintiff owned fifty-six thousand five hundred and sixty-six shares of the capital stock of the defendant company; that said Wehe made the contract on behalf of the defendant; that the defendant had paid \$1,000 thereon, and judgment for \$4,000 was asked. The second and modified promise to pay, as alleged in the present action, was by way of letter written by the secretary ²⁰⁰ of the defendant company, at Milwaukee, Wisconsin, and directed to the plaintiff at Night Hawk, Washington. The plaintiff had this letter in his possession at the time he brought the former suit. That suit came on for trial in 1905, and objection was made to the admission of any testimony, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the objection and rendered judgment against the plaintiff. No appeal was taken from that judgment, and it was in full force and effect when the present action was brought.

In the present action the defendant interposed three defenses: 1. A general denial of liability; 2. That the alleged contract of July 9, 1902, was entered into between the plaintiff and said Wehe on account of Wehe himself, and that he had no authority to make the same on behalf of the defendant; 3. The judgment in said former action was pleaded as *res judicata*. The trial was by the court without a jury, and the court found the necessary facts to establish all of these defenses. Judgment was rendered that the plaintiff shall take nothing by the action, and the plaintiff has appealed.

The assignments of error are based upon the court's findings and conclusions. It is contended that the defense of *res judicata* was not established. The evidence certainly shows that the parties to the former action were the same as in the present one, the appellant being plaintiff and the respondent defendant in both cases. The cause of action in each case was the same, viz., the recovery of the purchase price of certain mining claims, the only difference between the two actions being that in the present action the demand is for the purchase price of the mining claims alone, while in

the former one it was for the purchase price of the mining claims and also for that of fifty-six thousand five hundred and sixty-six shares of the capital stock of the respondent company, claimed to have been held by appellant and sold by him to the respondent company that issued the stock. Both complaints refer to the contract of July 9, 1902, but the complaint ²⁰¹ in the present action omits to allege that the consideration for the demand includes the sale of the fifty-six thousand five hundred and sixty-six shares of capital stock as was alleged in the former action.

The court held, in the former action, that the contract as alleged was illegal, for the reason that it undertook to obligate the respondent as a corporation to traffic in its own stock. Appellant sought in this action to avoid the force of the former holding by omitting any demand on account of the shares of stock, and limited his demand to \$3,000 for the mining claims alone. The written contract was, however, an indivisible one. No part of the consideration of \$5,000 mentioned therein was apportioned to the mining claims and no part to the mining stock. But appellant sets up in his present complaint one or two letters written to him by the secretary of the respondent company as the alleged basis of the present action for \$3,000, and as distinguishing it from the former cause of action. He had those letters in his possession when he brought the former action. If the rule that what might have been adjudicated in a former action should be treated as adjudicated were applied, appellant would now be precluded by that rule from asserting any new element introduced by the letters. But without deciding whether that rule should apply here or not under the circumstances, it is nevertheless true that the letters do not attempt to segregate a part of the original contract price as applying to mining claims and a part to capital stock. What was said in the letters related to the subject matter of the original written contract, and the complaint in the present action refers to that contract as the basis of sale and the cause of action. The letters, in other words, do not constitute an independent basis for a cause of action. But they grow out of, and are dependent upon, the original contract, which was an indivisible one, and provided for the sale and purchase of both mining claims and capital stock. The cause of action being an indivisible one, and a suit having been once brought thereon in which ²⁰² judgment went against appellant, the contract cannot now be divided and a subsequent suit maintained on a part

of it: 24 Am. & Eng. Ency. of Law, 2d ed., p. 786; 23 Cyc. 1174; Kline v. Stein, 46 Wash. 546, 123 Am. St. Rep. 940, 90 Pac. 1041; Collins v. Gleason, 47 Wash. 62, 125 Am. St. Rep. 891, 91 Pac. 566.

All the conditions necessary to render the former judgment *res judicata* are present. There is identity of the thing sued for, of the cause of action, and of persons and parties. But it is conceded by appellant that, since the former judgment was rendered on objection to the introduction of any evidence, it was not, therefore, a judgment on the merits which can be interposed as *res judicata*. The objection was upon the ground that the complaint did not state a cause of action, and when it was sustained and judgment entered upon the ruling, it was in the nature of a judgment on demurrer to the complaint. A final judgment rendered on demurrer which goes to the grounds of recovery is a judgment on the merits, and is *res judicata*: 24 Am. & Eng. Ency. of Law, 2d ed., p. 799; 23 Cyc. 1232; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107; Gould v. Evansville etc. R. Co., 91 U. S. 526, 23 L. ed. 416; Northern Pac. R. Co. v. Slaght, 205 U. S. 122, 27 Sup. Ct. Rep. 442, 51 L. ed. 738.

It follows that this action is barred by the former judgment, and that being true, it is unnecessary for us to discuss in detail other findings. We may say, however, that the evidence in the record in support of the defense on the merits is such that we think the court's findings thereon are supported, and should not be disturbed.

The judgment is affirmed.

Rudkin, Dunbar, Root, Crow, Fullerton and Mount, JJ., concur.

The Rule Against Splitting Causes of Action does not obtain where there is one contract, but the performance is several. Where one who has constructed a railroad under a contract to receive money, also stock and bonds placed with a trust company, sues the railroad company, joining the trust company as defendant, but dismissing it at trial, and is adjudged entitled to a lien, the money, and a certain amount of stock, no money judgment being rendered for the stock because having no pecuniary value, the judgment does not bar him from suing in equity to compel the trust company to deliver the certificates of stock and the railroad company to make a transfer of the shares on its books: Baumhoff v. St. Louis etc. R. R. Co., 205 Mo. 248, 120 Am. St. Rep. 745. If an officer has disposed of a portion of personal property alleged to have been wrongfully seized by him under a writ of attachment, the owner may maintain an action in trover and conversion for the goods thus disposed of, and an action in replevin for the remainder: Gehlert v. Quinn, 35 Mont. 451, 119 Am. St. Rep. 864. The giving of a promissory note for a part of a

sum due for materials sold and delivered, and the subsequent taking of judgment for the amount of such note, do not, where there is evidence that the note was taken in payment of the amount, preclude the plaintiff from afterward maintaining an action for the balance due. The cause of action accruing at the maturity of the note is not the same as that resting on the balance of the account, and recovery therefor may be had without splitting the cause of action: *Ebersole v. Daniel*, 146 Ala. 506, 119 Am. St. Rep. 52. If by the same act of trespass adverse possession is taken of land, but one action can be maintained to recover such possession, and if an action is brought and judgment rendered for part only of the tract, no subsequent action can be maintained for the balance, though it is claimed that the bringing of the action for a part only was due to accident and mistake: *Kline v. Stein*, 46 Wash. 546, 123 Am. St. Rep. 940.

FISHER v. NORTHERN PACIFIC RAILWAY COMPANY.

[49 Wash. 258, 94 Pac. 1073.]

CARRIERS, Liability of as Such, When has not Terminated.—If goods shipped over a railway reach their destination, but the consignee, on applying for them, is informed that the waybills are not made out and will not be made out on that day, this is equivalent to notifying him that the goods cannot then be delivered, and the railway company remains liable as a carrier for the subsequent loss of the property by fire without negligence. (p. 868.)

B. S. Grosscup and Ira P. Englehart, for the appellant.

Snyder & Luse, for the respondent.

259 MOUNT, J. This case was tried to the court without a jury. Findings were made in favor of the plaintiff, and a judgment was entered against the defendant for three hundred and sixty-eight dollars and nineteen cents. The defendant appeals.

The facts are as follows: The respondent was doing business in North Yakima, in this state. In May, 1906, three boxes of merchandise, of the value of three hundred and sixty-eight dollars and nineteen cents, were shipped from Portland, Oregon, over the line of the appellant, to the respondent at North Yakima. The goods arrived at North Yakima about noon on May 5, 1906. About the time the goods arrived, the plaintiff called at the depot for them. He was informed that the goods were probably in the shipment of that day, but that the waybills were not made out and would not be made out on that day. Plaintiff did not return for the goods on that day. During the afternoon the goods were unloaded from the car and placed in the warehouse of

the railway company. At about 11 o'clock of that night a fire started in the warehouse known as Coffin Bros.' warehouse, about one hundred feet from the freight-house of the railway company where the goods in question were stored. The North Yakima city fire department was unable to control the fire, and it spread to and consumed the warehouse of the railway company, and the goods stored therein were lost. It is conceded that there was no negligence on the part of the railway company. Upon these facts the appellant argues that it is liable only as a warehouseman and not as a carrier. This presents the only question in the case.

Many authorities hold that, where goods are shipped by rail and arrive at their destination, and are there unloaded into a warehouse and held ready for delivery, the company's liability ceases as a common carrier, and it is thereafter liable as a warehouseman only: See note to *Denver etc. R. Co. v. Peterson*, 97 Am. St. Rep. 76, 90 (30 Colo. 77, 69 Pac. 578), where ²⁶⁰ many of the cases cited by the appellant are mentioned. But the rule is stated in note "e," page 91 of the same volume, as follows: "Merely placing the goods in storage at their destination does not, in our opinion, reduce the carrier's liability to that of a warehouseman. Its liability as carrier continues, according to the sounder reason and the weight of authority, until at least such time as the consignee has had a reasonable opportunity to inspect the goods and take them away in the usual course of business." Several cases are then cited which support this rule. The author continues: "This doctrine applies both to carriers by rail and to carriers by water. But the consignee must act with reasonable expedition. If he fails within a reasonable time and after a fair opportunity to take charge of the goods, the carrier's liability becomes that of a warehouseman only."

And many cases are cited to support this rule. We think the rule as quoted above under note "e" is the rule which should apply in this case. It was substantially followed by us in *Normile v. Northern Pac. R. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271. When the respondent called for his goods he was informed, in substance, that they could not be delivered to him until the next day. They were destroyed that night. He therefore had no opportunity to obtain the goods or to take them away before they were destroyed. Under these facts and the rule above stated, the liability of the appellant was that of a carrier and not of a warehouseman.

The judgment must therefore be affirmed.

Hadley, C. J., Crow, Fullerton and Root, JJ., concur.

For Authorities in Support of the Principal Case, see the note to Denver etc. R. R. Co. v. Peterson, 97 Am. St. Rep. 84, and the subsequent case of Arkansas etc. Ry. Co. v. German Nat. Bank, 77 Ark. 482, 113 Am. St. Rep. 160. The case of North Yakima Brewing & Malting Co. v. Northern Pacific Ry. Co., 49 Wash. 375, 95 Pac. 486, 16 L. R. A., N. S., 935, may be regarded as the antithesis of the principal case, for instead of determining that the carrier's liability continued because of want of readiness to deliver the goods, it held such liability had ceased and the liability of warehousemen only had attached, because when the goods were called for, the consignee had been told that the bills would be ready and the goods would be delivered at any time after noon of that day, and not being called for, the goods were destroyed on the following night. A judgment against the railroad company was reversed, the court saying:

"In the case of Fisher v. Northern Pac. R. Co., 49 Wash. 258, ante, p. 867, 94 Pac. 1073, we held that the mere placing of goods in storage by the carrier after they had arrived at their destination did not reduce the carriage liability to that of a warehouseman, but that its liability as carrier continued until such time as the consignee had a reasonable opportunity to inspect the goods and take them away in the usual course of business. The converse of the rule must be that after goods have been transported by the carrier to their place of destination, and a reasonable opportunity is given the consignee to inspect them and take them away, the carrier's liability thereafter is that of a warehouseman, and it can be held for the loss of the goods only when that loss is occasioned by some negligence on its part.

"Was a reasonable time given in the present case to inspect and take the goods away? It seems to us that there was. What constitutes a reasonable time for the removal of goods after notice must, of course, vary with the circumstances of each particular case, and no general rule can be laid down applicable to all cases by which the fact can be determined, but, because of the nature of the liability and its extreme hazard to the carrier, it can be said that the consignee must act promptly after receiving notice of the arrival of his goods, and not defer taking them away to attend to other matters of his own, no matter how important they may be. The liability of a common carrier for goods in transit is an extraordinary liability, and although founded on sound principles of public policy, is not to be extended beyond the point where necessity for its existence continues. In the case before us there was ample opportunity given to take the goods away. The respondent's place of business was but four hundred feet from the warehouse where the goods were stored. It had its own drays and trucks, and the only reason why the goods were not taken away during the afternoon preceding the night the fire occurred was that it did not suit the convenience of the respondent. This being true, we think it should bear the loss instead of the appellant, since each of the parties is equally free from responsibility for the fire which caused the loss."

ANDERSON v. McCARTHY DRY-GOODS COMPANY.

[49 Wash. 398, 95 Pac. 325.]

RES IPSA LOQUITUR, General Doctrine of.—Where the physical conditions, together with the other established facts, show that an occurrence is one which could not ordinarily, in the nature of things, happen but for negligence on the part of defendant, and where the negligent operation of the apparatus is naturally accompanied with danger and its control and the knowledge of its condition are practically limited to the defendant or his servants, and evidence as to the same is unavailable except through him or them, the rule of *res ipsa loquitur* may usually be invoked by one to whom the defendant owed a duty of protection and who was under no obligation to and did not know, or have reason or opportunity to know, of the danger that threatened him. (pp. 872, 873.)

RES IPSA LOQUITUR—Storekeeper's Liability to Customer.—If a customer enters a store to make a purchase, and while there a basket used upon the storekeeper's carrier system to convey goods to and from the counter falls from the track and strikes the customer, a *prima facie* case is there made out against the storekeeper, entitling the customer to have it submitted to the jury to say whether negligence has been established by the facts proved, unless the defendant shows that the carrier system was properly installed and in good repair, or that it had been properly inspected without any defect being discovered, or that the basket was caused to fall by some person or influence for whom or which the defendant was not responsible. (p. 875.)

John E. Humphries and George B. Cole, for the appellants.

Kerr & McCord, for the respondents.

398 **ROOT, J.** This was an action by appellants for damages alleged to have been sustained by appellant Mrs. Anderson, on account of a personal injury received by a basket falling from an overhead carrier system in the store of the respondent company. From a judgment of nonsuit, this appeal is prosecuted.

The material facts shown were about these: Mrs. Anderson entered respondent company's store to make some purchases, and while there, in the capacity of a customer, a basket used upon respondent's carrier system, conveying goods to and from the wrapping counter, fell or was precipitated from the track, and struck her. No evidence was introduced, except as to facts hereinbefore stated, showing or tending to show that the apparatus was improperly installed or out of repair. The evidence showed that the system was one of standard make and in general use. Appellants invoke the rule of *res ipsa loquitur*, asserting that the fact of the basket falling or being ³⁹⁹ precipitated from the carrier track upon appel-

lant under the circumstances mentioned was sufficient to establish a prima facie case of negligence as against respondent company.

The rule of *res ipsa loquitur* must be invoked sparingly, and applied only where the facts and demands of justice make its application essential. Negligence is never to be presumed from the mere happening of an injury or accident. But when certain physical conditions are established, together with certain happenings in connection therewith, it is sometimes permissible to deduce therefrom a conclusion of the fact of negligence.

"Though, as stated above, negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injuries complained of or the circumstances surrounding may well warrant an inference or presumption of negligence, such a situation being described by the familiar phrase *res ipsa loquitur*. As a matter of course, the application of the maxim in question depends on the peculiar facts and circumstances of each particular case. . . . The presumption which arises by virtue of the application of the maxim *res ipsa loquitur* is usually referred to as a prima facie or rebuttable presumption, which, when it arises, merely shifts the burden upon the defendant to disprove the inferred existence of negligence by evidence that as a matter of fact all proper and reasonable care was employed": 21 Am. & Eng. Ency. of Law, 2d ed., 512, 513.

"Sometimes the duty which the defendant owes to the plaintiff is of such a nature that proof that the accident happened to the plaintiff under certain circumstances will be of such legal value as to afford evidence of negligence on the part of the defendant, and make out a prima facie case in favor of the plaintiff. This is the doctrine of *res ipsa loquitur*, and it is not applied unless the thing causing the accident is under the control of the defendant or his servants, and the accident is of a kind which does not ordinarily occur if due care has been exercised. . . . It is, therefore, generally more correct to say that there are cases where the fact that the accident happened under given conditions, and in connection with certain circumstances, will amount to evidence of negligence sufficient to charge the defendant. To illustrate this, let us take again the case of a traveler in the highway. While ⁴⁰⁰ proof of the mere fact that he was struck and knocked down by some substance in front of A's building will not entitle him to recover damages of A, yet suppose that he is able to show (1) that he was struck by

some solid substance; (2) that this substance was a bale of goods; (3) that, at the time it struck him, this bale of goods was being lowered from the window of a warehouse above the street; (4) that A was owner of this warehouse. This, it has been held, will make out a prima facie case against A. But A might rebut this prima facie case by showing (1) that the bale was being lowered without his knowledge, by the servants of another person; or (2) that the traveler was himself one of the persons engaged in lowering the bale; or (3) that although the plaintiff was using the sidewalk as a traveler, yet he had stopped, and was standing still, under the window from which the bale was being lowered, and that he was warned of the danger and told to stand from under, but negligently failed to do so. . . . A person is lawfully on the street, when an adjoining building falls down, injuring him. In a suit against the owner of the building, he makes out his case by showing the facts stated, without more. The reason is, that the owner of the building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in a safe condition, so that it will not fall into the highway, injuring persons lawfully there. If it did so fall, every fair-minded man would draw the inference that it had not been properly inspected and kept in repair; and if the contrary were true, it is easy for the defendant to show that fact. In another case, it appeared that the defendants, who occupied for business purposes the second and upper floors of a building were hoisting a box, weighing about five hundred pounds, to their rooms, by means of iron hooks attached to its sides. Just as it reached the second floor the hooks broke, and the box fell, broke through the hatchway on the first floor, and struck and injured the plaintiff, who was lawfully in the basement. This, without more, was held evidence of negligence on the part of the defendants warranting a verdict for the plaintiff. So, proof of the fact that water escaped from the defendant's hydrant into the plaintiff's apartment, in the story below, makes out a prima facie case of negligence, which the defendant must excuse or pay damages. So, the fact that tools or other objects fall from an elevated railroad and injure a person thereunder, in the absence of explanation, is generally held ⁴⁰¹ to raise a presumption of negligence on the part of the railroad company": 6 Thompson's Commentaries on Law of Negligence, secs. 7635, 7636.

Ordinarily, it must be a peculiar and exceptional case that will justify the invocation of this rule, except in cases against

common carriers where it is frequently applied. However, where the proven or admitted physical conditions, together with the other established facts, show that the occurrence is one which could not ordinarily, in the nature of things, happen but for negligence on the part of defendant, and it further appears that negligent operation of the apparatus is naturally accompanied with danger, and its control and the knowledge of its condition are practically limited to the defendant or his servants, and evidence as to the same is unavailable except through him or them, the rule may usually be invoked by one to whom the defendant owed a duty of protection, and who was under no obligation to, and did not, know or have reason or opportunity to know of the danger that threatened him. The operation of baskets upon such a carrier system is fraught with some danger to customers over whose heads the apparatus is suspended. While a six or eight pound wire basket with metallic wheels could not be presumed to inflict much of a physical injury if it fell upon a person, yet it might occasion some personal injury as well as damage to the customer's clothing. The danger is greater than from the usual conditions obtaining in a store without such a system, and the knowledge of the apparatus, as to its being or not being in repair, is peculiarly with the storekeeper or his servants in charge. For this reason greater care is required to protect his customers than would be demanded concerning the ordinary conditions existing in such a store not having such apparatus.

When a plaintiff proves the existence of this carrier system and the falling of the basket therefrom, causing damage, we think facts are shown from which a reasonable mind might properly infer that the apparatus was improperly constructed ⁴⁰² or out of repair. Hence, a case for the jury is thus established. This case may be overcome by showing that the apparatus was properly installed and in good repair, or that it had been properly inspected and nothing wrong discovered. This defendant could easily prove if such were the facts. Upon rebuttal, of course, no substantive evidence could be introduced by a plaintiff except such as tended to rebut the particular probative facts established or sought to be established by respondent. In other words, plaintiff could not rely upon the rule in his case in chief, and then upon rebuttal introduce evidence of negligence that should have been produced in making his case. We think the rule here laid down is fair and just.

A carrier system such as this is a mechanical contrivance, the operation of which requires some peculiar skill or knowledge not possessed by the average person, and carelessness in its operation or maintenance is calculated to endanger customers impliedly invited within its presence. Such a person would not ordinarily have an opportunity to inspect the apparatus, or have sufficient technical knowledge of the device to know whether or not it was properly adjusted or in repair even if he did examine it. It would naturally be difficult to get evidence of its condition except from its owner or his servants. On the other hand, the owner, having the system in his possession and under his control, and being legally bound to properly inspect and know of its condition, could readily produce evidence thereof. If the condition was proper, he could easily show it and thus avoid liability. If improper and dangerous, he should not, as a matter of justice, escape liability, because from the peculiar nature of the thing the injured person was unable to get evidence of its condition.

Appellants cite, apparently with much reliance, the case of *La Bee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560. A rehearing has been granted in that case, and the decision of the case at bar is made without taking into consideration the opinion in the case cited. The rule invoked has ⁴⁰³ been recognized, however, in the cases of *Firebaugh v. Seattle Elec. Co.*, 40 Wash. 658, 111 Am. St. Rep. 990, 82 Pac. 995, 2 L. R. A., N. S., 836, and *Williams v. Spokane Falls & Northern R. Co.*, 39 Wash. 77, 80 Pac. 1100. In the case of *Griffin v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922, the court of appeals of New York applied the rule in a case where a passenger elevator in a building became unmanageable and a heavy counterweight fell down the shaft, killing a passenger in the elevator cage. In that case the trial court gave the following instruction: "There is another rule which the plaintiff asks me to call your attention, and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting, and if you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting."

This was upheld by the court of appeals, which, among other things, quoted from *Shearman & Redfield on Negli-*

gence, section 59, as follows: "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer"; and, in its discussion, used the following language: "The maxim is also in part based on the consideration that where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present."

⁴⁰⁴ In the case of *Uggle v. Brokaw*, 117 App. Div. 586, 102 N. Y. Supp. 857, it was held that, where a coachman driving in the street was struck by part of a skylight blown from an adjoining building, the incident itself raised a presumption of negligence under the rule of *res ipsa loquitur*. The rule is applied to cases of injury from falling objects perhaps more than to any other class of cases, aside from those having to do with common carriers. Such cases were the following: *Kaples v. Orth*, 61 Wis. 531, 21 N. W. 633; *Morris v. Strobel & Wilken Co.*, 81 Hun, 1, 30 N. Y. Supp. 571; *The Joseph B. Thomas*, 81 Fed. 578; *Taylor v. Peckham*, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578; *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 30 Am. St. Rep. 678, 31 N. E. 870; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Scheider v. American Bridge Co.*, 78 App. Div. 163, 79 N. Y. Supp. 634; *Mentz v. Schieren*, 36 Misc. Rep. 813, 74 N. Y. Supp. 889; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Weller v. McCormick*, 52 N. J. L. 470, 19 Atl. 1101, 8 L. R. A. 798; *Schnizer v. Phillips*, 108 App. Div. 17, 95 N. Y. Supp. 478. See, also, *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653, 35 L. ed. 270; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; *Connolly v. Des Moines Inv. Co.*, 130 Iowa, 633, 105 N. W. 400; *Weber v. Lieberman*, 47 Misc. Rep. 593, 94 N. Y. Supp. 460; *Lubelsky v. Silverman*, 49 Misc. Rep. 133, 96 N. Y. Supp. 1056; 6 Current Law, 772.

We think the case should have been submitted for the jury to say whether negligence of defendant was established by

the facts proved, or respondents should have been permitted, if they desired, to show that the carrier system was properly installed and that it was in good repair, or that it had been properly inspected without anything defective being discovered, or that the basket was caused to fall by some person or influence for whom or which respondent was not responsible.

⁴⁰⁵ The judgment of the honorable superior court is reversed and the case remanded for a new trial.

Hadley, C. J., Rudkin, Dunbar, Crow and Fullerton, JJ., concur.

The Rule of Res Ipsa Loquitur is based on the apparent fact that the accident could not have happened without negligence on the part of the defendant; or, upon the literal meaning of the expression, that the thing itself speaks, and shows prima facie that the defendant was negligent: *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 111 Am. St. Rep. 990. The liability of the owner of a building for damages to a traveler upon the highway caused by the falling of an awning is to be determined upon the principle of negligence in accordance with the maxim "*res ipsa loquitur*," and not upon the doctrine of insurance of safety, when there is no issue as to nuisance in the case: *Waller v. Ross*, 100 Minn. 7, 117 Am. St. Rep. 661; and the fall of a loaded passenger elevator affords prima facie evidence of negligence in the person charged with the duty of operating it: *Edwards v. Manufacturers' Building Co.*, 27 R. I. 1, 114 Am. St. Rep. 37. But it has been held that no presumption of negligence arises from the mere happening of an accident caused by the falling of an amusement stand in a city park: *City of Denver v. Spencer*, 34 Colo. 270, 114 Am. St. Rep. 158.

Presumptions of Negligence from the Happening of Accidents are discussed in the note to *Cincinnati Traction Co. v. Holzenkamp*, 113 Am. St. Rep. 986; and presumptions of the exercise of due care are discussed in the note to *Chicago etc. Ry. Co. v. Wilson*, 116 Am. St. Rep. 108.

MANNING v. FOSTER.

[49 Wash. 541, 96 Pac. 233.]

HUSBAND AND WIFE—Community Property—Wife's Knowledge of Transaction, When Sufficiently Proved.—If a deed is left in escrow pursuant to an agreement between the grantee and the husband of the grantor, and his wife goes to the depositary and signs the deed, this is satisfactory evidence that she understood and was assisting to carry out the agreement. (p. 878.)

FRAUDS, STATUTE OF, as Applied to Escrow.—The condition upon which a deed is delivered in escrow must rest in and be proved by parol. (p. 878.)

ESCROW, Deed Delivered in, Without Any Agreement in Writing.—If a conveyance is executed and deposited as an escrow, to be delivered upon conditions orally agreed upon, the grantors are bound and cannot avoid the escrow on the ground that the agreement was not expressed in writing. Oral testimony is admissible to establish its terms. (p. 879.)

Troy & Falkner, for the appellant.

Reynolds & Stewart, for the respondents.

541 ROOT, J. This was an action to enforce specific performance of an alleged escrow agreement. On the 18th of December, 1905, the defendant Henry Foster executed a deed for the land in question, at a consideration of \$4,500, and by **542** agreement with plaintiff placed said deed in escrow with certain bankers in Chehalis. With the deed there was deposited cash in the sum of \$2,854.63, a promissory note for \$500, and certain warrants amounting to \$1,145.37, a total of \$4,500. It was understood that the wife of defendant was to come and sign and acknowledge the deed, and that the warrants were to be indorsed by one J. R. Welty. When Mrs. Foster should sign the deed and the warrants should be indorsed by Mr. Welty, the deed was to be delivered to the appellant and the money, note, and warrants were to be turned over to respondents. The deposit of these instruments and money was accompanied with a memorandum as follows:

“Deposited with Coffman, Dobson & Co., Bankers, Chehalis, Washington.

“Special Deposit.

“By Henry Foster, December 18, 1905.

“Patent & Warranty Deed for delivery (when signed) to Frank A. Manning on payment of

Cash	\$2854.63
Note	500.00
3 R & B Warrants	
No. 2611, 2610 & 2609.....	1145.37
Total.....	4500.00

“J. W. A.”

Some days after the deposit, Mrs. Foster called and signed and acknowledged the deed. Mr. Welty, being a state official with office at Olympia, was seldom in Chehalis, but was expected to be there sometime during the Christmas holiday season. He came on Christmas, but, the bank not being open, was unable to sign the warrants at that time, and returned

to Olympia without doing so. A few days afterward, without the consent of the appellant, the respondent Henry Foster withdrew the deed from said bankers. Shortly thereafter said Welty indorsed said warrants, and the appellant demanded of respondents the delivery of the deed. They refused to deliver the deed, whereupon this action was commenced. Upon the trial the facts as hereinbefore set forth **543** were established by the evidence of appellant. Thereupon a motion for nonsuit was made by respondents, and the same sustained by the trial court. From a judgment of dismissal, this appeal is prosecuted.

We are unable to reach the conclusion announced by the honorable trial court. It is urged that this was community property, and that there was no evidence that Mrs. Foster had any knowledge or information of the agreement between the plaintiff and Henry Foster, her husband. The fact that she came to the bank and signed and acknowledged the deed, after it had been left there pursuant to the agreement between her husband and appellant, would seem to be satisfactory evidence that she understood and was assisting to carry out the agreement.

It is urged that there was no valid or written contract by the defendants, or either of them, to convey the lands, and that there was no sufficient memorandum to satisfy the statute of frauds. In the case of *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162, this court said: "The condition upon which a deed is delivered in escrow may rest in and be proved by parol." In *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 Pac. 380, this court held that an escrow agreement need not be in writing. At page 586, 16 Cyc., it is said: "Parol evidence is permissible to prove the condition upon which the instrument is deposited."

In the case of *Gaston v. Portland*, 16 Or. 255, 19 Pac. 127, the court said: "Nor is it necessary that the condition upon which the deed is delivered in escrow be expressed in writing; it may rest in parol, or be partly in writing and in part oral. The rule that a contract in writing inter partes must be deemed to contain the entire agreement or understanding has no application in such case."

In 11 *American and English Encyclopedia of Law*, second edition, at page 334, it is said: "It may be stated as a general rule that no particular form of words is necessary to constitute an escrow."

⁵⁴⁴ In *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315, the court spoke as follows: "But it is said there was nothing in writing authorizing Cox to hold or deliver the deed. There is nothing in the statute which requires this to be in writing. The statute only requires a note or memorandum in writing as evidence of the contract. Nothing in it has reference to any arrangement for the delivery of the deed in escrow, or its subsequent delivery by the parties so holding it to the grantee."

In *Stanton v. Miller*, 58 N. Y. 192, the court used this language: "The condition upon which a deed is delivered in escrow may be expressed in writing or rest in parol, or be partly in writing and part oral. The rule that an instrument or contract made in writing inter partes must be deemed to contain the entire agreement or understanding has no application."

Of course this does not mean that a written escrow agreement can be varied by parol: *Pacific Nat. Bank of Tacoma v. San Francisco Bridge Co.*, 23 Wash. 425, 63 Pac. 207. See, also, *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Glenn v. Hill*, 11 Wash. 541, 40 Pac. 141; *Horr v. Hollis*, 20 Wash. 424, 55 Pac. 565; *Monfort v. McDonough*, 20 Wash. 710, 54 Pac. 1121; *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 114 Am. St. Rep. 137, 85 Pac. 338, 6 L. R. A., N. S., 337; *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361; 16 Cyc. 570, 576, 577; *Daniel on Negotiable Instruments*, sec. 68; *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Browne on Statute of Frauds*, 5th ed., 366.

In the case at bar the deed of conveyance having been duly executed by the defendants and deposited at the same time plaintiff deposited his money, note and warrants, all accompanied by the written memorandum above set forth, and said ⁵⁴⁵ warrants having been properly indorsed within a reasonable time, we think there was a legal escrow agreement and a compliance by appellant with his part thereof, and that defendants should be held to their agreement, unless they can show other reasons than now appear in the record for not so doing. We think oral testimony was permissible under the circumstances of this case to show what the agreement of the parties was as to delivery of the deed, and that the evidence introduced establishes an escrow agreement binding upon the parties.

The judgment of the honorable superior court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Hadley, C. J., Dunbar, Mount, Crow and Rudkin, JJ., concur.

The Condition upon Which a Deed Placed in Escrow is to be delivered need not be in writing, but may rest in parol, or partly in writing and partly in parol: *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201.

FINCH v. NOBLE.

[49 Wash. 578, 96 Pac. 3.]

TAX TITLES, Who may not Acquire and Enforce.—One in Possession of Real Property Under a Contract of Purchase binding him to pay the taxes and who fails to make such payment, with the result that the property is sold for delinquent taxes without his knowledge and without any collusion between him and the tax purchaser, cannot acquire the resulting tax title and enforce it against his vendor. (pp. 882, 883.)

Vance & Mitchell, for the appellants.

George H. Funk, for the respondent.

578 RUDKIN, J. On the nineteenth day of July, 1898, David Mitchell and wife, as owners of the property now in controversy, entered into a contract whereby they agreed to convey to the defendants, and the defendants on their part agreed to purchase, to pay the purchase price in certain specified installments with interest, and to pay regularly and seasonably all taxes and assessments levied against the property from and after the day of the contract of sale. The defendants entered into immediate possession of the property under **579** this contract, and have continued in possession ever since. On the thirtieth day of January, 1899, Mitchell and wife conveyed to the plaintiff subject to the outstanding contract with the defendants. No payments have been made on account of the purchase price, except the interest accruing prior to the nineteenth day of July, 1904. The defendants failed and neglected to pay the state and county taxes levied against the property for the years 1898 to 1903, inclusive, and, by reason of such failure and neglect, the tax lien was foreclosed at the suit of Thurston county, and on

the thirtieth day of January, 1905, one James K. L. Mitchell purchased the property at tax sale for the sum of \$30.34, and received a tax deed. On the eighth day of August, 1905, the defendants purchased from Mitchell, the purchaser at the tax sale, for the sum of one hundred and fifty dollars, and received a quitclaim deed. In addition to the foregoing facts, it was found by the court that the plaintiff was informed that the premises had been sold for taxes, after the sale and before the delivery of the tax deed, that the defendants had no knowledge of the tax sale until long after the sale was made, and that there was no collusion between the defendants and the purchaser at the tax sale. The present action was instituted for the purpose of declaring the contract of sale between the Mitchells and the defendants a mortgage and foreclosing the same. On the foregoing facts, over which there is no controversy, the court gave judgment according to the prayer of the complaint, and the defendants have appealed.

The general rule that a tenant or purchaser in possession is estopped to deny the title of his landlord or vendor and will not be permitted to acquire a title adverse to him exists in one form or another in all the states. This general rule is conceded by the appellants, so that we are only concerned with the limitations upon the rule and its application to the facts before us. The appellants frankly concede that they could not themselves become purchasers at the tax sale or acquire a tax title through collusion with others, but they⁵⁸⁰ earnestly insist that, because they did not purchase directly at the tax sale or act in collusion with the purchaser, they may defend under the tax title, notwithstanding the tax sale was made and the tax title exists solely by reason of their own breach of covenant and default. With this last contention we are unable to agree: *Shepardson v. Elmore*, 19 Wis. 424; *Busch v. Huston*, 75 Ill. 343; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Haskell v. Putnam*, 42 Me. 244; *Cooley on Taxation*, 3d ed., 963 et seq.

In *Shepardson v. Elmore*, 19 Wis. 424, the court said: "The action being founded upon the covenant, and proceeding upon the obligation of the defendants to pay the taxes, it can make no difference that the defendants took the deed after the expiration of the term. They are as much estopped from denying the plaintiff's title and right of possession as if they had received the deed during the term. The controversy originates in a violation by the defendants of one of the conditions of the lease, and they cannot avoid estoppel by showing

that the mischief of which the plaintiff complains was consummated in part after the expiration of the term."

In *Busch v. Huston*, 75 Ill. 343, the court said: "It appears that the lands were sold for the nonpayment of taxes for the year 1844, and conveyed by the sheriff to John E. Johnston, and that he, on the twenty-fourth day of May, 1848, quit-claimed the lands to John Shoemaker; but it is not insisted that Shoemaker ever relied upon this deed as, in fact, conveying any title to him. It is evident that he could not do so, for two reasons: 1. The sale was made in consequence of the nonpayment of taxes which he was under obligations to have paid by the terms of his agreement with John Dewitt, Sr., by which he held and occupied the premises."

In *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94, the court said: "If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such negligence, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who ⁵⁸¹ purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly."

In *Haskell v. Putnam*, 42 Me. 244, the court said: "It was the duty of the tenant to pay the taxes upon the demanded premises. The omission to do so was a violation of good faith and a breach of the conditions upon which he occupied them. To permit him to set up a title which he has obtained by a violation of his duty if it were in other respects good would be most manifestly inequitable and in fraud of the rights of the demandant. Such a defense cannot prevail, either in law or in equity, and it requires no small degree of assurance to set it up in a court of justice."

In each of these cases the tax title came through a third person, without collusion, but the court deemed that fact utterly immaterial. The fact that the party in possession and claiming under the tax title was seeking to take advantage of a title which was made possible by his own breach of covenant and default was deemed fatal to his claim.

The appellants concede that the respondent is entitled to a personal judgment for the amount claimed, and there would seem to be little difference between a personal judgment for the purchase price and a judgment declaring the amount a lien, in so far as the purchasers are concerned, for no exemption rights can prevail against either, but we prefer to rest

our judgment on the ground on which it was placed in the court below.

Finding no error in the record, the judgment is affirmed.

Hadley, C. J., Fullerton, Mount, Crow and Dunbar, JJ., concur.

Who may be Purchasers at a Tax Sale is the subject of a note to Blake v. Howe, 15 Am. Dec. 684, and of a more recent note to Cone v. Wood, 75 Am. St. Rep. 229.

HICKS v. NATIONAL SURETY COMPANY.

[50 Wash. 16, 96 Pac. 515.]

MORTGAGES—Bills of Sale Intended as Security, When must Comply with Statute Respecting.—Under a statute declaring that a mortgage of personal property is void as against creditors unless accompanied by an affidavit that it is made in good faith and without any design to hinder, delay or defraud creditors, and acknowledged and recorded in the manner required by law for a conveyance of real property, a bill of sale given as security must be acknowledged and accompanied by the affidavits required by the statute. (p. 885.)

A CHATTEL MORTGAGE or a Bill of Sale is Valid as Between the Parties, though not acknowledged nor accompanied by an affidavit of good faith as required by the statute. (p. 885.)

ENCUMBRANCER IN GOOD FAITH, Who is not.—One who Takes an Encumbrance as Security for a Pre-existing Debt cannot be deemed an encumbrancer for value and in good faith. (p. 885.)

The section of the code referred to in the opinion is as follows: "A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property": Bal. Code, sec. 4558; Pierce's Code, 6531; 1 H. C. 1648.

Roberts & Hulbert, for the appellants.

Pruyn & Felkner, for the respondent.

17 **RUDKIN, J.** On the third day of July, 1906, the defendant Farrell entered into a contract with the Kittitas Oil and Gas Company, whereby he agreed to bore a well for the

oil company to the depth of sixteen hundred feet, on or before August 1, 1907, for the consideration of five thousand dollars, to be paid when the work was fully completed. To secure the faithful performance of this contract, and the return of any money that might be advanced thereunder, in case of failure to fully perform, the contractor gave a bond to the oil company in the penal sum of five thousand dollars, which was executed by the intervener as surety. On the twenty-fifth day of January, 1907, Farrell executed and delivered to the plaintiff Hicks a bill of sale of his drilling outfit to secure the payment of seventeen hundred dollars. The bill of sale was absolute in form, and was not acknowledged or accompanied by the affidavit of the vendor or mortgagor to the effect that it was made in good faith and without any design to hinder, delay or defraud creditors. The instrument was recorded in the bills of sale record of Kittitas county on the twenty-eighth day of January, 1907. On the second day of August, 1907, the oil company notified the contractor and the surety company that the contractor had breached his contract; that the oil company had advanced fifteen hundred dollars to the contractor, and that certain claims for labor and material were outstanding and unpaid. On the twelfth day of August, 1907, Farrell executed and delivered to George W. Allen, as agent for the surety company, a bill of sale of the property included in the former bill of sale to the plaintiff Hicks, to secure and indemnify the surety company against any sums it might be required to pay by ¹⁸ reason of the indemnity bond. This bill of sale was duly acknowledged and accompanied by the affidavit of the vendor that it was made in good faith, etc., and was filed for record on the thirteenth day of August, 1907. The plaintiff instituted this action on the nineteenth day of August, 1907, for the recovery of the seventeen hundred dollars advanced by him to the defendant Farrell, averring that his bill of sale was intended as a chattel mortgage and praying a foreclosure thereof.

At the time of the commencement of this action, an order was obtained from the court directing the sheriff to forthwith take the property into his possession and to safely keep the same until the further order of the court. On the twenty-third day of September, 1907, the surety company intervened in the action by leave of court, and filed its complaint in intervention, setting forth its rights under the bill of sale to its agent, and alleging that the bill of sale under which the plaintiff claimed was void, because not acknowledged or ac-

accompanied by the affidavit of good faith as required by law. The plaintiff joined issue on the complaint in intervention, and the cause came on regularly for trial. The court below found that the lien of the plaintiff was prior and superior to the lien of the intervener, and gave judgment accordingly. From that judgment the present appeal is prosecuted, and the question of priority between the two liens is the only question presented for our consideration.

A bill of sale given as security must be acknowledged and accompanied by the affidavit of good faith required by Ballinger's Code, section 4558 (Pierce's Code, section 6531), or the same will be void as against creditors of the vendor or subsequent purchasers and encumbrancers of the property for value and in good faith: *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022. But a chattel mortgage or bill of sale is good as between the parties, though not acknowledged or accompanied by the affidavit of good faith as required by the above section: *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Roy & Co. v. ¹⁹ Scott, Hartley & Co.*, 11 Wash. 399, 39 Pac. 679; *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872; *Strahorn etc. Commission Co. v. Florer*, 7 Okl. 499, 54 Pac. 710.

It will further be observed: "That this statute makes a broad distinction between creditors and subsequent purchasers or encumbrancers. As to the former, it positively declares that chattel mortgages are void unless they are accompanied by the specified affidavit and are acknowledged and recorded as required by law. But an encumbrancer or subsequent purchaser, in order to avail himself of an omission of the affidavit, or of a failure to acknowledge or record the instrument, must be able to show that he is an encumbrancer for value and in good faith": *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872.

The instrument under which the appellant claims was taken as security for a pre-existing debt or a pre-existing contingent liability. Under such circumstances, does it come within the definition of an encumbrancer for value and in good faith, as that term is defined in law? Under the great weight of authority it does not: *People's Savings Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. Rep. 679, 30 L. ed. 754; *Gest v. Packwood*, 34 Fed. 368, 13 Saw. 202, 39 Fed. 525; *Franklin Savings Bank v. Taylor*, 53 Fed. 854, 4 C. C. A. 55; *The Elmbank*, 72 Fed. 610; *Napa Valley Wine Co. v. Rinehart*, 42 Mo. App. 171; *Milton v. Boyd*, 49 N. J. Eq. 142, 22 Atl. 1078; *Hill v. Shrygley*, 51 Ark. 56, 9 S. W. 845; *Kohl v.*

Lynn, 34 Mich. 360; Jones v. Graham, 77 N. Y. 628; 23 Am. & Eng. Ency. of Law, 2d ed., p. 492, and cases cited.

Inasmuch as the lien under which the respondent claims is first in point of time and is valid between the parties, and the appellant is not an encumbrancer of the property for value and in good faith, the judgment must be affirmed, and it is so ordered.

Hadley, C. J., Mount and Fullerton, JJ., concur.

Dunbar and Crow, JJ., took no part.

A Chattel Mortgage is Good Against the Mortgagor, though not in the form, nor accompanied by the affidavit, required by the statute, and not filed for record: Deseret Nat. Bank v. Kidman, 25 Utah, 379, 95 Am. St. Rep. 856.

ILES v. MUTUAL RESERVE LIFE INSURANCE COMPANY.

[50 Wash. 49, 96 Pac. 522.]

INSURANCE, LIFE—**Forfeiture for Nonpayment of Premium Note.**—If in part payment of a premium for issuing a life insurance policy the assured gives his promissory note, and the policy contains a condition that if the note is not paid at maturity the policy shall be void, the failure to pay such note at maturity terminates the right to recover on the policy. (p. 887.)

INSURANCE, LIFE—**Estoppel, When does not Result from an Attempt to Collect a Note Given for Premium.**—If, by the condition of a policy of life insurance it is forfeited and rendered void by the failure to pay a premium note at maturity, the forfeiture is not waived by placing the note in the hands of an attorney and making efforts to collect it, if the policy contains a provision that no contract, alteration of contract, waiving of forfeiture or granting of credits shall be valid unless in writing, signed by the president or vice-president and one other officer of the company. (pp. 887-891.)

Parsons & Parsons, for the appellant.

Hathaway & Alston, for the respondent.

⁴⁹ HADLEY, C. J. This is an action to recover upon a life insurance policy. The suit was brought by the administrator of the estate of the assured. The policy was for one thousand dollars, and ⁵⁰ the first year's premium was not paid in cash, but the assured gave his promissory note for twenty-three dollars and forty-one cents, due three months from its date. The note was not paid at maturity and has

never been paid. The assured died eight months after the date of the policy and five months after the maturity of the note. At the time the note was taken and the policy delivered the defendant gave to the insured a receipt in writing, which the latter accepted, and it contained the following condition: "If a note is given in payment of any part of the premium, receipt of which is hereinabove acknowledged, and if said note be not paid at its maturity, it is understood and agreed that the policy shall then be ipso facto null and void."

The policy itself also contained an equivalent provision with respect to the effect of nonpayment of any premium installment when due. After the maturity of the note, and after the defendant had knowledge of the default in payment, it placed the note in the hands of an attorney for collection, and efforts were made in behalf of the defendant to collect from the assured the amount of the note, but he still failed to pay. The cause was tried before the court without a jury, and the court concluded from the facts that the defendant, by its action in endeavoring to collect the amount of the note after its maturity, waived its right to declare a forfeiture of the policy, and that it is now estopped to deny that the policy was in full force when the insured died. Judgment was awarded to the plaintiff, and the defendant has appealed.

Assuming that the policy was in full force during the three months' credit period extended by reason of the note, it is, however, true that the assured did not die during that period. He died five months after the credit period had expired. Under the terms of the contract, the policy undoubtedly became null and void upon default in payment of the note at maturity. That proposition seems to be so elementary that discussion of it appears unnecessary. The policy having become void by reason of the negligent act of the insured to ⁵¹ pay the note, was it afterward revived by the act of the appellant in merely seeking to effect payment? Was that conduct of appellant's sufficient of itself to waive the forfeiture that had already been effected in law? The policy contained the following provision: "No contract, alteration or discharge of contract, waiver of forfeiture, or granting of permits or credits, shall be valid unless the same shall be in writing, signed by the president or vice-president and one other officer of the company."

Under the above provision, it is plain that the forfeiture could not ordinarily be waived except in the manner stated. To be sure, if the money had been actually paid after forfeiture and its benefits had been accepted and retained by the

appellant, a different question would have arisen. But nothing was done except to ask the insured to pay, which amounted to a mere offer to revive the policy if he should pay. To say that the mere offer to revive the policy, on condition of payment being made, operated to waive the forfeiture provision in the policy, notwithstanding the fact that payment was not made and the assured did nothing and assumed no liability which changed his situation, would, we think, do violence to elementary principles of fairness between men. Waiver as applied to the facts of this case is identical with estoppel.

In *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452, we said of estoppel as follows: "The doctrine of estoppel is of equitable origin, and is founded upon principles of equity and justice. It is applied to conclude a party who, by his acts or admissions, has influenced the conduct of another only when in good conscience and honest dealing he ought not to be permitted to gainsay them."

Again, in *Elhart v. Pacific Mutual Life Ins. Co.*, 47 Wash. 659, 92 Pac. 419, this court, speaking of waiver, said: "Ordinarily, a waiver is an intentional release of some right, and it is generally held that provisions of this character ⁵² in insurance policies are deemed to be waived only when an intention to waive is apparent, or where the conduct of the company is inconsistent with an intention to declare a forfeiture, or has placed the other party at a disadvantage, or gained for itself an advantage which it should not in justice and good conscience be permitted to assert."

In what way did the acts of appellant here influence the conduct of the deceased so as to mislead him or put him at a disadvantage? The argument is made that the demand for payment lulled him into the belief that the forfeiture was waived and that the policy was thereby reinstated and in force. To say that appellant should be estopped for such a consideration would, in our view, be to base the estoppel upon an element not sounding in good morals, whereas estoppel is always founded upon principles of equity and good conscience. If the insured contented himself with the belief that the mere demand for payment after maturity without any action upon his part revived his policy which had been forfeited by his own neglect, then he must have also rested secure in the belief that, no matter for how long a time he continued to refuse payment, his insurance would nevertheless be indefinitely prolonged. He had neither legal nor moral right to allow himself to be lulled into any such belief, and inas-

much as he in no way acted upon the demand for payment, his position was in law in no way changed thereby.

Respondent insists that the decision of this court in *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 84 Pac. 412, is decisive of this case in his favor. We find that the facts of the two cases are very dissimilar. In the case cited the policy provided for monthly payments in advance. For a number of months the company accepted, without objection, payments at any time during the month. In some instances payments were not made until the last day of the month. These repeated acts established such a custom and course of dealing as admitted of no other construction than that it was the intention to waive the terms of the contract requiring ⁵³ advance payments. The insured relied thereon and continued to make payments which were accepted, greatly to her prejudice if the company should have afterward been permitted to say that the provision as to payments in advance had not been waived. We have seen that the insured in the case at bar was in no way put to a disadvantage by any act of appellant's, and the former case is therefore not an authority for holding that there was a waiver here.

Respondent also cites *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147. The defense there was that the contract never became effective, for the reason that the agent had no authority to grant credit for premiums. A note was taken for premium and, after its maturity, the insured gave his check on the bank to the agent. But the check was returned "not good." Correspondence ensued between the agent and assured with reference to providing for the cashing of the check, the letter suggesting that the assured attend to the matter "next week." The next day after this letter was written the assured died. The court held that the contract as made by the agent was ratified by the company, the credit being permitted, and that what occurred about the check amounted to an extension of the credit period. The insured died during that extension period, and the company was held. The court held that the credit period was extended by reason of the fact that the assured was definitely given until the next week to pay, and was not notified of any intention to insist upon a forfeiture. He was thus led to act upon a definite extension of credit, much to his disadvantage if the company could afterward insist upon a forfeiture. The element of estoppel therefore clearly existed in the case. There was no definite or any extension of credit in the case at bar, but a mere offer in legal

effect to reinstate a forfeited policy if payment should be made.

The case of *Hollis v. State Ins. Co.*, 65 Iowa, 454, 21 N. W. 774, is also cited by respondent. That case involved a ⁵⁴ fire insurance policy, and after the acts of the assured had had the effect to render the policy void, the company knowingly continued to treat the contract as of binding force, and thereby induced the insured to incur expense in that belief. The assured was placed at a disadvantage and his situation was changed, resulting directly from the act of the insurer; thus clearly introducing the element of estoppel.

Respondent cites three Kentucky cases, as follows: *Moreland v. Union Cent. Life Ins. Co.*, 104 Ky. 129, 46 S. W. 516, *Union Cent. Life Ins. Co. v. Duvall*, 20 Ky. Law Rep. 441, 46 S. W. 518, and *Union Cent. Life Ins. Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264. If the Kentucky cases should be fully accepted as authority in the premises, then probably respondent has room for argument therefrom in favor of affirming this judgment. Appellant, however, insists that the Kentucky court has gone far in its attempt to apply the principles of waiver and estoppel in insurance cases. It may have gone further than we feel justified in going under our views of the fundamental principles governing estoppel as hereinbefore discussed and as heretofore expressed in other cases. However, while some of the facts of the Kentucky cases cited may be said to approach very nearly to those now under consideration, yet each case may be distinguished from this one by a close application of the principles of estoppel. The *Moreland* case was decided first, and the opinion in the *Duvall* case was filed on the day following, the court being divided in each case. The *Spinks* case was decided later, the court being again divided. The *Moreland* case probably approaches this in similarity more fully than either of the others, and yet the opinion states that, by the attempt of the company to collect, the assured was put to trouble and expense, thereby effecting at least some change in his situation, which is lacking as an element of estoppel in the case at bar. In the *Duvall* case the offer to waive was accepted and remittance was made four days after maturity of the note. The ⁵⁵ amount was received and was retained by the company until it learned of the sickness or death of the insured, which occurred meanwhile, and then the money was returned. Clearly, the company was estopped to deny waiver under such circumstances. In the *Spinks* case the insured had been in the habit of giving notes for his pre-

miums and paying the same some time after maturity. The payments were always accepted without question. By custom a course of dealing was established between the two upon which the insured had a right to rely until he was notified to the contrary, and thus the company was estopped to deny a waiver. It will therefore be seen that each case cited contains some fact giving rise to estoppel which does not exist in the case at bar.

For the reasons stated, the judgment is reversed and the cause remanded, with instructions to dismiss the action.

Fullerton, Rudkin, Mount, Crow, Root and Dunbar, JJ., concur.

A Policy of Life Insurance is not Forfeited by a Failure to Pay a premium note when due, if it was given by a third person and without conditions: Galvin v. Union Cent. Life Ins. Co., 115 Ky. 547, 103 Am. St. Rep. 336. See, also, Drury v. New York Life Ins. Co., 115 Ky. 681, 103 Am. St. Rep. 351. And where a life insurance agent who is entitled to the first premium on a policy as his commission takes, in part payment of such premium, the note of the insured, sells it, and reports to the company that the premium is paid, the insurer cannot, in an action on the policy, avail itself of a default in the payment of the note, although it purchases the note from the agent's indorsee after the death of the insured: Union Life Ins. Co. v. Parker, 66 Neb. 395, 103 Am. St. Rep. 714.

The Failure to Pay a Premium Due on an Insurance Policy ordinarily works a forfeiture of the rights of the insured: Thompson v. Fidelity Mut. Life Ins. Co., 116 Tenn. 557, 115 Am. St. Rep. 823; Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 112 Am. St. Rep. 862.

AMERICAN BONDING COMPANY v. LOEB.

[50 Wash. 104, 96 Pac. 692.]

JUDGMENT Foreclosing a Pledge—Effect of upon the Right to the Possession of the Pledged Property.—A judgment in favor of the pledgee of a certificate of stock directing its sale to satisfy the judgment merges the rights of the pledgee into the judgment, leaving him only the right to have it enforced by the sale as directed, and terminating his right to possession of the certificate. (p. 893.)

Richard Saxe Jones, for the appellant.

Campbell & Powell, for the respondent.

¹⁰⁵ Per CURIAM. On the twenty-seventh day of March, 1908, application was made to this court by the respondent for leave to withdraw the original certificate for one hundred

shares of the capital stock of the Pacific Brewing and Malting Company from the records and files of this court, substituting a copy in lieu thereof. The appellant appeared on the hearing of this motion and asked that the statement of facts and all exhibits in the case be returned to the clerk of the lower court, to the end that the final judgment might be carried into execution as directed by this court. On the hearing of these motions the application of the appellant was granted and the application of the respondent denied, without an opinion. A rehearing has been asked for, and in view of the fact that there seems to be a misunderstanding between counsel as to the effect of the court's decision, or the reasons upon which it was based, we deem it proper at this time to state briefly our reasons for the order then made. The facts in the case are thus briefly stated in the opinion filed on the hearing of the appeal: "One A. L. Campbell was an agent of the respondent, American Bonding Company, and issued a bond in behalf of the respondent for a charter-party entered into by Saunders, Ward & Co., and took security back from Saunders, Ward & Co. The appellant Loeb was a member of the transportation company for whose benefit the first bond was given. He became an officer of the transportation company to whom the charter-party of the schooner 'Aberdeen' was assigned, and said schooner was operated by said company. Twenty-five thousand dollars of the par value of the capital stock of said ¹⁰⁶ company was delivered to the appellant Loeb, and afterward sold by him for a valuable consideration. Loeb deposited one hundred shares of the capital stock of the Pacific Brewing and Malting Company as collateral security to protect the bonding company from loss on the bond furnished by it. The transportation company unsuccessfully conducted its business, and failed. Action was brought on the bond against the American Bonding Company, in San Francisco, California, and judgment rendered thereon, and this action is brought by the bonding company to foreclose the right of all parties to the shares of the capital stock of the Pacific Brewing Company deposited as aforesaid. Upon the hearing of the case, judgment was entered in favor of the bonding company, from which judgment this appeal is taken": *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282.

From the foregoing statement it will be seen that the original action was instituted to foreclose a lien on the shares of stock now in controversy, and the stock certificate was filed as an exhibit on the trial. The final judgment of the court

granted a foreclosure of the lien and directed a sale of the stock to satisfy the judgment. This judgment was affirmed on appeal to this court: *American Bonding Co. v. Loeb*, 47 Wash. 447, 92 Pac. 282.

The contention of the respondent seems to be that, notwithstanding the fact that it has foreclosed its lien and reduced its claim to judgment, it nevertheless has a right to the possession of the certificate of stock to do with as it wills, until the certificate is redeemed by the appellant. With this contention we are unable to agree. The claim of the respondent has been reduced to judgment, and whatever rights it may originally have had in the shares of stock as pledgee are now merged in that judgment. It has no more right to withdraw the certificate at this time than it would have to withdraw a promissory note or mortgage after judgment for the purpose of negotiating it. The only rights it now has in the certificate or the stock is the right to have the judgment of the court carried into execution, and it is not entitled to the ¹⁰⁷ possession of the stock certificate for that purpose. For these reasons the motion of the respondent is denied.

The only right the appellant has in the stock certificate, on the other hand, is the right of redemption. The time or manner of carrying the judgment into execution rests entirely with the respondent, in whose favor the judgment was given. In returning the record to the superior court from which it came, we do not accede to any of the contentions made by the appellant before this court. We simply deemed the clerk of the lower court the proper custodian of the certificate until redeemed or sold under the decree.

The rehearing is therefore denied.

The Law of Pledges and Collateral Securities will be found discussed in the notes to *Griggs v. Day*, 32 Am. St. Rep. 711; *Robinson v. Hurley*, 79 Am. Dec. 499.

RITZVILLE HARDWARE COMPANY v. BENNINGTON.

[50 Wash. 111, 96 Pac. 826.]

EXEMPTION OF PROCEEDS of the Sale of a Federal Homestead.—If one holding a homestead acquired under the laws of the United States sells it and the money goes into the possession of a third person, it becomes subject to garnishment, though the debtor intended to use such money in the acquisition of a new homestead, to be owned and occupied under the laws of the state. The federal exemption ceases as soon as the land is voluntarily disposed of by the homesteader. (pp. 894, 895.)

O. R. Holcomb, for the appellants.

Adams & Naef, for the respondent.

111 RUDKIN, J. The Ritzville Hardware Company brought an action against D. F. Johnston on a money demand, and sued out a writ of garnishment against one W. J. Bennington. Both the garnishee and the principal defendant made answer to the writ, admitting that the garnishee had in his possession and under his control at the date of the service **112** of the writ the sum of twelve hundred and eighteen dollars and seventy cents belonging to the principal defendant, and averring that the money so held was derived from the sale of a homestead acquired by the principal defendant under the homestead laws of the United States; that the principal defendant intended to use the money so held in the acquisition of a new homestead, to be owned and occupied by him under the laws of the state; that the principal defendant is the head of a family, etc. The cause was heard on the issues thus presented, and from a judgment directing the garnishee to pay over sufficient of the funds in his hands to satisfy the judgment in the principal action, this appeal is prosecuted.

In *Becher v. Shaw*, 44 Wash. 166, 120 Am. St. Rep. 982, 87 Pac. 71, we held that, where a homestead exempt under the laws of the state is sold, the proceeds of the sale are exempt from garnishment for a reasonable time while in transition from the homestead sold to another purchased. This conclusion was based on Ballinger's Code, sections 5219 and 5247 (*Pierce's Code*, sections 5461, 840), which permit of the sale of a homestead free from liens and encumbrances, and the acquisition of a new homestead with the proceeds, which shall likewise be free from execution or attachment. We do not think that this rule can be extended to embrace or include proceeds arising from the sale of a federal home-

stead. While section 2296 of the United States Revised Statutes declares that, "No lands acquired under this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issue of the patent therefor," such exemption is not founded upon any state law or state policy. The federal exemption exists whether the claimant is the head of a family or not, and whether the land is occupied as a home or not; it exists regardless of the value of the homestead, or the value of any other property the claimant may own, and regardless of the fact that the claimant may own and occupy another homestead exempt under state laws, and the exemption only exists as against debts ¹¹³ contracted prior to a certain date. Indeed, the exemption created by the act of Congress has never been looked upon as a homestead exemption at all. It is in the nature of a condition attached to the grant, in virtue of the power of the federal government relating to the primary disposal of the soil, rather than in virtue of any police power vested in that government: *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213; *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932. And the federal exemption ceases as soon as the land is voluntarily disposed of by the homesteader. It does not extend to the proceeds of the sale: *McIntosh v. Aubrey*, 185 U. S. 122, 22 Sup. Ct. Rep. 561, 46 L. ed. 834; 18 Cyc. 1440.

The funds sought to be garnished were, therefore, not exempt by virtue of any act of Congress, nor were they exempted expressly or by implication by any law of the state. Such having been the conclusion of the court below, its judgment is affirmed.

Fullerton, Crow and Dunbar, JJ., concur.

Root, J., dissents.

Hadley, C. J., and Mount, J., took no part.

The Proceeds of the Sale of a Homestead intended for use in the purchase of another homestead may, according to *Fred v. Bramen*, 97 Minn. 484, 114 Am. St. Rep. 740, be reached by garnishment. But where the statute provides that, in case of the sale of a homestead, any subsequent homestead acquired by the proceeds shall be exempt from attachment or execution, the proceeds of a voluntary sale of a homestead which its vendors intend to invest in another homestead are exempt from garnishment: *Becher v. Shaw*, 44 Wash. 166, 120 Am. St. Rep. 982.

CHARON v. CLARK.

[50 Wash. 191, 96 Pac. 1040.]

WATERS—Artesian Wells—Rights in Acquired by Conveyance.

If an owner of lands on which is situated an artesian well conveys the waters thereof, estimated by inches of miner's measurement, and subsequently grants part of such lands, subject to the existing rights of all persons to take waters from such well, the grantee must respect the rights of the persons having prior conveyances of such water (pp. 898, 899.)

WATERS—Artesian Wells—Injunction to Protect Rights in.—

If the owner of lands on which is an artesian well conveys portions of the waters thereof, his grantees are entitled to an injunction against a subsequent grantee with notice to prevent such diversion by him of the waters of the well as infringes on the complainant's rights. (p. 899.)

WATERS of Artesian Wells—Conflict Between Grantees of.—

If there are several grantees of waters flowing from an artesian well by grants of different dates, and it appears that the original grantee has conveyed more than the actual amount flowing in the well, or the flow becomes diminished, his first grantee acquires rights paramount to the subsequent grantees with notice and has the right to retain the specific amount granted to him. (p. 899.)

Wm. M. Thompson, for the appellants.

Fred Parker and Thomas E. Grady, for the respondents.

192 HADLEY, C. J. This is a suit to enjoin interference by the defendants with the flow of water from an artesian well to land of plaintiffs. The plaintiffs are the owners of a tract of land in Yakima county, which is arid and will not produce crops without irrigation. They have all of the land under cultivation, and for twelve years they and their predecessors have raised valuable crops thereon. During all those years water from the artesian well has been used for the irrigation of crops and for domestic uses upon the land, which is entirely dependent upon the well as a source of water supply. The defendants are now the owners of a small tract of land containing four and fifty-six hundredths acres upon which the well flows to the surface of the ground. This tract, together with other surrounding ones, was formerly owned as one entire tract by a single owner, one McDonald. At various times prior to the time McDonald conveyed the small tract of land upon which the well flows to the defendants' grantor, he made other conveyances of part of the original entire tract owned by him to various persons, and executed a number of conveyances purporting to convey to various individuals certain amounts of water, or perpetual rights to

the use of certain quantities of water, from the well for irrigation and domestic uses, on the respective tracts of land theretofore conveyed by him. It is stipulated in the case that, through McDonald as a grantor and through various mesne conveyances purporting to convey certain amounts of water, the plaintiffs can deraign title to an amount of water flowing from this well equal to eighteen ¹⁹³ and three-fourths inches, miner's measure, under a four-inch pressure, delivered at the highest point on the plaintiffs' land. The plaintiffs became the grantees of this water supply, and were in the possession and enjoyment thereof prior to the time the defendants became the owners of the immediate tract upon which the well flows. The deed under which the defendants claim contained the following condition: "Subject, however, to all existing rights of divers persons to take water from the artesian well located upon said premises. Also subject to all rights of way for irrigating ditches as now constructed and existing through, over and upon said conveyed premises."

Upon the foregoing facts, the trial court held that the plaintiffs are the owners of eighteen and three-fourths inches of water, miner's measure, under a four-inch pressure, flowing from said well; also, of the right of way through defendants' land for the conveyance of that amount of water to the plaintiffs' lands, and that plaintiffs are entitled to an injunction perpetually enjoining the defendants from in any manner interfering with the flow of the water to the plaintiffs' lands. From a judgment of the foregoing effect, the defendants have appealed.

Appellants contend that no perpetual rights or estates in the water were conveyed by McDonald's several conveyances. The source of water supplying this well, it is argued, is entirely subterranean, and reaches the well through percolation. Its course is indefinite, uncertain, unknown, and appellants seek to apply here general rules which have been applied in some cases to subterranean percolating waters. They suggest that the law with respect to such waters was not developed until a comparatively recent period, and that all rules governing the subject cannot be regarded as settled at the present time. They argue that it is now established that an action will not lie to prevent a person from diverting percolating subterranean waters. A discussion of the authorities cited upon this general subject of the mere naked right of ¹⁹⁴ an ordinary land owner to divert such waters without regard to any relations arising out of contracts, we think, is

unnecessary and inappropriate here, by reason of the relation of these parties. The parties here stand in the relation of grantors and grantees. Appellants stand in the shoes of respondents' grantor. They accepted their deed, under which they claim title, expressly subject to the burden of respondents' water right which had been granted by their grantor. The following statement of the rule applicable in such cases is clear and to the point: "The rule that an action will not lie against a person for intercepting or diverting subterranean waters does not apply where the rights of the parties are defined by a deed or other instrument, by which the person diverting or intercepting such waters has previously conveyed all water in a certain close, as his right must be ascertained from the instrument alone; and if it conveyed the subterranean water, the grantor is liable for subsequently diverting or intercepting it. Therefore, the grant of a well or a spring may be in such form as to preclude the grantor from doing any act which will interfere with the enjoyment of the thing granted. . . . But a grant of the right to water as then conducted from certain springs will prevent the grantor from doing anything on his remaining land which will cut off the water supply. So, a deed of wells, one discharging into the other and both drawn from by a pipe to the grantee's buildings, which in express terms conveys also all right and title to water naturally flowing into them, passes the right to percolating subsurface supplies, and the grantor and his successors in interest are answerable if, on the adjoining land, they so act as to cut off or diminish the underground sources": 3 Farnham on Waters and Water Rights, sec. 943.

The following authorities support the rule above stated: *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, 25 Am. Rep. 125; *Whitehead v. Parks*, 2 Hurl. & N. 870; *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; *Minard v. Currier*, 67 Vt. 489, 32 Atl. 472; *Davis v. Spaulding*, 157 Mass. 431, 32 N. E. 650, 19 L. R. A. 102. In the last-cited¹⁹⁵ case, it is true, it was held that the grant of an easement to draw water from a well by a pipe laid in the ground, as used at the time of the grant, through which the water flowed by gravitation, does not preclude the grantor or his subsequent grantee from digging another well on his own land, although the result may be to destroy the value of the easement by diversion of the water which formerly percolated into the well. The grant in that instance was, however, a mere easement or privilege of maintaining the pipe and drawing water therefrom. There was no definite grant of a specified

quantity of water, and no covenant that the remaining estate should be burdened to supply it. The principle hereinbefore stated is fully recognized in that case as obtaining in all cases where there has been a clear intention expressed in definite terms by grant to burden the remaining estate with the servitude of maintaining a definite quantity of water for the conveyed estate. In the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 729, the argument is made that water, gas and oil belong to the owner of the land, and are a part of it so long as they are on it or in it, and are subject to his control; but when they escape and go on or into other land, or come under another's control, the title of the former owner is gone. That decision was in relation to natural gas, but the court classified water, gas and oil as minerals *ferae naturae*, and as all subject to the same rules. There was, therefore, an ownership in the water which was conveyed by respondents' grantor. The water is a part of the land so long as it is on the land or in it, and it was definitely granted by the appellants' grantor. Appellants' conveyance was expressly made subject to the grant of the water estate. They accepted it as such, and must now abide by the burden which it imposes.

It is further contended that, in any event, the several grantees of the water rights must take subject to the rights of all others who have similar claims, and that if McDonald conveyed more than the actual amount flowing in the well, or if ¹⁹⁶ the quantity of the flow is diminished, then each of the grantees of the water rights holds simply a correlative easement. We think the ordinary rules applying to grantors and grantees must apply here. The first grantee of a water right received a specific quantity of water and a definite estate, and each subsequent grantee, having taken with full notice of the estates held by prior grantees, must hold subject to those estates.

The judgment is affirmed.

Fullerton, Mount and Crow, JJ., concur.

The Right of Land Owners in Percolating Waters will be found discussed in the notes to *Wheelock v. Jacobs*, 67 Am. St. Rep. 663; *Katz v. Walkinshaw*, 99 Am. St. Rep. 66.

BUCKLEY v. BUCKLEY.

[50 Wash. 213, 96 Pac. 1079.]

VOID MARRIAGE—Right of the Court to Annul and to Divide the Property of the Parties.—Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marital state pursuant to some ceremony or agreement recognized by the law of the place, which marriage would be legal but for the incompetency of the man, which he conceals from her, a status is created justifying the court in rendering a decree annulling the assumed marriage on the complaint of the innocent party, and where the woman has helped acquire and materially save the property, the court has jurisdiction, as between the parties, to dispose of it as in the case of granting a divorce. (p. 902.)

JURISDICTION—Publication of Summons in Statutes for the Annulment of Marriage.—The rules governing the publication of summons in divorce cases apply to statutes for the annulment of marriage. (p. 903.)

DIVORCE Granted Against a Nonresident—Validity of.—If a wife obtains a divorce pursuant to the laws of the state in which she has for several years had her domicile, and in which state was also the domicile of the marital relation, the decree is not only valid in the state, but is entitled to recognition in every other under the full faith and credit clause of the constitution of the United States, and if this be not so, it may be recognized in another state as a matter of comity. (p. 907.)

PLEADING—Divorce and Annulment—Variance.—If a woman files a complaint for divorce, and in response to the answer prays for an annulment of the marriage on the ground that the husband had a wife still living when it was contracted, this is not such a variance as precludes the court from granting the annulment. (pp. 907, 908.)

DIVORCE—Decree not Making any Disposition of the Property—Power of Courts of Another State.—If a woman, residing in one state obtained a decree of divorce against her husband residing in another, without making any disposition of the property, a court of the state of his residence and in which the property is situated may thereafter, in a suit for partition or any other appropriate action, divide the property as it would do under the statute controlling divorce proceedings in such manner as seems just, and is not bound to regard her as entitled to the undivided one-half thereof. (p. 908.)

John E. Humphries and George B. Cole, for the appellant Andrew Buckley.

McClure & McClure, for the appellant Philomene Buckley.

Higgins, Hall & Halverstadt, for the respondent.

214 ROOT, J. This is an appeal from a judgment and decree rendered in two cases that were consolidated for trial, one being by the respondent against appellant Andrew Buckley for divorce or annulment of marriage and division of property, the other being by the appellant Philomene Buck-

ley against appellant Andrew Buckley for a division of property claimed to have been acquired while he and she were husband and wife.

The material facts, as found by the court, and which we believe to be sustained by the evidence, were about these: On or about the fifteenth day of October, 1898, in the city of St. Paul, Minnesota, Mary Buckley and Andrew Buckley entered into an oral agreement of marriage, and then and there entered into the marriage state. The law of that state permitted common-law marriages. At that time he had a former wife living from whom he had never been divorced, and she had a former husband living from whom she had not been divorced. She had reason to, and did, believe that her former husband had obtained a divorce from her prior to this time. She did not know that Andrew Buckley had a wife living, or that he had ever been married, but believed that he was unmarried and competent to enter into a contract of marriage with her.

On the eleventh day of September, 1877, at Detroit, Michigan, appellant Philomene Buckley and appellant Andrew Buckley intermarried; and they lived together until about ²¹⁵ October 29, 1877, when he deserted her, and has never lived with nor supported her since. No justification is shown for this desertion. As a result of this marriage, a child was born in 1878. Philomene Buckley, believing that her husband, Andrew Buckley, had been drowned, intermarried a few years thereafter with one Young. In 1907 Philomene Buckley, having learned that her former husband, Andrew Buckley, was alive, brought an action for divorce in the superior court of Cook county, state of Illinois, the same being a court of general jurisdiction, and she at that time being, and having been for a year or more theretofore, a bona fide resident of said state. Her complaint was filed in said court, and summons was served by publication in the manner and form required by the statutes of the state of Illinois. Thereupon the cause was brought on for trial, Andrew Buckley not appearing, and the court entered a judgment and decree dissolving the bonds of matrimony existing between Philomene and Andrew Buckley, but declining to make any order, judgment, or decree affecting the property of these parties, or either of them, situate in the state of Washington.

As a ground for her action, Mary Buckley assigned cruelty, personal indignities and drunkenness. These allegations were supported by the evidence adduced at the trial, and the trial court rendered a judgment and decree annulling her marriage

contract with the defendant, and awarding her an undivided one-fourth interest in all of the real estate of said Andrew Buckley. The court awarded to Philomene Buckley an undivided one-fourth interest in and to all the real property belonging to Andrew Buckley.

It is the contention of Andrew Buckley that Mary Buckley never became his wife, and that the court was without authority to award her any portion of the property standing in his name or which he had acquired. Whatever may be said of the right of Mary Buckley to recover in the form of action instituted here, it cannot be doubted that she is entitled to some redress or compensation in some form of action against ²¹⁶ Andrew Buckley. Under the law of this state, the courts are called upon to regard substance rather than form, and it is not the policy of our law to turn a suitor out of one door of the court to come in at another in order to secure justice. Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marriage state pursuant to any ceremony or agreement recognized by the law of the place, which marriage would be legal except for the incompetency of the man, which he conceals from the woman, a status is created which will justify a court in rendering a decree of annulment of the attempted and assumed marriage contract, upon complaint of the innocent party; and where in such a case the facts are as they have been found here, where the woman helped to acquire and very materially to save the property, the court has jurisdiction, as between the parties, to dispose of their property as it would do under Ballinger's Code, section 5723 (Pierce's Code, section 4637), in a case of granting a divorce—awarding to the innocent, injured woman such proportion of the property as, under all the circumstances, would be just and equitable.

“When either party to a marriage shall be incapable of consenting thereto, for want of legal age or a sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed”: Bal. Code, sec. 4477 (Pierce's Code, sec. 6262).

“When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage”: Bal. Code, sec. 5717 (Pierce's Code, sec. 4631).

“Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of

nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases": Bal. Code, sec. 5718 (Pierce's Code, sec. 4632).

²¹⁷ In the case of *Piper v. Piper*, 46 Wash. 671, 91 Pac. 189, this court held that the rule covering the publication of summons in divorce cases applied likewise to actions for the annulment of marriage. Among other things the court said: "Appellant argues that an action for annulment of a marriage is, in this state, of the same nature as an action for divorce, and that it has always been treated by our legislatures in the passage of statutes as in effect the same. We believe this is true. . . . It thus appears that our legislature has invariably treated actions for divorce and for the annulment of marriages as belonging to one general subject, and in conferring jurisdiction to grant divorces it has also been made to include the annulment of marriages. . . . In view of the not uncommon legislative policy above indicated, as well as in view of the express provisions of our statutes, we think it has been the evident intention of our legislature to establish the same jurisdiction and practice for both divorce and annulment suits."

In his article on *Marriage*, 26 Cyc. 918, 919, Mr. Justice Harlan, of the United States supreme court, says: "Permanent alimony cannot be granted in cases of this kind, for if a decree is made in accordance with the prayer of the petition, it must adjudge the pretended marriage void ab initio, and consequently that the parties never sustained the relation of husband and wife. But where the woman is of good character and blameless in the affair, even though the marriage is declared void, she may be entitled to receive a substantial allowance, not technically as alimony, but by way of compensation for the pecuniary benefits derived by the man during the supposed marriage relation. . . . So, in passing the sentence of annulment, the court has power by statute in some states, and apparently at common law, to make an order for restitution to the wife of the property which the husband received from her or of which he acquired possession by virtue of the marriage. And in other cases where a party has been tricked or duped into a marriage and it is annulled, the court may order the restoration to him of his property fraudulently acquired and converted by the other party. Also where the wife entered into the marriage in good faith and is free from blame, and it is annulled for the fault of the husband, ²¹⁸ she may be allowed substantial compensation for the bene-

fits which he received or the loss which she suffered in consequence of the marriage."

In the case of *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127, 41 L. R. A. 349, the supreme court of Kansas said: "It is true, as the plaintiff in error contends, that the marriage between the parties was absolutely void from the beginning. Although living together as husband and wife, they were not in fact married, and hence no allowance could be made as alimony. The rule is that permanent alimony can only be allowed where the relation of husband and wife has existed; but this rule does not preclude an equitable division of the property where there is a judicial separation of the parties on account of the invalidity of the marriage contract: *Fuller v. Fuller*, 33 Kan. 582, 7 Pac. 241. Strictly speaking, this action as it was tried was not a divorce proceeding, but it was rather one to annul a void marriage. Although instituted under the statutes to obtain a divorce, the pleadings were so drawn and the issues so shaped that it was within the power of the court to grant relief independently of the statutes relating to divorce, and it rendered a decree of nullity, rather than a decree of divorce. The plaintiff below set forth at length the description and nature of the property which had been acquired by the parties, the manner in which it had been acquired, and her interest in the same, and in the prayer of her reply she asks to be allowed a just and equitable division of the same in case the marriage was held to be null and void. The court in its decree did not treat the award as alimony, but rather adjudged her a share of the property jointly accumulated by the parties during the time they lived together as husband and wife. *Fuller v. Fuller*, 33 Kan. 582, 7 Pac. 241, greatly relied on by the plaintiff in error, holds, it is true, that in an action of this character the defendant is not entitled to recover permanent alimony, but at the same time it is expressly stated: 'That in all judicial separations of persons who have lived together as husband and wife a fair and equitable division of their property should be had; and the court in making such division should inquire into the amount that each originally owned, the amount that each party received while they were living together, and the amount of ²¹⁹ their joint accumulations.' Even in cases where the marriage is valid, and a divorce is refused for any cause, the court may adjudge an equitable division and disposition of the property of the parties: Civ. Code, sec. 643. But independently of the statute of divorce, we think the court had authority to decree, not only an an-

nulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding, and, within its equity power, the district court had full jurisdiction to give adequate relief to the parties. The division that was made was eminently equitable and just."

See, also, *Scrimshire v. Scrimshire*, 4 Eng. Ecc. 562; *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724; 2 Am. & Eng. Ency. of Law, 2d ed., pp. 104, 117, 118; 6 Current Law, 515; *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127, 41 L. R. A. 349; *Strode v. Strode*, 3 Bush, 227, 96 Am. Dec. 211; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *Barkley v. Dumke*, 99 Tex. 150, 87 S. W. 1147; *Selby v. Selby*, 27 R. I. 172, 61 Atl. 142; *Stapleberg v. Stapleberg*, 77 Conn. 31, 58 Atl. 233; *Gore v. Gore*, 44 Misc. Rep. 323, 89 N. Y. Supp. 902; *Blankenmiester v. Blankenmiester*, 106 Mo. App. 390, 80 S. W. 706.

It is also urged by appellant Andrew Buckley that the certified copies of the decree of divorce in the case of *J. T. Bell v. Mary Bell* (this respondent Mary Buckley) and that of the case of *Philomene Buckley v. Andrew Buckley* were incompetent evidence; that the decree in each of those cases was of no effect in this state. In support of this contention reliance is placed upon the case of *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. Rep. 525, 50 L. ed. 867. It appears that Bell obtained a decree of divorce against respondent Mary Buckley in the territory of Oklahoma at a time when he was living in that territory, which was at said time the "domicile" of the "marriage relation." She was absent from the territory and service was had by publication of summons. The case of *Philomene Buckley v. Andrew Buckley* was prosecuted in Illinois, which was, and had been for many years, the home of Philomene Buckley, she having removed to that state from Michigan ²²⁰ after her desertion by appellant Andrew Buckley. Summons was published in this case. Neither personal service upon nor appearance by defendant in either case.

In the *Haddock* case the supreme court stated several legal propositions as having been "irrevocably concluded by previous decisions" of that court, and which were accepted as a basis for the arguments put forth to sustain the conclusion announced in the case then at bar. One of these propositions was stated as follows: "The place where the wife was domiciled when so abandoned constitutes her legal domicile until a new actual domicile is by her elsewhere acquired."

This would clearly imply that she could acquire an actual domicile elsewhere than in the state where their domicile was at the time of her abandonment. The following proposition was also announced: "So also it is settled that where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause."

Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794, is cited in support of this proposition. It was also stated that, where the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state does not become a new domicile of matrimony, and is not to be treated as the actual or constructive domicile of the wife. In the *Haddock* case the marriage took place in New York, and the husband removed to Connecticut, where he secured a divorce by publication without ²²¹ personal service upon the defendant, who remained a resident of the state of New York. She subsequently prosecuted an action in her home state, to which action he interposed in defense the judgment of the Connecticut court. The substance of the decision of the United States supreme court was, as we understand it, that the courts of New York were not compelled by virtue of the full faith and credit clause of the federal constitution to recognize the decree of the Connecticut court, although as a matter of comity they might so do. In that case it was also announced that the principles applying to a judgment in personam did not relate to proceedings in rem, the court using this language: "That is to say, in consequence of the authority which government possesses over things within its border there is jurisdiction in a court of a state by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing."

Discussing a suit for divorce as a proceeding in rem, the court propounds the question as to what constitutes the res,

and says that, if the marriage relation constitutes this, it cannot be supposed that it was removed from New York to Connecticut when the husband wrongfully abandoned the wife and went from the state of New York into Connecticut; and that anyhow, if he could take a portion of the res, the other portion would remain with the wife where the marriage took place and where her domicile legally remained. The court says: "On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy, but also to protect the ²²² individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to persons within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. . . . It enables the states rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicile from which the presence of a party not physically present within the borders of a state may be constructively found to exist."

Under this holding it would seem that, Philomene Buckley having obtained a decree of divorce pursuant to the laws of the state of Illinois in the courts of that state, which at that time was, and for several years theretofore had been, her actual bona fide home, and which was the "domicile" of the marital relation, such decree was not only valid in that state, but entitled to recognition in every other under the full faith and credit clause of the constitution. If, however, this be not the meaning of the language used by that court, then we think there is no question but that, as a matter of comity, the courts of this state may recognize the decree rendered by the court of Illinois. The same observations may be made regarding the decree of the Oklahoma court in the case of *J. T. Bell v. Mary Bell*, now *Mary Buckley*. We, therefore, hold that the trial court was not in error in admitting in evidence the divorce decrees referred to.

It is further contended by appellant Andrew Buckley that, inasmuch as *Mary Buckley's* complaint herein was one as in an action for divorce, while in her reply to appellant's an-

swer she prayed for a decree of annulment of marriage, the latter prayer being granted by the court, there was such a variance as should prevent her from having any relief in this action. We do not think this contention is meritorious: 25 Cyc. 900; *Werner v. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. 127, 41 L. R. A. 349.

It is contended by the appellant Philomene Buckley that, after the decree of divorce was rendered in her suit against ²²³ Andrew Buckley in Illinois, she and Andrew Buckley became tenants in common as to all of the property which he had accumulated and which was situated in the state of Washington; that each became the owner of an undivided one-half interest therein, and that she is entitled in this action to have the court set aside to her one-half of all of such property. We think that where a court of a sister state grants a decree of divorce to a wife residing in that state and makes no disposition of the property belonging to the parties and situated in our state, where the husband resides, the courts of this state may thereafter, in a timely suit for partition, or in any other appropriate action, divide the property in this state between the parties as it would do under Ballinger's Code, section 5723 (*Pierce's Code*, section 4637) in a divorce proceeding: *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931; *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864; *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267; *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443; 1 *Ency. of Pl. & Pr.* 415. In this action we think the trial court was authorized to divide the property of Andrew Buckley and Philomene Buckley between them in such a manner as it deemed just and equitable under all the circumstances of the case, and that it was not obliged to divide the property equally or in any definite proportions other than would be thus equitable and just. The value of the property was not found by the trial court. The total value was probably five thousand dollars or six thousand dollars. Bearing in mind that appellant Buckley accumulated this property, and that he is now sixty-six years old, in feeble health, requiring support, medical attendance, and nursing, we cannot say that the disposition of the property, as made by the trial court, was erroneous, inequitable, or unjust.

Finding no error in the record, and believing that substantial justice has been done as between all these parties, the judgment and decree is affirmed.

Hadley, C. J., and Crow, J., concur.

Fullerton, J., concurs in the result.

224 RUDKIN, J., Concurring. I concur in the judgment of affirmance but not in the application of Ballinger's Code, section 5723 (Pierce's Code, section 4637), to the annulment proceedings of Mary Buckley against Andrew Buckley. Between these parties there was no marriage, and their property should be divided or distributed according to the rules governing the division or distribution of the joint accumulations of any other persons between whom no marriage exists. As applicable to such a proceeding, I approve the rule announced in the authorities cited in the majority opinion, viz., that the court may restore to the woman any property the man may have acquired by or through her, may compensate the woman for any pecuniary benefits derived by the man during the existence of such relation, or may make a just and equitable distribution of their joint accumulations. But this is very different from the power exercised by the court under section 5723. Under that section the court considers not only the party through whom the property was acquired, but also the merits of the parties and the condition they will be left in by the divorce. It not only considers the past but provides for the future as well. It may, and generally does, provide for the future maintenance and support of the wife, by general alimony or by an award of property, especially where the husband is at fault. None of these considerations enter into a decree of nullity. In the one case the property is simply distributed to those who have aided and assisted in its acquisition. In the other case the court exercises a broader discretion, distributes the property according to different rules, and adjusts the rights, duties and obligations growing out of the marriage relation. It seems to me that even a superficial reading of this section would convince one that a valid subsisting marriage lies at its very foundation. I believe, however, that the division made by the lower court was equitable and just under all the circumstances, without any regard whatever to section 5723, and that its judgment should be affirmed.

The Property Rights of the Parties to a Void Marriage are discussed in the notes to *Deeds v. Strode*, 96 Am. St. Rep. 270; *Werner v. Werner*, 68 Am. St. Rep. 375. As to what marriages are void, see *State v. Lowell*, 78 Minn. 166, 79 Am. St. Rep. 361.

YOUNG v. DAVIS.

[50 Wash. 504, 97 Pac. 506.]

LIS PENDENS—Judgment of Foreclosure and Sale Thereunder—Effect of, No Notice of the Action Having been Filed.—If a suit is brought to foreclose a mortgage, and a decree is entered and a sale made thereunder, such decree is from the date of its entry constructive notice to anyone purchasing the property both of the decree itself and all proceedings taken for its enforcement. Therefore, a subsequent purchaser from the mortgagor is chargeable with notice of the decree and sale, though neither the certificate of sale nor any notice of the pendency of the action was filed, and on the execution of a conveyance pursuant to the foreclosure sale, the grantee takes title paramount to that of the mortgagor in good faith for value and without actual notice of the foreclosure or the sale. Nor is it material that the latter grantee took possession of the property and made valuable improvements thereon. (p. 912.)

S. Douglas, for the appellant.

W. H. Jackson, for the respondents.

504 FULLERTON, J. The appellant, who was plaintiff below, began this action to quiet title in himself to certain real property situated in Colville, Stevens county, Washington. The respondents answered claiming title in themselves, which title they also asked to be quieted. On the issues made, a trial was had before the court, which resulted in findings and a judgment in favor of the respondents. This appeal was taken therefrom.

The facts shown by the record, material to the inquiry here, are in brief these: On March 31, 1890, one W. H. Kearney, a bachelor, was the owner of the land in dispute, and on that day mortgaged the same to the Stevens County Bank, to secure the payment of a promissory note of five hundred dollars and interest, due ninety days after date. This mortgage was **505** duly recorded in the auditor's office of Stevens county. Thereafter the bank became insolvent, and on September 12, 1902, made a general deed of assignment of all its property, including the mortgage and note above mentioned, to one John B. Slater. Slater entered upon the duties of his trust, and shortly thereafter began proceedings to foreclose the mortgage. Thereafter, and while the suit was pending, Slater resigned his trust, and one William J. Galbraith was appointed receiver in his stead. Galbraith continued the foreclosure proceedings, obtaining a decree and order of sale in the regular way on September 12, 1894, under which the

property was sold to one Frank Fish on May 22, 1896. At the time of the sale a certificate of sale in due form was made out by the officer conducting the sale and delivered to Fish; also, due return of the sale was made and filed in court, and the sale confirmed June 5, 1896. No notice of the pendency of the action was filed with the auditor, either by Slater or Galbraith, and Fish never recorded his certificate of sale. On July 15, 1903, one Ehorn procured a quitclaim deed to the land from W. H. Kearney, the original mortgagor, and on August 24, 1903, conveyed the property by deed to one H. M. Bollinger, who in turn conveyed to the appellant by deed dated October 19, 1906.

Frank Fish, the purchaser under the foreclosure sale, died intestate, in the state of Nebraska, sometime in the fall of 1896, without having parted with the interest he acquired by his purchase at the sale. He left surviving him a widow and one son as his sole heirs at law, who inherited his interests in the property. These interests were conveyed to the respondents by the son and widow, by deeds dated, respectively, February 26, 1907, and March 20, 1907. Thereafter on September 13, 1907, the sheriff of Stevens county executed and delivered to the respondents, as successors in interest of Frank Fish, a sheriff's deed to the premises, pursuant to the foreclosure sale.

⁵⁰⁶ In addition to the foregoing the evidence tended to show that Bollinger, after his purchase from Ehorn, entered into possession of the property, and remained therein for some three years, building a house and otherwise improving the premises. The land, however, was vacant and unoccupied at the time of the commencement of this action. There was evidence, also, tending to show that Ehorn had no actual knowledge of the foreclosure sale at the time he purchased the land from Kearney.

The principal question presented by the record is, whether the purchaser from Kearney was bound to notice the judgment of foreclosure and the subsequent sale thereunder of the mortgaged property to the purchaser Fish. The appellant contends that he was not, since nothing was of record in the auditor's office that put him upon his inquiry. He concedes that, had a notice of the pendency of the action been filed in that office, or had Fish recorded his certificate of sale therein, or had a sheriff's deed been executed pursuant to the foreclosure sale and recorded in the auditor's office prior to his purchase, he would be bound by constructive notice; but

that he was not obligated to take notice of the proceedings recorded in the county clerk's office, even though they affect real property situated in the county in which the office is situated.

But the appellant mistakes the statute. Since the act of March 3, 1893 (Laws 1893, p. 65), a judgment of the superior court has been a lien upon the real property of the judgment debtor in the county where the judgment is rendered from the date of its entry, and this being so, it is of course constructive notice to anyone purchasing such real property. It must follow, also, that since the judgment itself is constructive notice, all of the subsequent proceedings had thereunder are likewise constructive notice to subsequent purchasers of real property affected by such proceedings. So in this case, since the purchaser from the mortgagor ⁵⁰⁷ Kearney after the foreclosure and sale was bound to take notice of the decree of foreclosure and the subsequent sale of the mortgaged land thereunder, he took with notice of such proceedings and acquired only such interests as Kearney had therein. But Kearney's interests were effectually cut off by the foreclosure and sale. By his purchase at the foreclosure sale, the purchaser Fish acquired the full equitable title in the property, which could only be defeated by a redemption from the sale within the year permitted by statute, by the mortgagor or his successor in interest. The title became absolute in Fish on the failure to redeem within the time, and descended to his heirs on his death, and was acquired by the respondents by their deeds from such heirs and became perfected in the respondents by the deed from the sheriff.

The fact that a predecessor in interest of the appellant entered into possession of the land for a time and made improvements thereon does not affect the respondents' title. Doubtless such acts tended to show good faith on the part of the purchaser, but the good faith of either party is not in question; it is a question of the superior title, and we hold the superior title to be with the respondents.

Stang v. Redden, 28 Fed. 11, is a case in point on all of the questions presented here. It was there held, under a statute similar to our own, that the judicial confirmation of a foreclosure sale vests in the purchasers the full equitable title to the mortgaged premises, whether any deed is executed and delivered to the purchaser or not, and that the foreclosure record in the district court was constructive notice to all persons claiming under the mortgagor of the outstanding equities vested in the purchaser at such foreclosure sale: See, also,

on the question of notice, *Fleckenstein v. Baxter*, 114 Mo. 493, 21 S. W. 852.

The judgment appealed from is affirmed.

Hadley, C. J., Root, Mount, Crow and Dunbar, JJ., concur.

A Recorded Judgment Concerning Land is Notice to subsequent purchasers, in the absence of fraud and misrepresentation; and equity will not relieve against negligence in failing to examine the record, by interfering with the legal rights of others who are without fault: *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 48.

SPOKANE v. CAMP.

[50 Wash. 554, 97 Pac. 770.]

MUNICIPAL ORDINANCE Relating to Livery-stable, When not Void for Indefiniteness.—An ordinance declaring it to be unlawful to locate, build, construct or occupy in any block in which two-thirds of the buildings are devoted to residence purposes, a livery, boarding or sale stable or private stable where more than five head of stock are kept within two hundred feet of any such residence on either side of the street, unless the owners of a majority of the lots in such block fronting on the street consent in writing, is not void on the ground that it is so ambiguous that it cannot be ascertained how many blocks must be considered in determining the number of residences in a block. (p. 914.)

MUNICIPAL ORDINANCE—When not Void as Delegation of Legislative Power—Livery-stable.—An ordinance prohibiting the keeping of a livery-stable in any block in which two-thirds of the buildings are used for residence purposes, unless the owners of the majority of the lots in the block consent in writing, is not a delegation of legislative power to such property owners, and will not be declared void on that ground. (p. 915.)

L. R. Hamblen, F. D. Allen and Harry A. Rhodes, for the appellant.

John M. Gleeson, for the respondent.

⁵⁵⁶ DUNBAR, J. The defendant, respondent on this appeal, was convicted before the municipal court of the city of Spokane for violating Ordinance No. A2919. Appeal was taken to the superior court of Spokane county; whereupon defendant moved to dismiss the cause and discharge the bondsmen and himself. This motion was granted by the court. Judgment of dismissal was entered, and the city appeals.

The sole question involved is the validity of the ordinance, it having been adjudged void and of no effect by the trial court. The ordinance is as follows:

"Section 1. It shall be unlawful for any person, firm or corporation to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes a livery, boarding or sale stable, or private stable where more than five head of stock are kept, within two hundred feet of any such residence on either side of the street, unless the owners of a majority of the lots in such block fronting or abutting on the street consent in writing to the location or construction of such livery, boarding or sale stable, or private stable where more than five head of stock are kept. Such written consent of the property owners shall be filed with the Board of Public Works before a permit shall be granted for the construction or keeping of such livery, boarding or sale stable, or private stable where more than five head of stock are kept.

"Sec. 2. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of ⁵⁵⁷ a misdemeanor, and shall be fined in any sum not less than fifty dollars nor more than one hundred dollars.

"Sec. 3. This ordinance shall take effect and be in force ten days after its passage."

It is contended by the respondent that the ordinance is void for uncertainty, the language being so ambiguous that it cannot be ascertained how many blocks would have to be considered in determining the number of residences in a block. But it seems to us that this difficulty is more imaginary than real, and that there can be no doubt that consent must be obtained from the owners of the block in which the livery-stable is actually located.

The other objections, with one exception, simply go to the policy of the ordinance, and embrace arguments which would more appropriately be addressed to the law-making power. The exception mentioned above is that the ordinance constitutes a delegation of legislative power to the property owners of the city of Spokane, which is exclusively vested by law in the mayor and city council. This is really the important and vexatious question in the case—important because it involves a fundamental principle of government, and vexatious because there is a bewildering conflict of authority which it is impossible to reconcile, so that a review of the authorities would avail nothing.

Out of the wilderness of cases discussing this proposition, *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, and *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 110 N. W. 680, are leading cases restricting the delega-

tion of legislative powers; while *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, 44 N. E. 853, 35 L. R. A. 84, *Davis v. Commonwealth*, 167 U. S. 43, 17 Sup. Ct. Rep. 731, 42 L. ed. 71, and *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. Rep. 317, 43 L. ed. 603, lay down a rule which would sustain the ordinance in question. Indeed, *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325, 44 N. E. 853, 35 L. R. A. 84, was a livery-stable case, and the ordinance sustained in that case was in all essentials similar to the ordinance assailed in this case. In that case the court held that the ordinance⁵⁵⁸ did not delegate to a majority of the lot owners a right to pass upon the question presented, but that consent was in the nature of a condition subsequent which might defeat the operation of the prohibition against the location of a livery-stable in a block where two-thirds of the buildings are devoted exclusively to residence purposes. The court stated in the course of its argument that, in a matter of purely local concern, the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority. In this case it may readily be seen that the council, recognizing the rights of the residents of the city to be consulted in matters purely local, matters affecting the comfort and even the health of the residents, and the right to have their will reflected in the enactments of their representatives, provided the ordinance for the purpose of meeting the desires of the residents in that regard. The ordinance is prohibitive, but leaves the right to the citizen to waive the prohibition if he chooses. Statutes of this character are common, and while it is generally conceded that the legislature cannot delegate its legislative function, it is well established that it may provide for the operation of a law which it enacts upon the happening of some future act or contingency. The local option laws in their various phases are common instances. While these laws were violently assailed, and in some instances received judicial condemnation, they are now almost universally sustained.

The ordinance, in our judgment, being a valid one, the judgment is reversed and the cause remanded to the lower court, with instructions to overrule the demurrer and motion interposed by the respondent, and to proceed with the trial of the cause in accordance with the opinion herein expressed.

Hadley, C. J., Crow, Mount and Root, JJ., concur.

Fullerton and Rudkin, JJ., took no part.

An Ordinance Similar to the One Involved in the Principal Case is upheld as constitutional in Chicago v. Stratton, 162 Ill. 494, 53 Am. St. Rep. 325. But in the recent case of State v. Withnell, 78 Neb. 33, ante, p. 586, an ordinance providing that it shall not be lawful to erect a gas-tank within the city without the written consent of all property owners within a radius of one thousand feet of the tank is held unconstitutional. A like rule is declared in Ex parte Sing Lee, 96 Cal. 354, 31 Am. St. Rep. 218, in the case of a laundry, and in St. Louis v. Howard, 119 Mo. 41, 41 Am. St. Rep. 630, in the case of a slaughter-house.

LUND v. IDAHO AND WASHINGTON NORTHERN RAILROAD.

[50 Wash. 574, 97 Pac. 665.]

CONSTITUTIONAL LAW—Damage to Private Property—Interfering with Ingress and Egress to Public Street.—The right of ingress and egress to lots abutting on a public street is property, and interference with it is damage within the meaning of the provision of the state constitution declaring that no private property shall be taken or damaged for a public or private use without just compensation having first been made or paid into court for the owner. (p. 918.)

AN INJUNCTION will be Granted Against the Construction and Maintenance of a Railroad materially interfering with the complainant's right of ingress and egress to his property abutting on a public street, and thereby diminishing its value and rendering less profitable his business thereon. (p. 920.)

INJUNCTION Against Construction of Railroad—When may be Held in Abeyance.—In a suit to enjoin the construction and maintenance of a railroad in front of complainant's property, and thereby materially affecting the right of ingress and egress to and from a public street, an injunction may be held in abeyance for a stated period to allow the railroad company to commence condemnation proceedings. (p. 921.)

Belden & Losey and Post, Avery & Higgins, for the appellant.

Cannon & Lee, for the respondents.

574 DUNBAR, J. Among the material allegations of the complaint in this case it is alleged that, on the twenty-fourth day of October, 1907, before daylight of said day, without the consent of plaintiffs or authority of them, and against their wishes, the defendant entered upon Fourth street, in the city of Newport, directly in front of the premises owned by plaintiffs, and whereon they were then and for some years prior thereto had been conducting a retail hardware store; and that the defendant then built upon said street, and diag-

onally across the same, in front of plaintiffs' property, its main line of railroad; that no compensation had been paid to plaintiffs for damages sustained by reason of such building and for ⁵⁷⁵ future operation of the railroad; alleges special damages by reason of the obstruction of the street and the prevention of travel thereon, and by reason of damage to plaintiffs' premises by smoke, steam, grease, cinders, noise, etc.

Defendant admitted the building of the railroad and its intention to operate the same as a steam railroad, but denied that plaintiffs would suffer any other damage than such as would be suffered by the public in general by the use of the street. Upon these issues, the cause went to trial, and the evidence showed that the market value of plaintiffs' premises was reduced to a material extent by reason of the construction and operation of this road; that the rental value was greatly reduced; and that the plaintiffs' business was damaged and practically made unprofitable by reason of the fact that the building of the road prevented safe ingress and egress to and from their place of business. The court, among others, made the following findings of fact: That plaintiff's premises, prior to the construction of defendant's road, was valuable as a retail business property, and was a desirable retail business location; that his hardware business was, and for many years had been, a profitable and lucrative business; that the defendant in the night-time, without the consent and against the protest of the plaintiffs, entered upon the premises substantially as alleged in the complaint; that the said Fourth street had a width of seventy feet; that the said railroad, as so constructed, and the operation thereof in the usual manner of operating engines and cars over and upon the same, will materially interfere with the ingress to and egress from plaintiffs' said premises, and will cause smoke, cinders and steam to fall upon plaintiffs' premises, and will otherwise cause injury and damage to plaintiffs' said business; that all said injuries so caused constitute special damages to plaintiffs' said property and plaintiffs' said business; and that the construction of the said railroad was with the permission of the city of Newport and authority theretofore granted by ordinance. As conclusions of law, the court found that the plaintiffs ⁵⁷⁶ were entitled to an injunction restraining and enjoining the defendant from in any manner operating or running its engines, cars, trains or other railroad equipment over and upon its said track in front of plaintiffs' said premises, or in any manner using said railroad at said point, until

it shall first have paid to plaintiffs the amount of damage caused to plaintiffs' said property by reason of such construction and operation of the road.

Appellant excepted to the material findings of fact in relation to the respondents' damages, and insists that said findings are error. An examination of the record, however, convinces us that the findings are abundantly sustained by the testimony, and we shall therefore discuss the case from the standpoint made by these findings. Section 16, article 1, of the state constitution, is as follows: "No private property shall be taken or damaged for public or private use without just compensation having first been made or paid into court for the owner."

This language is so plain and unequivocal that to undertake to construe it would be like undertaking to demonstrate a self-evident proposition in geometry. It is terse, vigorous, plain, compact and certain as to its meaning, and the only thing which will bear discussion in connection with it is, what is private property, what is a taking, and what is a damaging of private property. It has been the uniform holding of this court since the decision in the case of *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, that the right of ingress and egress, which the owner of lots abutting on a street had, was property, and that the interference with such right was a damage within the meaning of the constitutional provision. In commenting on *Moore v. Atlanta*, 70 Ga. 611, where the constitutional provision under consideration was similar to ours and where the injunction was denied, we said: "A case has been brought to our notice which is exactly in point in its ruling, viz.: *Moore v. City of Atlanta*, 70 Ga. ⁵⁷⁷ 611. The constitution of Georgia provides that private property shall not be taken or damaged without just and equitable compensation being first paid. The city of Atlanta was proceeding to grade a street in front of Moore's property, and he applied for an injunction to restrain the prosecution of the work until his damages should be assessed and paid. The writ was refused, and on appeal the supreme court affirmed the judgment. The decision of this case, as the reading of the opinion shows, was based on the argument that it was better that one man should be left to recover his damage by ordinary suit at law than the city authorities be hindered in grading the street; or, in other words, the damage to one man was balanced against the possible inconvenience of many, which is not a recognized basis of legal decision. The embarrassments of the constitutional provisions were

pointed out, but it seems to us the plain letter of that instrument was disregarded. Justification for the decision was sought in the case of *Stetson v. Chicago etc. R. Co.*, 75 Ill. 74, but the fact seems to have been entirely overlooked that the constitution of Illinois does not require that compensation be first made in any such case. We can foresee many difficulties, and perhaps much litigation, likely to ensue from the faithful enforcement of our constitutional requirement that damages be first paid; but we have no choice in the matter, and these difficulties, as well as many others, must be met and dealt with as they arise."

This case was followed by *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063, where it was decided that the owner of property abutting on a street had the right to restrain the operation of a railroad in the street until damages were paid, on the theory that his right to the use of the street in front of his premises was a right distinguished from that of the general public, and was properly subject to damages. We said in discussing that case: "In any event, if the appellants' property has been damaged in a manner different from that of the public generally by the appropriation of the street for railroad purposes, they are entitled to compensation; and damages, to be recoverable, are not confined to the land itself, but may only [also] affect ⁵⁷⁸ that which is incident thereto, and necessary to the use thereof. The owner of a lot on a street in a city has a right to the use of the adjoining street which is distinct from that of the public, and such right is as much property as the lot itself, and cannot be taken away or injuriously affected, without compensation."

This case has never wavered in its adherence to the general principles announced in these two cases, but has substantially reaffirmed the doctrines therein announced in *Patton v. Olympia Door & Lumber Co.*, 15 Wash. 210, 46 Pac. 237; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *State ex rel. Smith v. Superior Court King County*, 26 Wash. 278, 66 Pac. 385; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Stone v. Seattle*, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253.

The learned counsel for appellant attempts, but we think unsuccessfully, to distinguish these cases. While, of course, the situation in each case was somewhat different from the others, in all of them the court adhered to the main principle that the abutting property owner had an interest in the street in addition to the general interest of the public, and that

these interests or easements constituted private property which could not be damaged without compensation first having been made. The right to an injunction was also determined in many of the cases cited. Applying the rule of the cases cited to the facts in this case, where it appears that the operation of the road will materially interfere with ingress and egress to and from respondents' premises, and that by reason of damage done to the respondents' property the market and retail value of the premises is materially diminished and respondents' business rendered less profitable, the respondents are entitled to the relief granted by the trial court.

The appellant seems to rely largely on the case of *Smith v. St. Paul etc. R. Co.*, 39 Wash. 355, 109 Am. St. Rep. 889, 81 Pac. 840, 70 L. R. A. 1018, and quotes extensively from the opinion in that case. That case in no particular overrules the principle ⁵⁷⁹ announced in *Brown v. Seattle*, 5 Wash. 35, 32 Pac. 214, 18 L. R. A. 161, or *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063, but, on the contrary, approves both cases. In the judgment of the writer of this opinion, the word "physical" was given undue prominence in the opinion of that case, and has led to some confusion, for it is a little difficult to understand how the act of ejecting smoke, gases, fumes, and odors into the dwelling-house of another can consistently escape the imputation of a physical invasion. But, as showing that the case is in no wise controlling here, we quote from the opinion at some length: "The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon, and the emission of smoke physically injuring property are injurious physical effects to the corpus of respondents' property, which, we think, come within the scope of the term 'damaged,' as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon."

Thus it will be seen that the questions invoked in this case were not considered in that case, and that there was no attempt to overrule or modify the doctrine of *Brown v. Seattle* or *Hatch v. Tacoma etc. R. Co.* In view of the many and uniform decisions of this court on the determinative questions involved, we do not feel called upon to enter again into a review of the cases decided in other jurisdictions.

The judgment will be affirmed, but the injunction will be held in abeyance for the period of thirty days from the date this opinion is filed to allow appellant to commence condemnation proceedings. If such proceedings are not commenced within that time, the injunction will be enforced.

Hadley, C. J., Crow, Mount and Root, JJ., concur.

Fullerton and Rudkin, JJ., took no part.

The Right of the Owner of Property Abutting on a Public Street to compensation for damages due to the construction and operation of a railway in the street has been recognized in many cases. The injury to his property under such circumstances is damage within the meaning of the constitutional provision that no property shall be taken or damaged for public or private use without just compensation to the owner: *Stehr v. Mason City etc. Ry. Co.*, 77 Neb. 611, 124 Am. St. Rep. 872; note to *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 913.

An Injunction will Issue to Prevent a Corporation from Taking Possession of Property for a Public Use, as for railway purposes, without first making compensation therefor, although the bill does not allege that the injury which would be sustained by the complainant is irreparable or that the trespassing corporation is insolvent: *Harman v. Caretta Ry. Co.*, 61 W. Va. 356, 123 Am. St. Rep. 985. See, in this connection, *Town of New Decatur v. Scharfenberg*, 147 Ala. 367, 119 Am. St. Rep. 81; *Elser v. Village of Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326; *Clemens v. Connecticut Mut. Life Ins. Co.*, 184 Mo. 46, 105 Am. St. Rep. 526.

HAMILTON v. WITNER.

[50 Wash. 689, 97 Pac. 1084.]

LIMITATIONS OF ACTIONS—Color of Title—Void Judicial Sale.—A void deed, although made under and as a result of a judgment or decree absolutely void, constitutes color of title. (p. 926.)

LIMITATIONS OF ACTIONS—Void Guardian's Sale.—Under a statute declaring that every person in the actual, open and notorious possession of land under claim and color of title made in good faith, who shall have seven consecutive years continued in possession and paid all the taxes, shall be held to be the legal owner of such land to the extent and according to the purport of his paper title, one taking and holding possession under a void guardian's sale has color of title and may become the owner of the property if his possession is sufficiently long continued and he pays the taxes as required by the statute. (p. 926.)

COSTS OF SUIT—When not Avoided by Stipulation as to the Facts.—Though before the trial commences a stipulation is made as to the facts, this does not impair the right of a party to recover for costs incurred by him in obtaining certified copies of deeds and other

records to be used in evidence, and the use of which is subsequently rendered unnecessary by such stipulation. (pp. 926, 927.)

APPEAL AND ERROR—Costs—Judgment for, When Reviewable on Appeal.—The appellate court may review a judgment for costs, although the amount of costs involved is less than the sum fixed for the jurisdiction of the court, where the provision limiting or fixing such jurisdiction purports to apply to actions for the recovery of money or personal property. (p. 927.)

F. C. Kapp and Elias A. Wright, for the appellants.

Frank Groundwater and W. H. Abel, for the respondents.

691 HADLEY, C. J. This is an action in ejectment, brought by the appellant Hamilton against the defendants. The defendants moved for a bond for costs, which was given, with appellants Henderson and Harris as sureties thereon. The cause was tried upon an agreed statement of facts, the essential facts being as follows: On March 9, 1877, the plaintiff's father and mother resided in Thurston county, Washington Territory, and they were then the owners in fee simple, by title deducible of record from the United States, of certain real estate, situate in Chehalis county, Washington, described as the east half of the southeast quarter of section 33, and the west half of the southwest quarter of section 34, all in township 18 north, range 6 west of the Willamette Meridian. On said day, still owning the land as aforesaid, the plaintiff's father died intestate, leaving surviving him as his sole heirs at law his widow and three minor children, of whom the plaintiff was one, he having been born May 18, 1876. Thereafter the estate of plaintiff's father was administered in the probate court of Thurston county, which court had full jurisdiction, and in the administration proceedings an order of distribution was made on the twenty-fourth day of April, 1882, whereby an undivided one-half of the aforesaid land was distributed to the widow and one-sixth to each of the three minor children. Sometime prior to the decree of distribution, the widow and minor children moved from Thurston county, and established their residence upon the said land in Chehalis county, and continued to live there until dispossessed by one Axford as hereinafter stated.

Subsequently to the decree of distribution, certain proceedings were had in the probate court of Chehalis county, whereby the mother of the minor children was appointed their guardian. In the meantime the mother had remarried, and her appointment and qualification as guardian was under the name of Sarah J. Morton. As guardian she filed an inventory showing her three wards to be the owners of an undivided

⁶⁹² one-half of this land. Thereafter the guardian petitioned the probate court for an order to sell the real estate of her wards. An order to show cause was made. The same came on for hearing at the time fixed by the court, and the guardian then appeared in person and moved "to vacate said petition," which motion was granted. On the same day the mother filed a petition in the probate court, asking a partition of the land. The paper was not entitled as in the guardianship proceedings, but was designated as "In the Matter of the Estate of Jimerson Hamilton, Deceased." Thereafter such proceedings were had that the court appointed three persons to make partition and division of the land, and these reported that the division could not be justly made. Whereupon the court made an order in which it was recited that the petition for partition was filed "in the matter of the estate and guardianship of the minor children," and the guardian was ordered to sell the land. Notice of such sale was given by the guardian, as directed by the court, and the sale of this particular land was made by her as guardian to W. R. Axford, for the consideration of eight hundred dollars cash. The sale was approved and affirmed by the court, and the guardian was ordered to execute a deed to the purchaser, which she did September 30, 1882. The purchaser Axford went into possession on the same day, and he and his grantees, including the defendants, have ever since been in the actual, exclusive, open, notorious and adverse possession, asserting title to the land in fee simple under said sale, and they have paid all taxes thereon from year to year as the same came due. They have treated the property as their own, cultivated the land, and have at all times since September, 1882, enjoyed all the income and profits arising therefrom.

From the above facts the court concluded that, at all times since September 30, 1882, the defendants or their grantors have been in the adverse possession of the land, claiming in good faith to be its owners, and that said possession at all times has been and still is under claim of right and color of ⁶⁹³ title deducible of record from the United States. Judgment was entered in favor of the defendants dismissing plaintiff's action, without right to further prosecute. Judgment for costs was also entered against the sureties upon the cost bond. The plaintiff and also the sureties have appealed.

This suit was commenced May 6, 1907, which was twelve days before the expiration of ten years following the date that the appellant attained his majority. It is therefore claimed that the action is not barred by the general ten year statute

of limitations, for the reason that it was brought within ten years from the time of the removal of the appellant's disability, in accordance with Ballinger's Code, section 4809 (Pierce's Code, section 293). We have, however, nothing to do with the ten year statute, if respondents are entitled to the benefits of Ballinger's Code, section 5503 (Pierce's Code, section 1660). That section is as follows: "Every person in actual, open and notorious possession of lands or tenants under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

It is admitted by appellant that, if respondents' possession and that of their grantors has been and is under claim and color of title in good faith, then the judgment is right. It is, however, contended that the facts do not show the existence of color of title in favor of respondents and their grantors. It is argued that the court proceedings in Chehalis county show that the guardian's deed to respondents' grantor was void, and that it did not, for that reason, constitute color of title. The record, it is true, shows a rather singular admixture ⁶⁰⁴ of the guardianship and the partition proceedings, the aid of the probate court having apparently been invoked for the latter proceeding, if it was intended as such. The court, however, declared in its order of sale that the so-called partition petition was filed in the guardianship matter, and the order of sale purports to have been made in that matter. The probate court of Chehalis county has jurisdiction of the subject matter of the guardianship, with which matter we think a fair interpretation of the record shows that the court was all the time intending to deal. The proceedings were undoubtedly irregular, but respondents contend that the deed was simply voidable and not void. Assuming appellant's position, however, that the proceedings were such as to render the deed a void one, still we think the decided weight of authority is that, especially under such statutes as ours, section 5503, *supra*, even a void deed constitutes color of title where

possession and claim of title are in good faith made under it, coupled with the payment of taxes. Speaking generally upon this subject of color of title, we find the following statement in 1 Cyc. 1093: "A deed executed under and by virtue of a judgment or decree gives color of title, although such judgment or decree is voidable or absolutely void. As a general rule, deeds executed in pursuance of a sale give color of title, although the sale be irregular or void."

In support of the above statement citations are made referring to the decisions of twenty-two states, and also to decisions of the United States supreme court and other federal cases. With reference to the policy and reasons for this rule the supreme court of the United States in *Pillow v. Roberts*, 13 How. 472, 14 L. ed. 228, said: "Statutes of limitation are founded on sound policy. They are statutes of repose and should not be evaded by a forced construction. . . . Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence color of title, even ⁶⁹⁵ under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course, adversely to all the world."

Judge Dillon gave expression to the same view in *Miller v. Sullivan*, 4 Dill. (U. S.) 340, Fed. Cas. No. 9592, as follows: "This is a wise statute, doubly wise in a new country, for reasons which fully appear in this case. It would be robbed of its virtue if it was confined to cases where the sale was valid, for such sales do not need the protection of such a statute. 'They that are whole need no physician.'"

This court expressed the same view long ago, and held that a void tax deed constitutes color of title as the basis for the running of the statute of limitations: *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. It was there said: "We are aware that there are cases holding that a void tax deed will not constitute a basis for the running of the statute of limitations. But we think such decisions overlook both the philosophy and the object of such statutes. Statutes of limitation are strictly statutes of repose, and the policy upon which they are founded is, that a reasonable lapse of time shall put an end to legal strife and controversy, and that he who neglects or refuses to assert his rights within such a time as the legislature may deem reasonable shall be conclusively presumed to have waived them. If it is necessary for one claiming the benefit and protection of the statute to first prove a perfect and indefeasible title, it is impossible to

perceive for what purpose such statutes are enacted. A perfect title needs no extraneous aid, and if imperfect ones are not within the purview of the statute, then the law, in either case, is entirely ineffectual and useless, and might well be eliminated from the body of statutes."

The supreme court of the United States recognized such to be the rule in this state in its decision in *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 16 Sup. Ct. Rep. 939, 41 L. ed. 72. In Illinois, where a statute similar to our seven year statute exists, it is held that where one pays the taxes for seven years and in good faith holds possession under even a void deed, ⁶⁹⁶ such deed becomes color of title: *Nelson v. Davidson*, 160 Ill. 254, 52 Am. St. Rep. 338, 43 N. E. 361, 31 L. R. A. 325. The same rule was recognized in *Clayton v. Feig*, 179 Ill. 534, 54 N. E. 149, where it was held, however, that the defense failed for failure to prove clearly the payment of taxes. In *O'Keefe v. Behrens*, 73 Kan. 460, 85 Pac. 555, 8 L. R. A., N. S., 354, the defendant had been in possession for eight years under a void administrator's sale, and it was held that the void deed, together with possession, supported the running of the statute of limitations. An extensive footnote in 8 L. R. A. states that the weight of the authority is in accord with the above decision, and numerous citations are there collated all to the effect that a purchaser in possession for the statutory period will be protected, even though the proceeding leading up to the sale or the sale itself is void. In *Philadelphia Mortgage & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501, it was held that an invalid or void sheriff's deed, when possession was taken and title was in good faith asserted thereunder, gave color of title sufficient to start in motion the statute of limitations.

In view of the foregoing authorities, it must be held here that the guardian's deed in the case at bar, even though it may have been void, became color of title within the meaning of our statute. Possession was taken under it in good faith under a claim of right and of title, and that possession was maintained and the taxes paid by respondents and their grantors from year to year continuously for about twenty-five years before this suit was brought. This constituted ownership in respondents under section 5503, *supra*, to the extent and according to the purport of their paper title. Their paper title purports to be a fee simple one, and their ownership is accordingly.

Appellants urge that the court erred in denying their motion to retax certain costs. In preparing for the trial, re-

spondents obtained certified copies of deeds and other records to be used in evidence. Before the trial, however, a stipulation was made as to the facts, the facts shown by the copies ⁶⁹⁷ being embodied in the stipulation. We think, under such circumstances, respondents are entitled to recover the costs of such copies. It was necessary for them to prepare in a timely way for trial, and the fact that an ante-trial agreement as to the facts was afterward reached did not avoid the necessity for the expenditure at the time it was made, in the exercise of proper diligence.

Appellants Henderson and Harris have appealed for the reason that judgment for costs was entered against them as sureties on the cost bond. Respondents concede that this was error, but maintain that the question cannot be raised here, for the reason that it was not raised below by motion to retax, and for the further reason that the amount is below two hundred dollars. The question did not arise until the entry of judgment, and under Ballinger's Code, section 5051 (Pierce's Code, section 668), it is not necessary to except to the judgment itself: See, also, *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501. With reference to the amount involved, we think the two hundred dollar limitation does not govern here. This is not an action at law for the recovery of money or personal property where the original amount in controversy or the value of the property does not exceed two hundred dollars. The judgment for costs against the sureties, being admittedly wrong, must therefore be reversed, and the appellants Henderson and Harris are entitled to recover their necessary costs on the appeal. The judgment against appellant Hamilton is in all respects affirmed.

Rudkin, Mount, Dunbar, and Crow, JJ., concur.

Fullerton and Root, JJ., took no part.

Any Instrument may Constitute Color of Title, within the meaning of the law of adverse possession, which purports to convey the land and shows the extent and boundaries of the premises claimed, although it is void as a muniment of title: See the note to *Power v. Kitching*, 88 Am. St. Rep. 704. Thus a deed under a void decree, purporting to pass the owner's title, gives color of title to support adverse possession: *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. And though jurisdiction is not obtained over the person of the defendant in divorce proceedings, a sheriff's deed on a sale under execution based on a personal money judgment for alimony is color of title upon which adverse possession may be based: *Joplin Brewing Co. v. Payne*, 197 Mo. 422, 114 Am. St. Rep. 770.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

ILSLEY v. SENTINEL COMPANY.

[133 Wis. 20, 113 N. W. 425.]

LIBEL.—Publication of Judicial Proceedings.—At the common law a publication of a fair, correct and good faith report of a judicial proceeding was privileged equally in favor of everyone, newspapers as well as, but no more than, others. (p. 929.)

LIBEL.—The Publication of Pleadings and other preliminary papers filed in the clerk's office, which have not yet been called to the attention of some judicial officer and to which no judicial action has been invited, is not within the privilege accorded the publication of judicial proceedings, for at that stage of the proceedings the public has no concern therewith. (pp. 931, 932.)

LIBEL.—Publication of Court Proceedings.—Conceding that a report of a judicial proceeding, to be privileged, need not be by way of quotations, but may be condensed and expressed in the words of the reporter, yet that does not permit him to declare as on his own authority the existence of facts which are only asserted in the proceedings. He is limited to reporting the fact of the assertion. (p. 933.)

Quarles, Spence & Quarles and George Lines, for the appellants.

Robert N. McMynn, for the respondent.

21 DODGE, J. Appeal by defendants from order overruling demurrer to complaint charging defendants, publishers of the "Milwaukee Sentinel," with libel, in that on September 9, 1905, they, with intent to defame, maliciously published false and defamatory matter generally to the effect that the plaintiff, together with others, had been sued by the defendant Pfister, under headlines identifying the various defendants in that action, stating, "Are Sued for Conspiracy"; "Defamed and Libeled"; "Used Organ and Grand Jury in Effort to Ruin Plaintiff"; "Used Jury to Injure Him"; "Were Taken by Surprise"; "Papers Served on Defend-

ants''; "Text of the Complaint." These were followed by extracts from a complaint charging the several defendants, including the plaintiff in this action, with having conspired to injure the plaintiff in that action, C. F. Pfister, by instituting unfounded prosecutions against him and publishing defamatory matter in public prints, and maliciously procuring to be issued an ²² unfounded indictment against him, and otherwise; also, for a second cause of action, that on February 6, 1906, defendants caused to be published in the "Sentinel" another article, asserting generally the dismissal of C. F. Pfister's former action and the institution of a new one of much the same character, various extracts from the complaint in which are quoted and contain similar defamatory matter as against plaintiff in this action.

1. That the article published by appellant contains defamatory charges against the plaintiff which, but for some privilege, would be libelous if false, is not controverted, but privilege is claimed by virtue of section 4256a, Statutes of 1898, which provides: "The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding."

Among the answers made to this claim is a contention that a mere pleading, filed but not in any wise presented to any judicial officer as basis for any action by him, is not included within the matter to which the statute accords privilege. That contention is fundamental to this action, for there is nothing in the complaint to suggest that the pleadings summarized or quoted in the published article had reached any stage beyond that of service on the defendants in the conspiracy action, or, at most, that of filing with the clerk of court. The latter fact nowhere appears at all clearly, and ²³ probably, if fatal to the complaint, could not be assumed upon demurrer under the rule of liberal construction indulged in favor of pleadings so attacked, but we do not deem the fact of filing inconsistent with the conclusion we reach, and shall therefore treat the complaint as if that fact appeared. At common law, publication of a fair, correct and good faith report of a judicial or legislative proceeding was privileged equally in favor of everyone, newspapers as well as, but no more than, others: *Odgers on Libel and Slander*,

4th Eng. ed., 291; *Usill v. Hales*, L. R. 3 C. P. D. 319; *Lewis v. Levy*, El., Bl. & El. 537, 560; *Kimber v. Press Assn.*, [1893] 1 Q. B. 65; *Townshend on Slander and Libel*, 4th ed., sec. 229; *Connor v. Standard P. Co.*, 183 Mass. 474, 67 N. E. 596; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401; *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 859, 68 N. W. 403. Some questions having arisen as to the kind of proceedings within this privilege and as to the tribunals or meetings the proceedings of which were privileged, statutes were enacted having considerable resemblance to our own in New York in 1854, now section 1907 of New York Code of Civil Procedure, and in England in 1888: See history in *Odgers on Libel and Slander*, 4th Eng. ed., 759 et seq. Our statute was enacted originally in 1897, quite immediately after a decision of this court denying any privilege to reports of city council proceedings: *Buckstaff v. Hicks*, 94 Wis. 34, 59 Am. St. Rep. 859, 68 N. W. 403. Such history indicates that at least one purpose of the legislation was to extend the privilege in newspaper reporting beyond judicial proceedings and proceedings of the legislature with which the common law stopped. An examination of all cases in England discloses none in which the privileged "judicial proceeding" included anything beyond the actual hearing in presence of a judicial officer and his decision announced thereon. A compendious collection of such cases is made in chapter 11 of *Odgers on Libel and Slander*, fourth English edition. A negative view has often been announced in the United States and applied to exclude any ²⁴ privilege in publication of mere pleadings before any judicial hearing involving them: *Stanley v. Webb*, 4 Sand. 21; *Sanford v. Bennett*, 24 N. Y. 20; *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548, 78 Am. Dec. 285; *Sutton v. A. H. Belo & Co.* (Tex. Civ. App.), 64 S. W. 686; *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401; *Park v. Detroit F. P. Co.*, 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599; *Barber v. St. Louis D. Co.*, 3 Mo. App. 377; *Billet v. Times-Democrat Pub. Co.*, 107 La. 751, 32 South. 17, 58 L. R. A. 62; *Archambault v. Great N. W. Tel. Co.*, 4 Mont. Q. B. 122; *American Pub. Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005; 18 Am. & Eng. Ency. of Law, 2d ed., 1044. Neither appellants' nor our own research has disclosed any decision which, fairly considered, supports any such privilege. Two cases are cited: *Pittock v. O'Niell*, 63 Pa. 253, 3 Am. Rep. 544, and *Thompson v. Powning*, 15 Nev. 195. In the first, the question was

passed without decision, by the remark that the publication might have been privileged if fair and correct. In the second, it was held no evidence of express malice for defendant to publish the plaintiff's own complaint in the very libel action on trial, a ruling that obviously involved different considerations. Clearly, the overwhelming consensus of authority sustains the view that the publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and no judicial action invited thereon is not within the privilege accorded publication of judicial proceedings in absence of statute modifying the rules of the common law.

The propriety of such exclusion is equally obvious when we consider the reasons on which rests the privilege to publish reports of true judicial or legislative proceedings. The whole foundation for that privilege is the interest of the public to know the conduct of judicial officers and legislators, to the end that misconduct or incapacity may be promptly discovered and remedied. This end has been deemed so vital to ²⁵ public welfare and to the maintenance of good government as to demand subordination of the interest of individuals adverse to the publicity of defamatory statements against them which must otherwise control. There is, however, no right in the public to know that A charges B with unworthy or criminal conduct, even in court, as a fact by itself; that is mere gossip or scandal. The public at most needs to know what its court does, and, since this cannot be intelligibly reported without stating the charges and issues upon which the court's action is based, the latter may be reported also, although as an incidental result the fact of defamatory charges against some individual becomes public to his injury. "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings": *Rex v. Wright*, 8 Term Rep. 293, 298; *Wason v. Walter*, L. R. 4 Q. B. 73, 87.

The fundamental reason is the same which demands that proceedings of courts and legislatures shall be open to the public: *Stockdale v. Hansard*, 9 Ad. & El. 1; *Lewis v. Levy*, El., Bl. & El. 537; *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318. When this reason is understood, it obviously fails wholly to justify publication of defamatory contents of mere pleadings and other preliminary papers which have simply been filed in the clerk's office. In those the public have no concern until they are actually brought to the attention of

some judicial officer and some action on his part is demanded based thereon. Then, for the first time, is public interest involved to know what action he takes. The distinction is too obvious for extended comment. The fact that anyone who wishes may, on other grounds, have access to such papers for examination, if any such right exists, has no bearing on the question. The degree of publicity likely to be so accomplished is trifling in comparison with general publication, and, at best, results incidentally from a public policy of ²⁶ nondiscrimination by a mere clerk which is in no wise promoted by spreading abroad the information which one may acquire by such inspection. In absence of dominating public interest, surely the individual ought not to be subjected to such assaults upon his character and reputation as may result from general publication of charges which may thus be made. The author of a pleading is broadly privileged in asserting his claims against his opponent, and may, and often does, make the most damaging charges with little or no foundation. He may make them with no expectation of proving them—nay, with no purpose of ever proceeding further with his action—and yet furnish most salacious matter for the enterprising reporter upon whose industry the pleader may indeed have counted to render his charges effective to injure his opponent before the public, though he never expected any effect for them in court. The great peril of injury to individuals has been vigorously portrayed in several of the cases above cited: *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Park v. Detroit F. P. Co.*, 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599; *Barber v. St. Louis D. Co.*, 3 Mo. App. 377; *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 82 N. Y. Supp. 401.

As a result of what has preceded, we are fully convinced that at common law no privilege could have sheltered the publication in question; and the next inquiry is whether any is conferred by our statute above quoted. The reports thereby privileged of publication are of a judicial proceeding or any public statement in such proceeding. Counsel argues that a judicial proceeding in this state includes everything involved in a civil action, which, he says, is a proceeding in a court of justice, and therefore a judicial proceeding, and cites instances of such use of the term: *Hogan v. State*, 30 Wis. 428, 11 Am. Rep. 575; *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066. We have no doubt that under some circumstances the words "proceedings" or even "judicial proceedings" may be used in a sense to include even the service or filing of a plead-

ing,²⁷ but the phrase "judicial proceeding," or, rather, "report of a judicial proceeding," had attained a perfectly definite significance in the law of libel, the subject which the legislature were attempting to regulate, and every presumption supports the view that they then used it in that sense. That they did so is confirmed by its association with "other public official proceeding," also by reference to "public statement, argument," etc. If it be argued that, upon such construction, the statute did not change the law as pre-existing and its enactment was vain, it is answered that the statute added to reports entitled to privilege those of other public official proceedings and also that it undertook to regulate all reports whether of judicial, legislative or other proceedings in the matter of headlines and comments and to provide for mitigation of damages in case of retraction, so that, although no new grant of privilege was accomplished by the enactment, yet other legislative purpose is obviously wholly consistent with mere declaration of an existing immunity: See *Smith v. Burlington*, 129 Wis. 336, 109 N. W. 79.

Unless obvious beyond reasonable doubt, we should be slow to believe in an intent to authorize and privilege publications so fraught with injury to individuals and for which justification in public policy or other reason is so entirely wanting. We do not find such purpose obvious, and therefore cannot think that the legislation in question goes beyond the rule of the common law in sheltering a report of any step in an action which does not in some way involve at least the attention and invited action of some judicial officer. We are convinced that the filing of pleadings or other papers in the clerk's office is not of that character. Hence we must hold that nothing appearing in the complaint in this action shows that the defamatory publication set forth is entitled to any privilege, and that, since falsity is alleged, a cause of action is stated.

2. Were a different conclusion reached upon the subject of privilege, we should still find great difficulty in holding²⁸ that the headlines and comment contained in the article published were incapable of a libelous meaning to the reader. Conceding that a report of a proceeding, to be privileged, need not be by way of quotations, but may be condensed and expressed in the words of the reporter, yet that does not permit him to declare as on his own authority the existence of facts which are only asserted in the proceeding. He is limited to reporting the fact of the assertion. Such utterances as "Defamed and libeled," "Used organ and grand jury in effort to ruin plaintiff," "Used jury to injure him," in their

context are somewhat ambiguous. They might be understood by a reader as only asserting that the complaint which had been filed contained such allegations, and, if so understood, might not transcend permissible reporting. But if they are even capable of being understood as declaring the fact of conspiracy to injure, use of jury, etc., they would exceed any privilege to report. In view of our conclusion on the broader question, we perhaps need not discuss this further than to suggest the caution demanded of a reporter of privileged public proceedings when he enters the field of comment and summarization, and to call attention to a few of the decided cases, and especially to the warning of our own statute—Stats. 1898, sec. 4256a—that no reporter is protected against libelous matter “contained in any headline or headings to any such report, or libelous remark or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding”: *Odgers on Libel and Slander*, 4th Eng. ed., 302 et seq.; *Pfister v. Sentinel Co.*, 108 Wis. 572, 84 N. W. 887; *Stanley v. Webb*, 4 Sand. 21; *Thomas v. Crosswell*, 7 Johns. 264, 5 Am. Dec. 269; *Edsall v. Brooks*, 17 Abb. Pr. 221.

By the COURT. Order affirmed.

The Liability for Libel or slander in the course of judicial proceedings is the subject of a note to *Kemper v. Fort*, 123 Am. St. Rep. 631. The public has no right to any information on private suits until they come up for public hearing or action in open court, and when any publication is made involving such matters, they possess no privilege, and the publication must rest either on nonlibelous character or truth to defend it: *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544. See, also, *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 78 Am. St. Rep. 900. As to whether excerpts and garbled reports of pleadings can be regarded as privileged, see *Metcalf v. Times Publishing Co.*, 20 R. I. 674, 78 Am. St. Rep. 900.

SCHULTZ v. SCHULTZ.

[133 Wis. 125, 113 N. W. 445.]

HOMESTEAD—Whether Subject to Lien for Alimony.—Where the law provides that a homestead is exempt, “except as otherwise provided in these statutes,” but also provides that in an action for divorce where alimony is allowed the court “may impose the same as a charge upon any specific real estate of the party liable,” the homestead of a husband may be charged with a lien for alimony. (p. 937.)

HOMESTEAD—Lien for Alimony not Discharged by General Execution.—Where alimony has been charged as a lien upon the homestead of the husband, to be enforced in such manner as the court shall direct, the issue of a general writ of execution upon the order of the court to enforce the judgment does not release the specific lien decreed. (p. 937.)

HOMESTEAD—Execution to Satisfy Alimony—Writ of Assistance.—Where alimony has been decreed a specific lien on the homestead of the husband, and a sale of the property has been made under execution, the purchaser may properly be granted a writ of assistance. (pp. 937, 938.)

Umbreit & Umbreit, for the appellant.

Carl Runge, for the respondent.

126 TIMLIN, J. The order appealed from recites that the motion for the writ came on to be heard on the petition of Augusta Schultz, the filing of an affidavit of prejudice against all the circuit judges for Milwaukee county by the appellant, the calling in of the Honorable J. J. Dick, circuit judge of the thirteenth circuit, to hear, try and determine the motion, the appearances for the parties, the filing of a reply to said petition, and the filing of an answer to said reply; but does not refer to any other papers, and does not expressly recite that the order for the writ of assistance was made upon the several papers described. The certificate of the clerk of the circuit court is to the effect that the annexed and foregoing are the original notice of appeal and undertaking, the original order mentioned in said notice of appeal, and all the original papers used by each party on the application for the order appealed from. In the papers described as aforesaid is a description of the judgment by quoting therefrom as follows: "The said defendant, William Schultz, pay to the plaintiff, Augusta Schultz, the sum of fifteen hundred dollars as alimony and as her just and equitable share of their property both real and personal, said alimony or allowance to be for the full payment ¹²⁷ of all claims that the plaintiff may have against the defendant for her support or the support of their said child, Hedwig Schultz, and said sum of fifteen hundred dollars shall be in lieu of all alimony and attorney's fees heretofore ordered and for the costs of this action; that the defendant, William Schultz, pay to the plaintiff, Augusta Schultz, the said fifteen hundred dollars within thirty days after the service of a copy of this judgment upon him, the said William Schultz; that said payment of the said fifteen hundred dollars be charged as a lien upon the following described real estate of the defendant, to wit, lot No. 16 in block No. 14 in Plankinton's addition in the Ninth ward

of the city of Milwaukee, with the dwelling-house thereon; that the custody of the infant child of the parties be and is hereby awarded to the plaintiff; and that upon the neglect or refusal of the defendant to make such payment as is hereby adjudged, the plaintiff, upon filing an affidavit showing such failure or refusal, may apply to the court for an order for the enforcement of the same in such manner as to the court may seem proper."

A motion was made upon notice to appellant by the respondent for the enforcement of this judgment. The court ordered it enforced by execution sale. The execution was delivered to the sheriff March 30, 1905. The premises were sold under execution May 22, 1905, to the respondent for the sum of sixteen hundred dollars. September 18, 1906, a sheriff's deed was issued to the respondent on such sale and she demanded possession of the premises in question, which possession was refused, whereupon she applied for the writ of assistance in question. The execution, as described in the petition for the writ of assistance, seems to have been a general execution. It further appeared that upon the motion for the enforcement of the judgment above quoted the appellant appeared and resisted the motion, upon the ground that the premises in question were his homestead, but this objection was overruled and the writ of execution allowed. Upon the motion for writ of assistance the appellant again appeared in opposition and showed that the premises in question constituted his homestead. Upon this hearing reference was made in the ¹²⁸ affidavits used to all records, files and proceedings had in the divorce action and the proceedings for leave to enforce the judgment therein, but none of these are recited in the order appealed from nor transmitted to this court with the appeal papers. No motion, however, is made to dismiss the appeal on this ground, but it might be well to refer counsel to section 6 of circuit court rule 11, which requires all orders of the court or a judge, whether granted ex parte, by default, or otherwise, to briefly refer to all the records, petitions, affidavits and other papers read or used by either party upon the application for the order, and to the case of *Ellis v. Ashland*, 117 Wis. 575, 94 N. W. 292, and cases cited in the opinion. The order appealed from and the certification to this court are not, however, so informal as to require the dismissal of this appeal sua sponte for lack of jurisdiction. The judgment in the divorce action, as quoted above, made the sum of fifteen hundred dollars therein awarded to the respondent a specific lien upon the particular tract of land de-

scribed, which we will assume, as most favorable to appellant, was then the homestead of the parties. Was this within the power of the court in the divorce action? *Schultz v. Schultz*, 118 Wis. 228, 95 N. W. 151, sustains this power by implication. *Webster v. Webster*, 64 Wis. 438, 25 N. W. 434, holds that by the decree of divorce the court may divest the husband's title to the homestead and vest it in the wife. *Riehl v. Bingenheimer*, 28 Wis. 84, holds that a husband may, by deed which his wife does not sign as grantor, convey the homestead directly to the wife. Section 2983, Statutes of 1898, as it existed prior to the enactment of chapter 269, Laws of 1901, and as it exists after that amendment, exempts the homestead from seizure or sale on execution, from the lien of every judgment, and from liability in any form for the debts of such owner. This statute is expressly subject to the exception, viz.: "Except as otherwise provided in these statutes." Section 2367, Statutes of 1898, provides in actions for divorce, ¹²⁹ where alimony or other allowance for wife or children is made, the court "may impose the same as a charge upon any specific real estate of the party liable." "Any real estate of the party liable" must include the homestead, unless there is some ground for limiting the broad generality of the expression. Such ground cannot be found in section 2983, Statutes of 1898, considering the exception therein contained. The cases hereinbefore cited from this court, as well as the general trend of decisions outside this state, favor this construction of the two sections of the statutes above referred to: *Best v. Zutavern*, 53 Neb. 604, 74 N. W. 64; *Blankenship v. Blankenship*, 19 Kan. 159; *Mahoney v. Mahoney*, 59 Minn. 347, 61 N. W. 334. We conclude that the homestead of the appellant was lawfully charged with the lien. The issue of a general writ of execution upon the order of the court for the purpose of enforcing this judgment could not be taken to have released the specific lien decreed by the judgment: *Stats.* 1898, secs. 2967, 2969, subd. 3; *First Nat. Bank v. Greenwood*, 79 Wis. 269, 45 N. W. 810, 48 N. W. 421; *Bailey v. Hull*, 11 Wis. 289, 78 Am. Dec. 706. This case is not ruled by *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245, 37 N. W. 801, where the decree of divorce awarded alimony by a mere money judgment which became a lien, if at all, only by docketing the judgment. In such cases an execution issued can have no other effect than an execution issued upon any other money judgment. Having arrived at the conclusion that the execution sale under the decree in question was valid, conceding that the premises constituted a homestead, it be-

comes unnecessary to consider the question of the estoppel of the appellant by the order for the issue of execution and his appearance and objections to the granting of such order. The appellant showed no legal cause against the granting of the writ, and the writ was properly granted under section 3025, Statutes of 1898.

By the COURT. The order of the circuit court is affirmed.

*The Power of a Court to Make Alimony a Special Lien upon a home-
stead is discussed in the note to Harding v. Harding, 102 Am. St.
Rep. 709.*

IN RE ESTATE OF HANLIN. KILLILEA v. DOUGLAS.

[133 Wis. 140, 113 N. W. 411.]

ADMINISTRATOR—Whether Necessary Party to Foreclosure. An administrator of the estate of a deceased mortgagor is not a necessary or proper party to foreclosure as regards the liability of the estate for any claim enforceable in the county court. (p. 940.)

STATUTE OF LIMITATIONS—When Commences to Run.—The statute of limitations commences to run only from the time the cause of action accrues, and a cause of action does not accrue until the person owning it can successfully maintain an action thereon; the unfailing test is to decide upon the precise point of time when the owner of the right can institute a suit to enforce it and prosecute the same to a successful result. (pp. 941, 942.)

COVENANT AGAINST ENCUMBRANCES—When Breach Occurs.—There is a technical breach of a covenant against encumbrances, in case of an outstanding mortgage, as soon as the deed is delivered, but it gives rise only to an action for nominal damages; no action for substantial damages lies in advance of an eviction or of a payment of the encumbrance. (p. 942.)

COVENANT AGAINST ENCUMBRANCES.—The Statute of Limitations does not run against a breach of a covenant against encumbrances in advance of eviction or extinction of the encumbrance, for, although a technical breach occurs immediately on the delivery of the deed, it gives rise only to an action for nominal damages, and substantial damages are not suffered until eviction or payment. (p. 942.)

COVENANT AGAINST ENCUMBRANCES—Whether Runs with Land.—A covenant against encumbrances is one of indemnity, and, as to substantial damages for its breach, runs with the land, the action therefor not accruing until the damages are suffered; but there is also an action for mere nominal damages accruing at the instant of the delivery of the deed and becoming a mere chose in action, enforceable by the covenantee or his assignee. (pp. 942, 943.)

COVENANT AGAINST ENCUMBRANCES — Enforcement Against Estate of Decedent.—A cause of action for the breach of a covenant against encumbrances, made by a person since deceased, does not arise so as to be enforceable against his estate until the person entitled to the benefit of the covenant has suffered actual damages. (pp. 943, 944.)

Adolph Huebschmann, for the appellant.

Quarles, Spence & Quarles and J. V. Quarles, for the respondent.

¹⁴¹ MARSHALL, J. The facts of the case are these: R. Bruce Douglas is the owner of lot 14, block 223, Cambridge's subdivision No. 2, in the eighteenth ward of the city of Milwaukee, Wisconsin. He obtained his title by deed with full covenants from Mary Jane Hayes and Thomas E. Hayes, her husband, September 3, 1898, the deed being duly recorded September 6, 1898. The grantee, Mary Jane Hayes, obtained title from the deceased by deed with full covenants, January 15, 1898, which deed was duly recorded. When the deceased made such deed, part of the premises was under mortgage made by her and her husband, dated November 25, 1891, and duly recorded. ¹⁴² There was a pretended release of the mortgage, but it was fraudulently obtained and placed upon record. The mortgage was duly foreclosed, judgment being rendered November 26, 1904, in which the indebtedness secured was fixed at fifteen hundred and eighty dollars and sixteen cents. In the foreclosure action the administrator of the estate of the deceased and R. Bruce Douglas were made defendants. No issue was joined in the action by the pleadings as regards the liability of the administrator for the indebtedness secured by the mortgage. Nevertheless, at the request of R. Bruce Douglas findings were made to the effect that he was so liable. The administrator appealed from the judgment. In the proceedings upon the appeal Douglas did not participate. The appeal resulted in the court holding that the question of whether the estate of Margaret Hanlin was liable for the indebtedness secured by the mortgage was not one proper to be settled in the action. The judgment was therefore reversed as to the administrator and remanded to the trial court, where the complaint as to him was dismissed. Thereafter Douglas was obliged to, and did, redeem the mortgaged premises from the judgment of foreclosure. The redemption was made February 16, 1906, the amount paid being seventeen hundred and twenty-one dollars and twenty-three cents. Mr. Douglas reasonably expended in resisting the foreclosure one hundred and eighty-seven dollars and seventy-seven cents. The time for filing general claims against the estate of the deceased expired the first day of January, 1902. Douglas filed his claim February 26, 1906.

Upon findings of the court as to the facts corresponding with the foregoing statement, the legal conclusion was reached that the claimant's demand accrued and became absolute after the time limited for general creditors to present their demands; that it was seasonably filed, and that there was justly due thereon nineteen hundred and nine dollars and fifty cents, with interest from February 16, 1906. Judgment was rendered accordingly, from which this appeal was taken.

¹⁴³ The point is made by the learned counsel for appellant that the judgment in the foreclosure suit is *res adjudicata* of whether the estate is liable to pay the indebtedness which was the ground of respondent's claim. As indicated in the statement, no issue was raised in the foreclosure suit on that subject, though at the request of respondent the trial court therein made findings that the administrator of the estate of the deceased was personally responsible for the mortgage indebtedness and judgment was so rendered, and it was afterward, in due proceedings to that end, reversed and the cause dismissed as to him. It seems quite plain that the question of whether the estate of Margaret Hanlin was liable for the mortgage indebtedness was thus effectually removed from the case, and that it necessarily carried with it all opportunity for litigating whether the estate was liable over to respondent in case of his paying off the indebtedness.

Whatever liability there was of the estate on account of the mortgage indebtedness, from any point of view, was manifestly enforceable only by proper proceedings in the county court, and after the reversal of the judgment in the foreclosure action there was nothing left in that case passing upon respondent's rights in any way whatever. The administrator was not a necessary or proper party to the foreclosure as regards the liability of the estate for any claim enforceable in the county court, and for that reason, as plainly appears by the decision of this court, he was dismissed from the suit.

The point above treated being disposed of, the case comes down to this: Was respondent's demand extinguished by the statute of nonclaim, section 3860, Statutes of 1898, before the ¹⁴⁴ claim was filed in the county court? Such section provides that "if the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the county court and prove the same at any time within one year after it shall accrue or become absolute."

It must be conceded, as the fact is, that if respondent's cause of action did not accrue till he paid off the encumbrance, then his claim was seasonably filed; that the statute of limitations operates upon a claim only from the time there is a complete cause of action to enforce it, and that if respondent had no such cause till he extinguished the encumbrance, he was entitled to recover.

When did the respondent's cause of action mature? That would seem to be so plainly ruled by *Pillsbury v. Mitchell*, 5 Wis. 17, *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68, *Eaton v. Lyman*, 30 Wis. 41, and *Johnson v. Brice*, 102 Wis. 575, 78 N. W. 1086, that we need not go elsewhere for authority.

True, an action for nominal damages accrues in the circumstances of this case as soon as the deed is given. The authorities are all in harmony to that extent, but until eviction in such a case, there is no opportunity to recover substantial damages such as in this instance, the amount paid to remove the encumbrance, till payment occurs. In *Johnson v. Brice*, 102 Wis. 575, 78 N. W. 1086, the court said in harmony with previous adjudications and authorities generally: "While a covenantee is not bound to discharge the encumbrance before bringing suit for a breach of it, unless he suffers actual damages by effecting such a discharge before suit, he can recover only nominal damages."

While the rule is universally and freely conceded that the statute of limitations commences to run only from the time the cause of action accrues, there is often a controversy as to when that time arrives. The unfailing test is, in the absence of some statute to the contrary, whether the party asserting ¹⁴⁵ the claim can successfully maintain an action to enforce it.

The rule is stated tersely and with many supporting authorities in 19 American and English Encyclopedia of Law, second edition, 193, thus: "A cause of action does not accrue until the party owning it is entitled to begin and prosecute an action thereon; it accrues at the moment when he has a legal right to sue on it and no earlier."

That covers the whole subject. Nothing can be gained by multiplying words in respect to it.

Manifestly, a statute of limitations does not bear on a right until there is a right of action; a judicial remedy of some sort which the owner of that right can invoke to vindicate it. So, as said, the unfailing test is to decide upon the precise point of time when the owner of the right could have insti-

tuted a suit to enforce it and prosecute the same to a successful result. That time does not arise in the circumstances of this case, as we have seen, until the person entitled to the benefit of the covenant against the encumbrances is actually damnified by paying off the encumbrance. The right to have the encumbrance paid off by the covenantor, the breach of that right by failure to do so, and the compulsory payment by the covenantee of the one entitled to the benefit of the covenant, form the circumstances creating the cause of action.

There is some conflict of authority on the precise point involved here of whether the statute of limitations commences to run to recover substantial damages in an action of this sort till the encumbrance is paid off, but it would seem that the principle that one cannot maintain an action for damages till they actually are suffered by payment, and that the statute of limitations runs only from the time an action may be maintained, settles the question for this court. On the point that only nominal damages are recoverable prior to the extinguishment of the encumbrance, or eviction, the authorities ¹⁴⁶ are all in harmony. On the precise point here, that the statute of limitations commences to run on the demand for the damages suffered only from the time the encumbrance is paid off, the authorities are in substantial harmony. We cite the following: *Spoor v. Green*, L. R. 9 Ex. 99; *Yancey v. Tatlock*, 93 Iowa, 386, 61 N. W. 997; *Jenkins v. Hopkins*, 9 Pick. 543; *Post v. Campau*, 42 Mich. 90, 3 N. W. 272; *Hunt v. Marsh*, 80 Mo. 396; *Blondeau v. Sheridan*, 81 Mo. 545; *Wyatt v. Dunn*, 93 Mo. 459, 2 S. W. 402, 6 S. W. 273.

The few authorities conflicting with the above we need not refer to. Some of those cited are not entirely satisfactory, but the following from *Hunt v. Marsh*, 80 Mo. 396, not only fits the case before us very closely, but shows the ground of the rule; the reason why the cause of action for substantial damages does not relate to the date of the creation of the covenant: "It has long been settled that these covenants run with the land and inure to the owner who suffers ouster or who is compelled to extinguish the encumbrance to save his estate. No substantial injury happens before this, and no right of action accrues before."

It was formerly a controverted question here whether a covenant against encumbrances runs with the land, and such controversy was settled in the affirmative in *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68. There the authorities on both sides of the question were examined, and it was held, adopt-

ing the English rule, as was said, that the covenant is one of indemnity, and as to substantial damages runs with the land, the action therefor not accruing till the damages are suffered. The court recognized two rights of action, the one for mere nominal damages accruing at the instant of the delivery of the deed and becoming a mere chose in action, enforceable by the covenantee or his assignee, and the right of action for substantial damages; that the conveyance as to the latter ¹⁴⁷ damages is "intended for the security of all subsequent grantees, until the covenant is finally and completely broken; . . . that no such right of action accrues to the covenantee on the mere nominal breach, which always happens the moment the covenant is executed, as is sufficient to merge or arrest the covenant in the hands of the covenantee, or to deprive it of the capacity of running with the land for the benefit of the person holding under the deed when an eviction takes place or other real injury is actually sustained."

Mr. Justice Dixon, who wrote the opinion in *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68, in a very able dissenting opinion in *Eaton v. Lyman*, 30 Wis. 41, contended that the mere shadow of a claim entitling the owner to nominal damages, which was recognized when it was held that the covenants were for the benefit of the covenantee only, should not, in view of the position of the court that the covenant for substantial damages runs with the land, be further recognized; that no action should be maintained for mere nominal damages and no action for the breach of the covenant against the encumbrances should be held to exist in advance of actual damages accruing.

A careful reading of the opinion in *Eaton v. Lyman*, 30 Wis. 91, shows that a breach of the covenant against encumbrances which accrues immediately upon the delivery of the deed, giving rise to a cause of action for nominal damages, and a breach occurring at the time of paying off of the encumbrance are recognized as distinct, giving rise to two separate causes of action, though the court declined to decide whether if the one for the first breach were enforced the covenantee could subsequently sue for a second breach, but it was quite distinctly held that if the action for a substantial breach of the covenant is brought by a remote grantee, the covenantor has no reason to complain of a former recovery by the covenantee for nominal damages.

It follows that the cause of action for the recovery of substantial damages, as in this case, is so far distinct from ¹⁴⁸ the right to recover nominal damages as to be grounded

on a separate breach happening at the time the damages are actually suffered. It does not relate to the delivery of the deed. That is conclusive as to the right of respondent to the judgment appealed from.

By the COURT. The judgment is affirmed.

OPERATION OF THE STATUTE OF LIMITATIONS WHERE A CAUSE OF ACTION FOR NOMINAL DAMAGES SUBSEQUENTLY RIPENS INTO A RIGHT TO ACTUAL DAMAGES.

I. In Case of Action for Breach of Contract.

- a. In General, 944.
- b. Insurance Contract, 945.
- c. Contract of Common Carrier, 945.
- d. Sale of Personal Property, 945.
- e. Indemnity Agreement, 946.

II. In Case Title to Real Estate is Involved.

- a. Covenant Against Encumbrances, 946.
- b. Covenant of Seisin, 947.
- c. Misrepresentation as to Encumbrances, 948.
- d. Agreement to Examine or Furnish Abstract of Title, 949.

III. In Case of Action Against Public Officer, 949.

IV. In Case of Action Against Attorneys or Physicians.

- a. Negligence of Attorneys, 950.
- b. Malpractice of Physicians and Surgeons, 951.

V. In Case of Action for Tort or Negligence.

- a. In General, 952.
- b. Continuous or Repeated Injuries, 953.
- c. Wrongs in Nature of Nuisances, 953.
- d. Structures Interfering with Flow of Water, 954.
- e. Interference with Lateral Support, 954.

I. In Case of Action for Breach of Contract.

a. **In General.**—An action resting on a breach of contract generally accrues at the time the contract is broken, although substantial damages from the breach are not sustained until afterward. The gist of the action is the breach, not the consequential damages which subsequently accrued; they are not the result of a new or continuous breach, but relate back to the original breach which gave the right of action and without which they could not exist. Nominal damages at least can be recovered immediately upon the happening of the breach, and the statute of limitations then begins to run; its operation is not delayed until substantial or consequential damages accrue: *Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114; *O'Connor v. Aetna Life Ins. Co.*, 67 Neb. 122, 93 N. W. 137, 99 N. W. 845; *Compton v. Heissenbuttel*, 2 Misc. Rep. 340, 21 N. Y. Supp. 965; *Campbell v. Culver*, 67 N. Y. Supp. 469, 56 App. Div. 591; *Crowley v. Johnston*, 96 N. Y. App. Div. 319, 89 N. Y. Supp. 258. "If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable

for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single original breach or wrong. This would, in effect, nullify the statute": *Aachen & Munich Fire Ins. Co. v. Morton*, 156 Fed. 654.

b. Insurance Contract.—The principle thus announced in the preceding paragraph by the court in *Aachen & Munich Fire Ins. Co. v. Morton*, 156 Fed. 654, was applied in that case to a breach of contract to cancel an insurance policy. A person may maintain an action to recover damages for the breach of a contract to insure his property against a loss by fire, and the measure of damages, in case of the destruction of the property, is the value thereof, up to the amount for which it was agreed that insurance should be procured; and applying the general rule that a cause of action for breach of contract accrues immediately upon the happening of the breach, although actual damage resulting therefrom may not occur until afterward, it has been held that the right of action accrues and the statute of limitations begins to run at the expiration of the reasonable time within which the policy should have issued, and not from the time when the fire occurs: *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901.

A policy of title insurance, being a contract of indemnity, gives no occasion for an action thereon until the insured is evicted by the holder of a superior title. Hence, the statute of limitations does not commence to run against an action thereon until eviction, although the encumbrance under which the insured is evicted was in existence when the policy was issued: *Purcell v. Land Title Guarantee Co.*, 94 Mo. App. 5, 67 S. W. 726.

c. Contract of Common Carrier.—The statute of limitations begins to run against a carrier for negligence in billing and transporting goods delivered to it for shipment, from the date of its breach of contract or duty, and not from the time when the damages actually ensue: *Pennsylvania Co. v. Chicago etc. R. Co.*, 144 Ill. 197, 33 N. E. 415, affirming 44 Ill. App. 132. This rule, however, has been modified where there was an unreasonable delay in shipping several lots of merchandise, so that each day's delay created a new cause of action: *Jones v. Grand Trunk R. Co.*, 74 Me. 356.

d. Sale of Personal Property.—According to some authorities an action for breach of the warranty of title implied on the sale of personal property accrues at the time of the sale, and the statute of limitations runs from that time. The courts so holding liken the implied warranty of title to the goods to covenants of seisin or against encumbrances on the sale of real estate, which are broken, if not true, immediately upon the delivery of the deed: *Chancellor v. Wiggins*, 4 B. Mon. 201, 39 Am. Dec. 499; *Perkins v. Whelan*,

116 Mass. 542. Other authorities, however, hold that the statute of limitations, upon an implied warranty of title to chattels sold, does not commence to run until the vendee is disturbed in his possession by the true owner. The covenant of warranty is therefore given somewhat the same effect as a warranty of title to real property, which is not broken until eviction: *Gross v. Kierski*, 41 Cal. 111.

The statute of limitations upon an expressed or implied warranty of quality on the sale of goods runs from the date of the sale, rather than from the time of the discovery of the defect or the occurrence of injury therefrom: *Baucum v. Streater*, 50 N. C. 70; *Battley v. Faulkner*, 3 Barn. & Ald. 288, 22 Week. Rep. 390. This has been held the law in the case of a sale of fruit trees which are falsely represented to be of a different kind than in fact they are: *Allen v. Todd*, 6 Lans. 222. "Inability to ascertain the quality or condition of property warranted to be, at the time of the sale, a particular quality or in a certain condition, has never been allowed to change the rule as to the time when a right of action for a breach of the warranty occurs": *Allen v. Todd*, 6 Lans. 222. Where the sale of a carpet carries two implied warranties, one that the carpet is free from spots caused by grease left in the course of manufacture, and the other that the carpet will not develop spots from that cause after it is laid, the right of action on the second warranty begins to run from the time of the appearance of the spots: *J. Kennard & Sons' Carpet Co. v. Dornan*, 64 Mo. App. 17.

e. Indemnity Agreement.—A cause of action accrues upon a bond conditioned to do a certain act as soon as there is a default in performance, whether the obligee has suffered damage or not. If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, not from the date of the act which causes damage, but from the time when pecuniary loss ensues therefrom. It follows that in the first class of cases the statute of limitations begins to run from the date of default, while in the second class it runs from the time when loss or damage is entailed on the obligee: *Purcell v. Land Title Guarantee Co.*, 94 Mo. App. 5, 67 S. W. 726; *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226; *O'Connor v. Aetna L. Ins. Co.*, 67 Neb. 122, 93 N. W. 137, 99 N. W. 845; *Adkins v. Fry*, 38 W. Va. 549, 18 S. E. 737. A surety's right of action for reimbursement accrues from the time he pays the notes of his principal, not from their date, and the statute of limitations does not begin to run against him until the date of such payments: *Loewenthal v. Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115, 67 Pac. 324; note to *Scott v. Nichols*, 61 Am. Dec. 504.

II. In Case Title to Real Estate is Involved.

a. A Covenant Against Encumbrances is ordinarily regarded as broken, if at all, as soon as made: See the note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 676. An action for the breach accrues at once, and the statute of limitations then commences to run against

it: *Ettridge v. Bassett*, 136 Mass. 314; *Chapman v. Kimball*, 7 Neb. 339. But this breach, however, has been regarded as merely technical and giving rise only to nominal damages. The grantee usually incurs no substantial damages until he pays off the encumbrance or suffers eviction; and the courts have generally held that as to such damages the statute of limitations does not begin to run until the payment, foreclosure or eviction: *McClure v. Dee*, 115 Iowa, 546, 91 Am. St. Rep. 187, 88 N. W. 1093; *Post v. Campau*, 42 Mich. 90, 3 N. W. 272; *Wyatt v. Dunn*, 93 Mo. 459, 2 S. W. 402, 6 S. W. 273; *Taylor v. Priest*, 21 Mo. App. 685; *Priest v. Deaver*, 22 Mo. App. 276; *Seibert v. Bergman*, 91 Tex. 411, 44 S. W. 63; *Estate of Hanlin*, 133 Wis. 140, ante, p. 938, 113 N. W. 411, 17 L. R. A., N. S., 1189. "The doctrine that the statutes shall run from the technical breach," said Justice Cooley in the above Michigan case, "makes the covenant in many cases a mockery. If the encumbrance consists of a mortgage having many years to run, the covenantee has no legal right to pay it off until it falls due, and the fiction of a right of present action would defeat substantial redress. I am of opinion that the better and only just rule is, that a right of action accrues when substantial damage is suffered, and that there may be successive breaches when, by successive acts or occurrences, damages from time to time suffered as a consequence of the encumbrance."

b. **A Covenant of Seisin** is usually regarded as a personal covenant, not running with the land, and broken, if not true, as soon as made: See the note to *Eames v. Armstrong*, 125 Am. St. Rep. 443. Under a strict application of this rule the statute of limitations will commence to run against an action for the breach immediately upon the delivery of the deed, and the operation of the statute is not postponed until eviction: *Jewett v. Fisher*, 9 Kan. App. 630, 58 Pac. 1023; *Sherwood v. Landon*, 57 Mich. 219, 23 N. W. 778; *Johnson's Admsrs. v. Veal*, 3 McCord, 449; *Westrope v. Chambers' Estate*, 51 Tex. 178; *Pierce v. Johnson*, 4 Vt. 247. Some courts, however, have held the breach which occurs on the delivery of the deed as merely technical, and not such as would put the statute of limitations in motion against an action for substantial damages until they are actually sustained. These courts depart from the strict rule that the covenant of seisin is personal, and, in a sense, give it the effect of a covenant running with the land; and this, indeed, is necessary in many cases in order to prevent a miscarriage of justice: *Foshay v. Shafer*, 116 Iowa, 302, 89 N. W. 1106; *Leet v. Gratz*, 124 Mo. App. 394, 101 S. W. 696; *Wood v. Dubuque R. R. Co.*, 28 Fed. 910. Said the Iowa court in the above case: "The covenant was broken upon the delivery of the deed. But, as the covenantee had been given possession, the breach was only technical, and did not entitle him to recover substantial damages until some positive injury had been suffered." "When the breach relied upon is an outstanding paramount title," to quote from the above Missouri case, "the technical breach of the covenant of seisin, at the delivery of the deed, is deferred to and operates from the date of eviction, identically as does a breach of the express cove-

nant of warranty. At this point the two covenants seem to meet—indeed, it is true the covenant of seisin is breached before that time, i. e., when made, for which a nominal recovery may be had—but for the purpose of authorizing a substantial recovery, and for the purpose of initiating the operation of the statute of limitations against the right of action arising by virtue of the breach, it is deemed to have been breached by eviction, either actual or constructive, only. In this respect, it, of course, operates an assurance of possession concurrently with the covenants of warranty and quiet enjoyment”: *Leet v. Gratz*, 124 Mo. App. 394, 101 S. W. 696.

c. **Misrepresentation as to Encumbrances.**—Where one who has been induced to purchase land through fraudulent representations by one holding a mortgage thereon, that there is no other encumbrance, when in fact there is to his knowledge another mortgage upon the premises, an action for the fraud accrues immediately upon the purchase, and the statute of limitations begins to run from that date rather than from the time of an eviction under the mortgage: *Northrup v. Hill*, 57 N. Y. 351, 15 Am. Rep. 501. Said Justice Dwight, in delivering the opinion of the court: “I think that it is clear that when a party to a contract is guilty of fraud, he commits a wrong for which he is liable to the defrauded party, to pay, at least, nominal damages. The act of entering into contract relations implies that the parties are to deal in good faith with each other. On no other basis can the minds of the parties be expected to meet. If one of them, professing in this way to act in good faith, in fact commits a fraud, he breaks the implied obligation he is under, and should be made to respond in damages. It is no answer to say that the defrauded party may rescind the contract. That course is at his option. He may elect to affirm it, and have his action for such damages as he may prove, whether substantial or otherwise: *Allaire v. Whitney*, 1 Hill, 484. If he proves no special damage, he should, at least, recover nominal damages for the breach of the implied promise to act in good faith. It is familiar law that a party may have an action for breach of duty, though he sustains no positive damage and there is no intention to do wrong. Thus, where an attorney compromised an action in opposition to his client’s instructions, though he acted in good faith and caused him no actual damage, he was held liable to pay nominal damages: *Fray v. Voules*, 1 El. & El. 839. . . . Suppose that the plaintiff in the present case had employed an attorney gratuitously to search the title to McCarty’s farm, and he, through his neglect, had not disclosed the Fellows mortgage, and the plaintiff had paid McCarty the full value of the land without reference to the mortgage, when would the statute of limitations have begun to run in the attorney’s favor? Would it not have been at the time when the plaintiff paid his money? See *Howell v. Young*, 5 Barn. & C. 259; *Short v. McCarthy*, 3 Barn. & Ald. 626. If that be so, would it have made any difference that the attorney falsely and fraudulently pretended that he made the search when he had not?

Certainly not. The ground of action in either case would be for breach of duty, and that breach would be the same whether it were occasioned by negligence or fraud. The justice of the rule here sought to be enforced is apparent in its application to the present case. For the sake of the discussion it has been assumed to be a case of nominal damages, which in fact it is not. After the defendant knew that the fraud had been committed, he might, at any time, have paid off the Fellows mortgage and have sustained damage to that extent which he might have recovered from the defendant. Instead of that, he preferred to allow a foreclosure to take place and to have his purchaser evicted, and then to pay the damages sustained by the breach of his covenant of warranty."

d. Agreement to Examine or Furnish Abstract of Title.—The rule that the statute of limitations commences to run from the time of the breach of a contract or from the time of an act of negligence has found application in a number of cases where the contract and negligence have been in respect to the examination of title to real estate; and the decisions wherein this question has arisen have been uniform in holding that where an attorney or an abstracter has been employed to examine a title or to search records, a cause of action against him for negligence in not discovering defects in the title or for giving a wrong certificate accrues at the date of examination or the date of the delivery of the abstract, and not at the time when the negligence is discovered or the substantial damage arises: *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; *Lilly v. Boyd*, 72 Ga. 83; *Russell v. Polk County Abstract Co.*, 87 Iowa, 233, 43 Am. St. Rep. 381, 54 N. W. 212; *Provident Loan Trust Co. v. Wolcott*, 5 Kan. App. 473, 47 Pac. 8; *Schade v. Gehner*, 133 Mo. 252, 34 S. W. 576.

III. In Case of Action Against Public Officer.

Some authorities have assumed that the foregoing rules as to the inception of the running of the statutes of limitation in case of a breach of duty thereafter resulting in substantial damage is the same when applied to public officers. Accordingly, it has been held that an action against a recorder for a false certificate of search begins to run from the time the certificate is given rather than from the time the damage arises: *Owen v. Western Savings Bank*, 97 Pa. 47, 39 Am. Rep. 794; and that where a recorder so registers a mortgage that the record does not constitute notice, neither he nor the mortgagee becoming aware of the error until after the execution of a second mortgage, a cause of action accrues against him at the time of the erroneous registration: *State v. Walters*, 31 Ind. App. 77, 99 Am. St. Rep. 244, 66 N. E. 182; that an action against a notary for making a false certificate of acknowledgment runs from the time thereof, and not from the discovery: *Bartlett v. Bullene*, 23 Kan. 606; that an action against a deputy sheriff for not attaching sufficient property to satisfy a judgment commences to run from the return of the writ and not from the time when the discovery is made:

Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264; and that an action for the negligence of a justice of the peace or the clerk of court in making an entry runs from the time thereof and not from the time of the discovery or the resulting damage: *Ellis v. Kelso*, 18 B. Mon. 296; *Lathrop v. Snellbaker*, 6 Ohio St. 276.

Other courts, with perhaps better reason, have drawn a distinction between public officers and private citizens in respect to the operation of the statute of limitations against actions for their negligence or wrongful conduct, and, taking the actual injury, rather than the neglect of the official duty, as the gist of the action by the person damaged, have decided that the statute does not commence to run until the injury is sustained. Thus it has been held that an action against a sheriff for negligence in levying an attachment accrues, not when the breach of duty occurs, but when the consequential injury is sustained: *People v. Cramer*, 15 Colo. 155, 25 Pac. 302; *Bank of Hartford v. Waterman*, 26 Conn. 324. And it has also been held that where a register of deeds fails correctly to record a conveyance, the cause of action against him accrues when the vendee is deprived of the property, not when the mistake is made: *State v. McClellan*, 113 Tenn. 616, 85 S. W. 267. Said Justice Shields in this last case: "Public officers are not liable for a breach of official duty to an individual unless he can show that in the public duty was involved a duty to himself as an individual, and that he has suffered a special and peculiar injury, not common to the general public. In other words, without special injury, the wrong is to the public only, and punishable by indictment or removal from office, or both. The plaintiff, in an action against a public officer for a breach of a duty primarily due to the public, must show both the breach of an official duty, in the correct discharge of which he was interested, and the special resultant injury to himself. All these elements must be present. This rule is necessary to prevent public officers from being annoyed and harassed by groundless actions and in the promotion of good public services. Therefore, a right of action against a public officer growing out of a breach of official duty involving individual rights is not complete and does not accrue until the happening of a consequential injury, resulting proximately from the breach." The doctrine of these cases was approved in *Aachen etc. Ins. Co. v. Morton*, 156 Fed. 654.

IV. In Case of Action Against Attorneys or Physicians.

a. *Negligence of Attorneys.*—An action by a client for the misfeasance or nonfeasance of his attorney is based on the latter's breach of duty, and not on the consequential damages subsequently resulting. Hence, the general rule is that the statute of limitations commences to run at the time of the breach of professional duty, and is not postponed to the time when the wrong is discovered or the consequential damages are felt: *White v. Reagan*, 32 Ark. 281; *Crawford v. Gaulden*, 33 Ga. 173; *Gould v. Palmer*, 96 Ga. 798, 22 S. E. 583; *Derrickson v. Cady*, 7 Pa. 27; *Downey v. Garard*, 24 Pa. 52;

Campbell's Admr. v. Boggs, 48 Pa. 524; Moore v. Juvenal, 92 Pa. 484; Sams v. Rhett, 2 McMull. (S. C.) 171; Sinclair v. Bank of South Carolina, 2 Strob. 344; Thomas' Exrs. v. Erwin's Exrs., Cheves (S. C.), 22, 34 Am. Dec. 586; Smith v. Owen, 7 Lea (75 Tenn.), 53. The leading case on this question is Wilcox v. Plummer, 4 Pet. 172, 7 L. ed. 821, where it is said: "When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

It has been said that the statute of limitations runs on an action against an attorney or abstracter for a want of care or skill in examining title to real estate, from the time when the examination is made or the abstract delivered: Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; Lilly v. Boyd, 72 Ga. 83; Rankin v. Schaeffer, 4 Mo. App. 108. The statute of limitations begins to run from the time of the collection of the money by an attorney for his client, which should have been paid over, if there has been no fraudulent concealment: Douglas v. Corry, 46 Ohio St. 349, 15 Am. St. Rep. 604, 21 N. E. 440. In Rhines' Admr. v. Evans, 66 Pa. 192, 5 Am. Rep. 364, an attorney gave a receipt for a note which he agreed to collect. In an action to recover for neglecting to collect the note it was held that the statute of limitations did not begin to run from the date of the receipt, but from a reasonable time afterward for beginning proceedings, and that seventeen months was more than a reasonable time. In Fox v. Jones (Tex. App.), 14 S. W. 1007, where an attorney received express directions from his client to sue on a note, but delayed until the statute of limitations had run its course, it was decided that his liability to his client accrued at the time when the claim was barred, and not when the note was delivered to him for collection.

b. Malpractice of Physicians and Surgeons.—The statute of limitations ordinarily runs against a physician or surgeon for damages due to malpractice from the time of the act of negligence or unskillful treatment, and not from the time of the consequential injury. This rule has been applied to an action against a surgeon for malpractice in setting and treating a dislocated and fractured arm: Coady v. Reins, 1 Mont. 424. But the rule was justly modified in Gillette v. Tucker, 67 Ohio St. 106, 93 Am. St. Rep. 639, 65 N. E. 865, where it was decided that in an action against a physician and surgeon for malpractice, consisting of negligently leaving a sponge in the abdomen of the plaintiff after performing an operation, where it remained for many months, and until after the relation of patient and surgeon ceased, the statute of limitations did not commence to run in favor of the surgeon until the termination of such relation,

because, until that time, it was his constant duty to remove the sponge. The decision of the Ohio court was vigorously dissented from by three members of the judges, and the doctrine of the dissenting opinion appears to have been subsequently approved in the case of *McArthur v. Bowers*, 72 Ohio St. 656, 76 N. E. 1128.

V. In Case of Action for Tort or Negligence.

a. **In General.**—Where a wrongful or negligent act occasions injury, though slight, for which the law affords a remedy, the statute of limitations is at once put in motion. The damages caused by the act may not all have been sustained at that time—in fact, they may yet be only slight or nominal—but this does not postpone the running of the statute. That the actual or substantial damages do not occur until later is of no consequence; the act itself, which is the ground of action, is not legally severable from its consequences: *Raynor v. Mintzer*, 72 Cal. 585, 18 Pac. 82; *Kansas Pac. R. R. Co. v. Michlman*, 17 Kan. 224; *Nashville etc. R. R. Co. v. Dale*, 68 Kan. 108, 74 Pac. 596; *Illinois Cent. R. R. Co. v. Hodge*, 21 Ky. Law Rep. 1479, 55 S. W. 688; *Brown v. Clingman*, 47 La. Ann. 25, 16 South. 564; *Griffin v. New Orleans Drain. Commission*, 110 La. 840, 34 South. 799; *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 58 Am. Rep. 333, 23 N. W. 781; *Guarantee Trust etc. Co. v. Farmers' etc. Nat. Bank*, 202 Pa. 94, 51 Atl. 765; *Houston Waterworks v. Kennedy*, 70 Tex. 233, 8 S. W. 36; *Grunert v. Brown*, 119 Wis. 126, 95 N. W. 959; *Madden v. Lancaster County*, 65 Fed. 188, 12 C. C. A. 566. "When an act is in itself lawful as to the person who bases thereon an action for injuries subsequently accruing from and consequent upon the act, the cause of action does not accrue until the injury is sustained. If, however the act of which the injury was the natural sequence was a legal injury, by which is meant an injury giving cause of action by reason of its being an invasion of the plaintiff's right, then, be the damages however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar": *Kruegel v. Trinity Cemetery Co.* (Tex. Civ. App.), 63 S. W. 652.

"The line of authority is unbroken that if the original act of negligence causes damage, although only nominal in extent, a cause of action accrues eo instanti, and that consequential damages may be recovered thereon up to the time of the trial. Of course it follows that the statute of limitations begins to run the moment a right of action accrues, and it is so expressly provided by our statute; and it cannot be deferred or held in abeyance because the full extent of the injury is not at once apparent, nor because the plaintiff was ignorant of the negligent act which caused the injury. This principle applies equally to cases quasi ex contractu and cases purely ex delicto. Upon these well-established principles it is obvious that in cases in

which an act of negligence causes damage, the cause of action cannot be split up into two or more causes of action, and therefore when suit is brought to recover damages upon an act of negligence which is barred by the statute of limitations, it cannot be taken out of the statute by a subsequent act of negligence which merely aggravates the damage already accrued": *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639, 65 N. E. 865. This quotation is from the dissenting opinion written by Justice Davis; the principles it announces, however, are universally recognized, and the dissenting opinion itself was approved in the subsequent case of *McArthur v. Bowers*, 72 Ohio St. 656, 76 N. E. 1128.

b. Continuous or Repeated Injuries.—The foregoing general rule is modified in case the wrongful act is continuous or repeated, so that separate and successive actions may be instituted for the damages as they accrue, and as to such actions for subsequently accruing damages the statute of limitations does not run from the date when the first wrong was suffered, but only from the dates of the accrual of such damages: *Knapp etc. Mfg. Co. v. New York etc. R. R. Co.*, 76 Conn. 311, 100 Am. St. Rep. 994, 56 Atl. 512; *Monroe v. McCranie*, 117 Ga. 890, 45 S. E. 246; *Western Union Tel. Co. v. Moyle*, 51 Kan. 203, 32 Pac. 895; *Reed v. State*, 108 N. Y. 407, 15 N. E. 735; *Doran v. Seattle*, 24 Wash. 182, 85 Am. St. Rep. 948, 64 Pac. 230, 54 L. R. A. 532.

c. Wrongs in Nature of Nuisances.—The authorities agree that when the original act creating a nuisance to land is permanent in its nature, and is at once productive of all the damage which can ever result from it, and at once destroys the estate for all practical purposes, so that when the act is completed all the damage that can be effected thereby is consummated, the entire damages must be recovered in one action, and the statute of limitations begins to run against the cause of action from the time of the complete erection of the nuisance. However, if an erection, when completed, is permanent in character, but not necessarily a nuisance, and it afterward becomes one, or where, though a nuisance at the time of completion, it is a continuing one, and from time to time gives a new cause of action, the statute of limitations begins to run from the time when the injury is received, and not from the time of the completion of the erection. In other words, where the nuisance is transient rather than permanent in its character, the continuance of the injurious acts is considered a new nuisance, for which a fresh action will lie; and although the original cause of action is barred, damages may be recovered for the continuance of the nuisance within the period of the statute, and where the continuance of the act is not necessarily injurious, though it is necessarily of a permanent nature, and it may or may not be injurious or may or may not be continued, then the injury to be compensated is only the damage which has actually happened up to the time of suit: See the note to *St. Louis etc. Ry. Co. v. Biggs*, 20 Am. St. Rep. 176; *Peck v. Michigan City*, 149 Ind.

670, 49 N. E. 800; *Howard County v. Chicago etc. R. R. Co.*, 130 Mo. 652, 32 S. W. 651; *Doran v. Seattle*, 24 Wash. 182, 85 Am. St. Rep. 948, 64 Pac. 230, 54 L. R. A. 532.

Where a smelter is lawfully erected, and subsequently the poisonous fumes therefrom injure a neighboring orchard, the statute of limitations does not commence to run until the time the injury occurs: *Sterrett v. Northport Min. etc. Co.*, 30 Wash. 164, 70 Pac. 266; and where a ditch is constructed by a city where the city has a right to construct it, and the ditch does not directly invade adjacent property, the statute of limitations does not run, as against an action for subsequent damages, from the date of the construction but from the time of such injuries: *Houston v. Parr* (Tex. Civ. App.), 47 S. W. 393.

d. Structures Interfering with Flow of Water.—Where a structure is erected which occasions no injury to neighboring property at the time of the erection, but subsequently casts water upon adjacent premises to their detriment, the cause of action for the tort arises, and the statute of limitation thereon commences to run, at the time the injury is suffered, and not at and from the date of the erection of the structure. This rule has found frequent application where a railway company has constructed a bridge or an embankment which did not interfere with the natural flow of water at the time, but afterward, in time of freshets or high water, threw water upon adjoining properties to their injury: *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; *Hunt v. Iowa Cent. Ry. Co.*, 86 Iowa, 15, 41 Am. St. Rep. 473, 52 N. W. 668; *Culver v. Chicago etc. R. R. Co.*, 38 Mo. App. 130; *Chicago etc. R. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540; *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484; *Henry v. Ohio River R. R. Co.*, 40 W. Va. 234, 21 S. E. 863.

If it is claimed that a culvert in an embankment erected by a railway company across a public highway is insufficient in size to carry away the accumulations of water in times of heavy rains, and that by reason thereof near-by property is overflowed, the statute of limitations against the cause of action therefor commences to run at the date of the suffering of the injury rather than from the date of the completion of the embankment: *Kelly v. Pittsburgh etc. R. R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134, 63 N. E. 233. And where ditches are constructed along a railway track in such a manner that the adjacent lands may be injured thereby, the owner may recover for each successive injury, and the statute of limitations does not commence to run against him upon the completion of the ditches: *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698, 61 Am. St. Rep. 578, 70 N. W. 263, 36 L. R. A. 417.

e. Interference with Lateral Support.—Ordinarily, the statute of limitations begins to run against a right of action for damages for the removal of lateral support only from the time that injury actually results therefrom, and not from the time of the excavation: *Ludlow v. Hudson River R. R. Co.*, 6 Lans. 128; *Smith v. Seattle*, 18 Wash. 484,

63 Am. St. Rep. 910, 51 Pac. 1057; *Mitchell v. Darley Main Colliery Co.*, L. R. 14 Q. B. D. 125, L. R. 11 App. Cas. 127; note to *Larson v. Metropolitan St. Ry. Co.*, 33 Am. St. Rep. 472. If the excavation is such as causes a legal injury at the time it is made, then perhaps the statute of limitations will be at once set in motion, although the damages have not yet all accrued: *Griffin v. Drainage Commission*, 110 La. 840, 34 South. 799; *Noonan v. Pardee*, 200 Pa. 474, 86 Am. St. Rep. 722, 50 Atl. 255, 55 L. R. A. 410; *Houston Waterworks Co. v. Kennedy*, 70 Tex. 233, 8 S. W. 36.

SERVONITZ v. STATE.

[133 Wis. 231, 113 N. W. 277.]

HABEAS CORPUS—Scope of Writ.—The writ of habeas corpus reaches jurisdictional error only; it cannot properly be used to serve the mere purpose of a writ of error. If jurisdiction of the accused is obtained so that the court might, under some circumstances, render a valid judgment, but error is committed in reaching a final result, then such error is judicial and reviewable only upon a writ of error; but if the court, though having no jurisdiction to render judgment at all, attempts to do so, the judgment is void, and habeas corpus is a proper remedy for relief therefrom. (p. 956.)

HABEAS CORPUS—Regulation by Statute.—The legislature may reasonably regulate the procedure in respect to habeas corpus, but the writ cannot be abrogated nor its efficiency curtailed by legislative action. (p. 958.)

HABEAS CORPUS is Effective to Test the Jurisdiction of any Court assuming by its judgment, or otherwise, to deprive one of his personal liberty. (p. 958.)

HABEAS CORPUS.—A Conviction Under an Unconstitutional Statute can be impeached in habeas corpus proceedings. (p. 958.)

CONSTITUTIONAL LAW—Class Legislation.—The classification of occupations as a basis for police regulation is a matter wholly within the discretion of the legislature, and whether there is room for the classification made in any given case is primarily a legislative question, and can never become a judicial one except for the purpose of examining, in any given situation, whether legislative action passed the boundaries of reason, reasonable doubts to be resolved in the negative. (p. 959.)

PEDDLERS—Classification and Regulation by Statute.—The legislature may treat peddlers as a class by themselves for the purpose of police regulation and occupation taxes; and it may make a subclassification of peddlers according to their facilities for going from place to place and carrying their wares, rendering one class likely to reach more customers than another and to do a correspondingly greater amount of business both as to number of transactions and the amount of money involved. (p. 961.)

John F. Donovan and Adolph Huebschmann, for the plaintiff in error.

Attorney General, A. C. Titus, assistant attorney general, and Dorr, Gregory & Stiglbauer, for the defendant in error.

233 MARSHALL, J. The point is made that a habeas corpus proceeding is not the proper remedy to test the validity of a judgment under which a person is restrained of his liberty. In support thereof the general principle is invoked that the writ of habeas corpus only reaches jurisdictional error; that it cannot properly be used so as to serve the mere purpose of a writ of error. The cases so holding in this and other courts are very numerous. The principle is so elementary that it is useless to refer to authorities in respect thereto.

Before applying the conceded rule to a case like this, one where the validity of the judgment is involved, it is necessary to determine whether the error claimed to exist is jurisdictional or judicial. In the absence of any statute extending the scope of the writ the test in respect thereto is this: Could the court, under any circumstances of the case, have properly rendered a judgment against the accused? If jurisdiction of the person is obtained so that the court might under some circumstances render a valid judgment in the cause against **234** the accused, but error is committed in reaching a final result, then such error is judicial, reviewable only upon a writ of error. If the court, though having no jurisdiction to render judgment against the accused at all, renders judgment, it is void. In the latter circumstances a writ of habeas corpus is proper. Speaking on the subject in *State v. Sloan*, 65 Wis. 647, 27 N. W. 616, the court said: "It is only when the court pronounces a judgment in a criminal case which is not authorized by law under any circumstances, in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by such judgment."

The rule stated is about as old as the writ itself. It is stated thus in Bacon's Abridgment, "Habeas Corpus," B. 10: "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge."

So, also, Chief Justice Abbott, in *Rex v. Suddis*, 1 East, 306, phrased the principle this way: "It is a general rule that, where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court [the king's bench] cannot review the sentence upon a return to a habeas corpus."

That this court has gone further in favor of the use of the writ than the quoted language would warrant is not material to this case. In *re Staff*, 63 Wis. 285, 53 Am. Rep. 285, 23 N. W. 587, suggests this remark. That case, In *re Pierce*, 44 Wis. 411, and perhaps others, deal with excess of jurisdiction and are referable to section 3428, Statutes of 1898.

It has been a mooted question in some jurisdictions whether in case of a conviction under an unconstitutional law the judgment rendered thereon can be impeached in a habeas ²³⁵ corpus proceeding to vindicate the right of the prisoner to his liberty, but the authorities are in general harmony that in such a case the trial court obtains no jurisdiction whatever; that the judgment rendered is utterly void, and so can be collaterally called in question. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, is a leading case on the subject. In discussing the subject the court said: "The validity of the judgment is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. . . . An unconstitutional law is void. . . . An offense created by it is not a crime. A conviction under it is not only merely erroneous, but is illegal and void. . . . The question of the court's authority to try and imprison the party may be reviewed on habeas corpus. . . . We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes."

The foregoing rules the point under discussion in favor of the plaintiff in error unless it be otherwise by reason of the statutory regulation of the writ of habeas corpus, sections 3408, 3427, Statutes of 1898, providing that:

"No person shall be entitled to prosecute such writ who shall have been committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such order or judgment; . . .

"The court or judge must make a final order to remand the prisoner if it shall appear that he is detained in custody . . . by virtue of the final judgment or order of any competent court of civil or criminal jurisdiction or of any execution issued upon such judgment or order."

If the legislature purposed by such sections to take away from circuit courts the common-law power exercisable by use of the writ of habeas corpus, it misconceived its authority. The circuit courts take their power in the matter from the constitution, not from the legislature. They look only to the organic act for the source of their authority, the same as the

236 legislature must do for limitations upon its field of action. The former always bow to the latter branch of the government as regards reasonable regulations of the exercise of their constitutional authority, but guard with strictest care against any invasion thereof. A law providing that the writ of habeas corpus cannot issue to vindicate the right to personal liberty where the imprisonment, though it be pursuant to a judgment of a court and with all the forms of law, is nevertheless void, would be clearly such an invasion.

Speaking on this subject under circumstances, as regards constitutional and statutory provisions, similar to those we have here, the New York court of appeals in *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, said substantially this: The statute regulates the exercise of jurisdiction in the use of the writ of habeas corpus, but the writ cannot be abrogated nor its efficiency at all curtailed by legislative action. The common-law scope of the writ as to remedying restraints upon personal liberty after judgment cannot, "until the people voluntarily surrender the right to this, the greatest of all writs, by an amendment of the organic law, be placed beyond its reach and remedial action." The writ is effective to test the jurisdiction of any court assuming by its judgment, or otherwise, to deprive one of his personal liberty.

It is considered that the legislative enactments under consideration were adopted in harmony with the views above expressed. Their prohibitive features as to inquiring into the validity of a judgment in habeas corpus proceedings are but mere declarations of the common law, and are in harmony with the constitution. They are to the effect that the writ shall only be used to correct jurisdictional error resulting in the wrongful restraint of personal liberty. When a judgment of any court is based on an unconstitutional law, it has no legitimate basis at all; it is not a judgment of a competent tribunal within the meaning of section 3408 of the Statutes, or of a "competent court" within the meaning of those words ²³⁷ in section 3427 of the Statutes. The law, so called, being unconstitutional, there is no law in fact, hence no jurisdiction to give force thereto; no legitimate jurisdiction over the subject matter or of the person, within the meaning of the decisions. That is in harmony with *State v. Sloan*, 65 Wis. 647, 27 N. W. 616, *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, and *In re Shinski*, 125 Wis. 280, 104 N. W. 86, and many other cases in our reports that might be referred to.

Keeping in mind that no court can obtain jurisdiction of the person and subject matter in a prosecution under an un-

constitutional law, and the expression often used that "the writ of habeas corpus does not reach beyond the commitment when the person in custody is detained by virtue of a final judgment or order of a court having jurisdiction of the subject matter and the person," it will readily be seen that the exception suggested in such expression covers the case of a judgment which is without any validity whatever because wholly referable for a basis to an unconstitutional law.

It is conceded that the law in question is valid, and the conviction of plaintiff in error thereunder was proper if such law be not fatally discriminatory, in that it imposes burdens upon one class of persons greater than upon others under substantially the same condition, thus offending against the equality clauses of the state and national constitutions.

That there may be legitimate classification for purposes of police regulation and occupation taxes is conceded. So whether the law is such a regulation or such a taxing enactment, or partakes of the nature of both, is not material.

We are referred to numerous adjudications of this and other courts for the legal test of constitutional classification. The time is past for profitable discussion of that subject or even an extended citation of authority in respect thereto. The rule on the subject has been so often and so definitely stated as to now be regarded as elementary. It may ordinarily ²³⁸ be applied without serious difficulty to any particular situation as it arises for consideration. This or equivalent language has been commonly used in phrasing the rule here:

"All classification must be based upon substantial distinctions which make one class really different from another.

"The classification adopted must be germane to the purpose of the law.

"The classification must not be based upon existing circumstances only; it must not be so constituted as to preclude addition to the number included within a class.

"To whatever class a law may belong, it must apply equally to each member thereof.

"The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation": *State v. Trustees*, 121 Wis. 54, 98 N. W. 954.

The law in question (Laws of 1905, chapter 490) provides that as a condition of engaging in the occupation of hawker or peddler within this state a license shall be obtained as

provided in such chapter, for which the candidate "shall pay into the state treasury an annual license fee, as follows: Where he shall use in such business or occupation a wagon or other vehicle, drawn by two or more horses, or other beasts of burden, or automobile or other vehicle or conveyance propelled by any mechanical power, the sum of seventy-five dollars; where he shall use in such business or occupation a wagon or other vehicle, drawn by one horse, or other beast of burden, the sum of forty-five dollars; where he shall use in such business or occupation a push or hand cart, or other vehicle not drawn by horses, or other beasts of burden, the sum of thirty dollars; and where he shall conduct such business on foot by means of pack, basket or other means for carrying merchandise on foot, the sum of twenty dollars."

Thus it will be seen that all persons following the occupation of hawker or peddler are placed in a class by themselves. So far, the classification is admittedly legitimate. It is sanctioned by *State v. Whitcom*, 122 Wis. 110, 99 ²³⁹ N. W. 468, and authorities generally. But it is contended that the subclassification offends against the rule indicated, rendering the law void.

In considering the subject we must bear in mind that the policy of classification is a matter wholly within legislative discretion, and that whether there is room for the classification made in any given case is primarily a legislative question, and can never become a judicial one except for the purpose of determining, in any given situation, whether legislative action passed the boundaries of reason, reasonable doubts to be resolved in the negative.

The purpose of regulation of the occupations in question is to minimize the mischief commonly supposed to be specially liable to flow from the operations of persons engaged therein. Such purpose has been universally held to warrant laws of the character of the one under consideration as to its general features: *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Freund on Police Power*, sec. 289; *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468.

Now, as regards the element of regulation as well as that of taxation, it would seem that there is a very wide distinction between those members of the general class who operate in such a way as to be likely to come in business contact with many persons and conduct many business operations involving large sums of money, and those so equipped as to be liable to meet a much smaller number of persons and conduct a

much less number of transactions involving much smaller sums of money.

The exaction as a police regulation being to guard against the mischiefs to be apprehended and the difficulties in remedying such mischiefs, there is good reason to make the burden correspond in some fair degree to that situation. The distinction referred to is quite as significant when the matter is viewed from the standpoint of taxation.

So it would seem very plain that there are substantial distinctions between the subclasses named in the law, making ²⁴⁰ one really different from the other. The classification is germane to the purposes of the law, because it aims at grading the license fees as near as practicable according to the harm to be apprehended and the magnitude of the business conducted. For the reasons stated the characteristics of each subclass may well be said to be so far different from those of others as to reasonably require difference in legislative treatment. In short, all of the calls for legitimate classification seem to be satisfied.

The subclassification, as here, of the members of a particular occupation, when substantial reasons exist therefor, has been uniformly sustained. The subject was so fully discussed in *State v. Evans*, 130 Wis. 381, 110 N. W. 241, that little more, if anything, need be said on the subject. Authorities justifying such subclassification are very numerous. The following are but a few of them: *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A., N. S., 121; *People v. Thurber*, 13 Ill. 554; *Slaughter v. Commonwealth*, 13 Gratt. 767; *East St. Louis v. Wehrung*, 46 Ill. 392; *County of Amador v. Kennedy*, 70 Cal. 458, 11 Pac. 757; *Ex parte Heylman*, 92 Cal. 492, 28 Pac. 675; *Smith v. Louisville*, 9 Ky. Law Rep. 779, 6 S. W. 911; *Singer Mfg. Co. v. Wright*, 33 Fed. 121.

No reason which appeals very strongly to our judgment is advanced why peddlers should not be classified, as in the law in question, according to their facilities for going from place to place and carrying their wares. The perils to be guarded against in respect to the occupation and the contributions that may reasonably be required to the public revenues strongly suggest, if they do not demand, such classification. Certainly the legislature, within the boundaries of reason, may well have thought that a person traveling about the country plying the vocation of a peddler with an

equipment consisting of a span of horses and a wagon should, both as a matter of police regulation and taxation, pay a greater license ²⁴¹ fee than a person plying the same trade but traveling about from place to place on foot. Not because the former would be more liable to be dishonest than the latter, but because of the greater opportunity and liability thereof in the one case than in the other, and the corresponding greater liability in the one case than in the other of the harm, if committed, being difficult of redress or going entirely without remedy; again, not because the person, as such, traveling with a team should be taxed more than one traveling on foot, but, since the one in all reasonable probability would conduct a much greater business than the other, the tax exaction should bear some practical relation thereto.

While we have discussed the legitimacy of the classification here involved as an original matter, it seems to have been practically settled in *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12. The law there under consideration (Laws of 1870, chapter 72) had nearly the same features as those we now have. The same is true as to the law involved in *State v. Whitcom*, 122 Wis. 110, 99 N. W. 468, and though such law was condemned, neither directly nor by the reasoning does the condemnation touch such features.

A reference to statutes elsewhere shows that, as a rule, the license fee exacted from hawkers or peddlers is graded substantially as here, and in no instance, so far as we can discover, has the classification been condemned. The statute of Missouri (Annotated Statutes, 1906, section 8867) is a fair type of the enactments on the subject. It provides that peddlers shall pay license fees as follows: "First, if the peddler travel and carry his goods on foot three dollars for every period of six months; second, if one or more horses or other beasts of burden, ten dollars for every period of six months; third, if a cart or other land carriage, twenty dollars for every period of six months; fourth, if in a boat or other river vessel, at the rate of one dollar per day for any period not less than five days."

²⁴² We need not further extend the discussion. No valid reason seems to exist for holding the law under which plaintiff in error was convicted unconstitutional, and, therefore, the judgment must be affirmed.

By the COURT. Judgment affirmed.

The Writ of Habeas Corpus can be used to attack the constitutionality of a statute or ordinance: *Ex parte Knight*, 52 Fla. 144, 120 Am. St.

Rep. 191; *Ex parte Kair*, 28 Nev. 127, 113 Am. St. Rep. 817; *Ex parte Lewis*, 45 Tex. Cr. 1, 108 Am. St. Rep. 929; note to *Koepke v. Hill*, 87 Am. St. Rep. 174. Some courts, however, have thought otherwise: *People v. District Court*, 33 Colo. 328, 108 Am. St. Rep. 98.

PHILLIPS v. EGGERT.

[133 Wis. 318, 113 N. W. 686.]

ATTACHMENT—Action on Sheriff's Bond—Recitals in Return as Evidence.—In an action against a sheriff and his sureties for permitting an attached vessel to be taken from his custody, his return upon the writ of attachment positively stating that the vessel was the property of the defendants named in the writ is an admission of a fact against his interest, made in the course of his official business, and is prima facie evidence of such fact, both against him and his sureties. (p. 965.)

ATTACHMENT—Vessels on Great Lakes.—The Wisconsin statute giving a lien upon vessels for certain demands against the owners, and providing for the enforcement or foreclosure thereof by a special form of attachment, does not provide an exclusive remedy, nor preclude the seizure of such property under the general attachment laws. (p. 965.)

ATTACHMENT.—Vessels on Great Lakes are Subject to attachment under the laws of Wisconsin. Such a seizure is not an invasion of the exclusive jurisdiction of the United States admiralty courts, because the vessel itself is not proceeded against; it is simply the reaching of property rights in the vessel by attachment in a personal action against the owner, which is a common-law remedy preserved by the admiralty law itself. (p. 966.)

ATTACHMENT—Action on Sheriff's Bond.—In an action against a sheriff and his sureties for permitting an attached vessel to be taken from his custody, recitals in the judgment in the main action that personal service of the summons had been made on the defendants are prima facie evidence of that fact. (p. 966.)

M. E. Davis and John E. Tracy, for the appellant.

Burke & Craite, Hougan & Brady and Isaac Craite, for the respondents.

320 WINSLOW, J. This is an action for breach of a sheriff's bond, brought against the sheriff (the defendant Eggert) and his sureties. The breach alleged was that the sheriff, having seized the steamship "Portage," lying in the harbor of Manitowoc, upon alias writ of attachment issued out of the circuit court for Brown county in a tort action brought by the plaintiff against the Portage Transit Company (a foreign corporation), negligently allowed the boat to be removed from his custody, and thus rendered uncollectible a judgment of two thousand five hundred and thirty-

seven dollars and seventy-two cents which the plaintiff subsequently obtained in said action. The defendants by answer admitted the formal levy of the attachment upon the boat, denied knowledge or information as to whether said boat was the property of the transit company, and alleged that the sheriff was told by the plaintiff's attorney at the time of the levy that it would not be necessary to place a watchman or deputy on board; that the boat was properly fastened to the wharf, and that it was so large that nothing further could be done in the way of securing or holding it; that the boat was taken away in the night-time without the sheriff's knowledge; that he had made diligent but unsuccessful search for it, and believed that it had been taken out of the jurisdiction of the court, and that he had exercised due care and diligence in attaching and keeping the property, and acted at all times in obedience to plaintiff's instructions. The answer further alleged that the steamer was a licensed freight-carrying steamer upon the Great Lakes, and not subject to attachment under the marine laws of the United States.

The action was tried before a jury, and it appeared that after receiving a bond of indemnity the sheriff made a formal attachment of the boat while it was being unloaded at the wharf, and served the summons and attachment papers on the captain, but placed no custodian on board; that the boat remained at the dock two or three days and he saw it, but that it was taken away without his knowledge in the night. ³²¹ The sheriff testified that at the time of making the levy he said to the plaintiff's attorney that if he (the attorney) deemed it necessary to place a watchman or deputy on board to secure his control he would do so, but that the attorney said it would not be necessary. This was denied by the attorney. The writ of attachment in the main action, with the return thereon, was received in evidence. By the return the sheriff stated that on the 28th of September, 1906, he attached the steamer and its equipment, "which ship and other property above named are all the property of the defendant named in said writ"; that on the same day he served the writ, affidavit, and undertaking upon the defendant "by reading the same to W. J. Cowles, the master of said ship, and by virtue of that office an agent of the defendant foreign corporation, having charge of and conducting business therefor in this state, and to me known to be such agent, and delivering to and leaving with him a true and correct copy of each." The judgment in the main action was also received in evidence, showing that the plaintiff recovered judgment

by default against the defendant in an action of tort December 3, 1906, for two thousand five hundred and thirty-seven dollars and seventy-two cents, and recites that the summons had been "personally served" on said defendant as appears by the return of the sheriff now on file." No other parts of the record in the main action were offered in evidence, except the attachment papers, as above stated. It was further proven that execution had been issued on the judgment and returned unsatisfied. The plaintiff's attorney testified that he was familiar with the value of boats, and examined the steamer in question, and that it was worth at least twenty-five thousand dollars. He further testified, subject to objection, that the captain of the boat stated at the time of the seizure that it belonged to the defendant and the defendant was operating it.

Both plaintiff and defendants moved for a directed verdict, and the court granted the defendants' motion, on the grounds (1) that there was no competent evidence that the defendant ³²² in the attachment action owned the boat; (2) that there was no competent evidence of the value of its interest if it had any; and (3) that there was no evidence that the plaintiff in the attachment action received the injuries for which he sued in that action upon the boat, or that they were inflicted by the boat within the meaning of subdivision 4, section 3348, Statutes of 1898. The plaintiff appeals from judgment for defendants upon the verdict.

The trial judge concluded that there was no competent evidence that the transit company owned the boat which was levied on, nor of the value of its interest if it had any; but we are entirely unable to agree with these conclusions. The sheriff's return upon the writ of attachment, which was introduced in evidence, states positively that the steamer and its equipment were the property of the defendant ³²³ named in the writ. This was an admission by the defendant sheriff of a fact against his interest, made in the course of his official business, and was, upon well-understood principles, prima facie evidence of such fact, both against the sheriff and against the sureties on his bond: 2 Brandt on Suretyship, 3d ed., secs. 796-799. There was, therefore, competent evidence that the boat was the sole property of the transit company, which was entirely sufficient until overcome by proof to the contrary, and there was in fact no such proof. There was also evidence by a witness who testified that he was acquainted with the value of such property and had examined the boat in question, to the effect that in his judgment it was worth

twenty-five thousand dollars, and there was no evidence to the contrary. It follows, therefore, that there was competent *prima facie* evidence upon both propositions.

The third ground upon which a verdict for the defendants was directed was, in effect, that the plaintiff had not shown that the cause of action upon which he sued in the attachment action was one of the causes of action named in section 3348, Statutes of 1898. The court evidently assumed that there could be no valid attachment of a boat except for a cause of action named in the section cited. This conclusion was also erroneous. That section and its accompanying sections following were passed for the purpose of giving a lien upon ships, boats and vessels for certain demands against the owners, and providing for the enforcement or foreclosure of such liens by a special form of attachment in a personal action against the owner. The legislature might just as well have provided that such liens should be perfected and enforced by an action in equity as by attachment. There is neither express nor implied provision anywhere to the effect that this remedy shall be exclusive, or that a man's interest in a boat or vessel shall not be subject to seizure on a writ of attachment issued under the general provisions of law authorizing the issuance of such writs in other actions. All ³²⁴ property in the state of the defendant named in the writ, not exempt from execution, is liable to seizure upon a writ of attachment: Stats. 1898, sec. 2738. The fact that the property may consist of an interest in a vessel makes no difference. Such a seizure is not an invasion of the exclusive jurisdiction of the admiralty courts of the United States, because the vessel itself is not proceeded against. It is simply the reaching of property rights in the vessel by attachment in a personal action against the owner, and this is a common-law remedy preserved by the admiralty law itself: U. S. Rev. Stats., subd. 8, sec. 563 (U. S. Comp. Stats. 1901, p. 457); *Warehouse & B. S. Co. v. Galvin*, 96 Wis. 523, 65 Am. St. Rep. 57, 71 N. W. 804; *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000, 93 N. W. 455; *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397.

Thus all the reasons given by the court for directing a verdict for the defendants are shown to be in fact no reasons.

It is argued by the respondents that the record shows that there was no valid service of the summons upon the defendant transit company in the attachment action, and hence that no jurisdiction was obtained in that action and the judgment

rendered was void. This contention is based upon the fact that the defendant Eggert testified that he served the summons and attachment papers on the captain of the boat at the time of the seizure, and the claim is that the captain was not an agent of the transit company having charge of any business therefor, within the meaning of subdivision 13, section 2637, Statutes of 1898, and hence there was no service of summons. We are not required to decide, and do not decide, the question whether such service was a valid service or not. The judgment in the main action was introduced in evidence and recited that personal service of the summons had been made on the defendant. This recital was *prima facie* evidence of the fact. Neither the summons itself nor the return was introduced in evidence, and the fact that the sheriff served the ³²⁵ summons on the captain, even conceding that this was insufficient, does not necessarily prove that service was not duly made on the corporation itself in some other way. So there was sufficient proof that the judgment in the attachment case was based upon due service of process.

There was certainly ample evidence to go to the jury upon the question whether the sheriff lost possession of the boat by reason of negligence: Crocker on Sheriffs, 3d ed., sec. 855. The question whether the plaintiff's attorney consented that no watchman or deputy be placed on the boat was in dispute, and has not been decided.

By the COURT. Judgment reversed, and action remanded for a new trial.

Liens Against Vessels may be Enforced in the State Courts, where the proceeding to enforce them does not amount to an admiralty proceeding in rem, or otherwise conflict with the constitution of the United States: Gindele v. Corrigan, 129 Ill. 582, 16 Am. St. Rep. 292. See, also, Delaney Forge etc. Co. v. The Winnebago, 142 Mich. 84, 113 Am. St. Rep. 566; Olsen v. Birch & Co., 133 Cal. 479, 85 Am. St. Rep. 215.

MEYER v. DOHERTY.

[133 Wis. 398, 113 N. W. 671.]

CONVERSION—Sufficiency of Allegations by Administrator.—

A complaint by an administrator alleging that the defendants had the decedent's money in their possession at the time of the death and retain the same in their possession, and have converted it to their own use, sufficiently alleges a taking and conversion of the money before the death of the decedent; and an allegation that, although often requested to do so, they refused to pay the same to the plaintiff as

administrator, does not limit the right to recover for a conversion after the death. (p. 970.)

CONVERSION—Procuring Lunatic to Draw Checks.—A son who procures his mentally incompetent mother to draw checks upon her bank account, and obtains the money thereon, is liable to her, or to her personal representatives after her death, as for a conversion of the money. (p. 970.)

PAYMENT.—The Giving of a Check is Presumptive Evidence of the payment of a debt where the transaction is bona fide, but this presumption may be overcome by other evidence. (p. 971.)

CONVERSION.—A Demand is Unnecessary to Perfect a Cause of Action for the conversion of money, where the defendant obtained it through wrongful conduct, but denies all possession or appropriation. (pp. 971, 972.)

CONVERSION.—A Complaint in the Usual Form of Conversion is sufficient under the rules of the Wisconsin code, without stating the particulars of the claim. (p. 972.)

C. L. Hood, for the appellant.

Geo. W. Bunge, for the respondent.

400 **SIEBECKER, J.** This is an action by the special administratrix of the estate of Mary Doherty, deceased. The complaint states that Mary Doherty died in La Crosse county on the nineteenth day of April, 1905, and that the plaintiff has been duly appointed administratrix of her estate.

“That the defendant, William Doherty, had in his possession at the time of her death the sum of eight thousand dollars, as plaintiff is informed and believes, the property of the said Mary Doherty.”

“That said William Doherty refuses to pay or deliver the same to this plaintiff, although often requested so to do, but retains same in his possession, and, as plaintiff is informed and believes, has converted the same to his own use, wherefore she asks judgment against this defendant for the sum of eight thousand dollars and interest thereon from June 1, 1905, besides the costs of this action.”

401 The defendant answered by a general denial, except as to the sum of four hundred and sixty dollars, two hundred and sixty dollars of which he claims to have paid out for debts and for the funeral expenses of Mary Doherty. On the trial there was evidence tending to show that the deceased was in her eighty-eighth year at the time of her death; that for some time previous to her death she had lived with the defendant; that when she came to live with the defendant she had two bankbooks showing deposits of three thousand six hundred and seven dollars and forty cents; that the defendant drew these deposits from the bank on four checks.

signed by the deceased by her mark; that she had an income of twenty-five dollars per month; that she had deeded her house and farm to the defendant seven years before her death; that she left six children surviving her; and that the four hundred and sixty dollars described in the answer was found by the defendant in her trunk after her death. Questions were asked of the defendant tending to prove the character of his relationship to his mother, and that he claimed as owner all of the property his mother had owned. The court excluded evidence offered by the plaintiff tending to show: "That for three years previous to her . . . death she [Mary Doherty] was absolutely senile and incapable of doing any business whatever; that she constantly mistook this defendant, William Doherty, for her deceased husband; that she called him husband, and sent for him and talked with him as her husband, who had been dead for twenty years; that she did not know the difference between her own children and her husband; that she did not know her own children and did not know their names; that she did not know that her son John was dead; and that she was an absolute imbecile and incompetent to do any kind of business."

The court also refused to allow evidence offered tending to show: "That she lived alone; that no one visited her except this son William and his children, who visited her daily; and that . . . when [plaintiff, who is a daughter of the deceased] visited her mother [she] was not known by her mother the last three years of her life."

402 On a motion that the action be dismissed because the evidence did not sustain any cause of action, the court in substance stated that under the facts adduced and the proposed offer the proper action to bring was an equitable one. This is an appeal from the judgment granting a nonsuit.

The complaint charges the defendant with having converted a sum of money, the property of Mary Doherty, to his own use. Defendant admits having received four hundred and sixty dollars of her money after her decease, states that he had disbursed all but two hundred dollars of this amount in payment of her debts, funeral expenses, and for the erection of a suitable monument for her, and he denies that at the time of her death or thereafter he had in his possession any of her property except this sum. There is evidence tending to show that the deceased in her lifetime had deposits of about three thousand six hundred dollars in a bank, and that the defendant drew these deposits from the bank on four checks signed by the deceased. Upon the trial plaintiff sought to

introduce evidence of decedent's mental capacity at the time of the execution and delivery of these checks. An objection to the reception of this evidence was interposed by respondent, and plaintiff then made an offer to show by evidence that the decedent at the time the checks were given was so weak mentally as to wholly incapacitate her from transacting any business, and that the respondent had obtained these checks and the proceeds thereof fraudulently and had converted them to his own use.

It is asserted that the complaint is one charging conversion of the money after the death of Mary Doherty. It alleges that the defendant had decedent's money in his possession at the time of her death, and that he retains the same in his possession and has converted it to his own use. These facts sufficiently allege a taking and conversion of the money before ⁴⁰³ her death. The allegation that, although often requested to so do, he refuses to pay the same to plaintiff as administratrix of decedent's estate, does not limit the right to recover for a conversion after Mary Doherty's death. If the evidence adduced should establish that the defendant actually converted decedent's money in her lifetime, then the allegation of his refusal to pay it to the administratrix becomes immaterial, and the cause of action may be sustained without proof of these facts, which bear only on the question of the time of the conversion.

Since the court treated the plaintiff's offer to prove that decedent was mentally incapacitated to transact business at the time defendant secured the checks and the proceeds thereof as the basis for a ruling as to the admissibility of such evidence in the case, we must, for the purposes of this appeal, treat the case as though such facts were in evidence and had been disregarded by the court in determining the rights of the parties. To so disregard them would be erroneous, and would result in injustice to the plaintiff, for the reason that if defendant wrongfully secured the checks and the proceeds thereof, this would operate as a fraud upon decedent and would not vest in the defendant any right to the checks or the proceeds. Under such circumstances he would acquire no right to or interest in the money so obtained by his wrongful acts. The payment of the money by the bank, because of his wrongful conduct, operated to vest in the decedent all the rights and whatever interest the bank transferred in the transaction, and left him without any right to it, and rendered him liable to her for his wrongful conversion of it. His wrongful participation in the transaction of obtaining

the money from the bank placed him in the same relation to decedent's rights in it as if he had obtained it directly from her. The argument is made that the presentation of the check at the bank amounted to a satisfaction of decedent's claim against the bank through the payment of the money, ⁴⁰⁴ and, since the check was the medium through which this was accomplished, the check must be held to be an actual transfer by decedent to the defendant of the right to the money paid on it. This would be a valid claim if the transaction were not infected by defendant's wrong. True, in a bona fide transaction the giving of a check is presumptive evidence of the payment of a debt (*Stimson v. Vroman*, 99 N. Y. 74, 1 N. E. 147; *Bernard v. Fee's Estate*, 129 Mich. 429, 88 N. W. 1052; 1 *Greenleaf on Evidence*, sec. 38), but this presumption is not conclusive and may be wholly overcome by other evidence. If the evidence should establish that the defendant fraudulently secured the checks, production of them, as between himself and the decedent, can avail him nothing, because they would operate to vest no right or interest to the proceeds of them in him.

The fact that the property alleged to have been converted is money in no way affects the situation, since it will be presumed, if his wrongful conduct be established, that he knew it was decedent's money, and he will be held to the same liability as if he had wrongfully converted some other of her personal property: *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532; *Alexander & Co. v. Goldstein*, 13 Pa. Super. Ct. 518; *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N. W. 319; *Cook v. Monroe*, 45 Neb. 349, 63 N. W. 800; *Donohue v. Henry*, 4 E. D. Smith, 162; *Hinckley v. Lewis*, 45 Ill. 327. In an action for conversion the rule is well established that in an illegal taking or wrongful assuming of a right to personal property the very manner of the taking or the holding of the property constitutes a conversion, and no further step is necessary to perfect the right of action, since the right of action is complete. This rule is well established and recognized in the decisions of this court: *School Dist. v. Zink*, 25 Wis. 636; *Wheeler v. Pereles*, 40 Wis. 424; *First Nat. Bank v. Kickbusch*, 78 Wis. 218, 47 N. W. 267; *Oleson v. Merrill*, 20 Wis. 462, 91 Am. Dec. 428. In the last case cited it is observed that, in an action of trover or for the recovery of property, an ⁴⁰⁵ averment of its wrongful taking is sufficient without demand, if sustained by proof of its original wrongful taking or subsequent wrongful appropriation. In this case defendant denies all possession or appropriation of any

of decedent's money. Under such circumstances a demand for it is not necessary to perfect the cause of action, if it be shown that he obtained it through his wrongful conduct.

It is urged that the complaint is insufficient in not alleging the facts upon which the conversion is predicated. The complaint is in the usual form of conversion, without stating the particulars of the claim. This form of pleading is deemed sufficient under the rules of the Code: *McKinnon v. Vollmar*, 75 Wis. 82, 17 Am. St. Rep. 178, 43 N. W. 800, 6 L. R. A. 121; *Kammermeyer v. Hilz*, 107 Wis. 101, 82 N. W. 689; *Thomson v. Elton*, 109 Wis. 589, 85 N. W. 425.

The circuit court erred in refusing to receive the evidence offered by the plaintiff.

By the COURT. Judgment reversed, and the cause remanded for a new trial.

Conversion of Personal Property sufficient to sustain an action of trover is discussed in the note to *Bolling v. Kirby*, 24 Am. St. Rep. 795.

CHASE v. WOODRUFF.

[133 Wis. 555, 113 N. W. 973.]

SUCCESSION.—The Uncontroverted Testimony of a Husband that He is the Sole Heir of his wife, in an action of ejectment wherein he is plaintiff, proves his succession to whatever title she had. He is not called upon to show negatively that she did not die testate. (p. 974.)

DEEDS—Presumption of Delivery.—The Possession of a Deed by a person at the time of his death raises a presumption that it was delivered, to take effect according to its import, at the time of its execution; and if it appears that the instrument was not delivered until some years after its date, this raises a presumption that it was intended to take effect when so delivered. (pp. 974, 975.)

DEEDS—Evidence of Delivery.—The Declaration of the Grantor in a deed that he delivered it to the grantee for safekeeping is self-serving, and not provable to defeat the deed which years before had passed into the grantee's possession. (p. 975.)

APPEAL—Reversal Because of Wrong Reason.—The ordinary rule that the conclusion of the trial court on questions of fact should not be overruled unless clearly wrong does not apply where the conclusion was reached by applying a wrong rule of law. (p. 975.)

DEEDS—Rebuttal of Presumption of Delivery from Possession. Evidence to rebut the presumption that a deed in the possession of the grantee at the time of her death was delivered to take effect according to its tenor should be pretty clear and satisfactory, but something quite short of establishing absolute nondelivery beyond all reasonable controversy is sufficient to raise a jury question. (p. 976.)

Dithmar & Carow and Grotophorst, Evans & Thomas, for the appellant.

H. E. Fitch and Goggins & Braseau, for the respondent.

⁵⁵⁶ MARSHALL, J. Action in ejectment, the complaint being in the usual form. The answer put in issue plaintiff's claim of title and pleaded title and right of possession in the defendants.

Both parties claimed title under the same grantor. The evidence was to this effect: March 4, 1868, Julius R. Woodruff made a deed in due form and naming one thousand dollars as the consideration, purporting to convey lots 3 and 4, block 25, of the village of Baraboo, Sauk county, Wisconsin, to his daughter Jennie, a child by his second wife, then about twelve years old, and one hundred and twenty acres of land to his sons by his first wife, Frank R. and Charles T., who were then of age or nearly so. It contained this language: "The intention is to give my sons equally the above-described farming lands, and to Sarah Jennie the house and lots in the village of Baraboo." The lot in question was vacant and so continued till Frank took possession thereof in 1905. The deed was in possession of Jennie for many years prior to her death, which occurred April 2, 1902. She left plaintiff, her husband, as her only heir at law, who obtained the deed as part of her effects and placed it on record March 8, 1906. When it was made the grantor was a widower, but he married for the third time a ⁵⁵⁷ few days thereafter. The third wife was living when this action was commenced. He died about two months before the deed was recorded. On April 19, 1905, he made a second deed of the property in question to Frank, who knew the first deed was outstanding. His deed was recorded May 5, 1905. Immediately after Frank got the deed he took possession of the lot, built a dwelling-house thereon, and occupied the same. He enjoyed the use of the premises continuously for over a year. After Jennie died Frank inquired of plaintiff as to the whereabouts of the first deed, and was told by the latter that he did not know where it was. Thereafter Frank and his father kept track of whether the old deed made its appearance of record.

There was no evidence that the father left a will or that the property in question consisted of a homestead or a part of one, nor direct evidence as to when the first deed was delivered to Jennie. Frank testified, under objection, that he saw it in his father's possession about 1874. He was called as a witness for plaintiff and allowed to testify that his father

told him the deed was delivered to Jennie. Under objection, on cross-examination, he was allowed to testify to a declaration by the father, made at the time of the conversation testified to in chief, that the deed was given to Jennie for safekeeping, because he did not wish to have it lie around the house. That evidence in deciding the case finally was held incompetent. Plaintiff did not endeavor to obtain possession of the lot or make any claim thereto till after Frank made his improvements. There was no evidence showing that Jennie made any claim to the property during her lifetime, or that she or her husband ever paid any taxes thereon, and no evidence as to whether the deed was relied on by Frank and his brother for title to the farm lands, nor any evidence that the deed was ever recognized by anyone as affecting the title to any of the property described therein till it was placed on record as aforesaid. There was evidence ⁵⁵⁸ undisputed that the use of the property as improved was worth from fifteen dollars to sixteen dollars per month, and unimproved worth, possibly, twenty dollars per year.

At the close of the evidence both sides moved for a directed verdict. The defendant's motion was denied. The plaintiff's motion was granted upon the ground that there was no evidence to efficiently rebut the prima facie effect of possession of the deed by plaintiff's wife for many years prior to her death, and that such prima facie effect could only be efficiently rebutted by evidence establishing nondelivery of the instrument for the purpose of having it take effect, beyond any reasonable controversy. Judgment was rendered accordingly, the court fixing the damages for the unlawful withholding of the property at twenty-eight dollars.

Respondent established title to the property in himself, if the deed to his wife was delivered to her as a conveyance according to its import. The uncontroverted evidence that he was her sole heir at law proved his succession to whatever title she had. He was not called upon to show negatively that she did not die testate. As the primary right of succession is by the law of inheritance, plaintiff was entitled to rest on the legal presumption of intestacy until that was rebutted by evidence: *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897.

It is conceded that if the deed was not delivered till after the grantor married and the property in question was a homestead, or part of one, the instrument was void, but there was no evidence that such was the character of the property.

⁵⁵⁹ It is conceded, as the fact is, that possession of the deed by respondent's wife at the time of her death, in the absence

of any other evidence, raises a presumption that it was delivered to her to take effect according to its import at the time of its execution, and that the fact, if it be a fact, that the instrument was not delivered till some years after its date raises a presumption that it was intended to take effect when so delivered. So the cause turns on whether the prima facie proof of title made by the circumstance that the deed was in fact in possession of respondent's wife, at least many years prior to her death, was rebutted so as to raise a jury question respecting the character of such possession.

The court in deciding the motion to direct a verdict rightly rejected the evidence as to what Julius R. Woodruff said to Frank about having delivered the deed to Jennie for safe-keeping. That declaration, if made, was of a self-serving character, and so was clearly not provable to defeat the deed which years before had passed into Jennie's possession. The rule on that subject is elementary: *Welch v. Sugar Creek*, 28 Wis. 618; *Jilsun v. Stebbins*, 41 Wis. 235; *Fay v. Rankin*, 47 Wis. 400, 2 N. W. 562.

With the evidence above referred to out of the record there is only left circumstantial proof impeaching the prima facie case made by the undisputed fact of Jennie's possession of the deed. Whether such proof was sufficient to raise a jury question must be decided as an original proposition. The ordinary rule that the conclusion of the trial court should not be overruled unless it appears to have been clearly wrong on the question of fact does not apply because the court's conclusion was reached by applying a wrong rule of law.

As indicated by the statement, the court held that the prima facie case referred to should prevail unless the contrary was established beyond all reasonable controversy. *Kercheval v. Doty*, 31 Wis. 476, was relied on by the learned court. Counsel for respondent, now relying thereon,⁵⁶⁰ add to the trial court's citation, *Baumann v. Lupinski*, 108 Wis. 451, 84 N. W. 836, and *Linde v. Gudden*, 109 Wis. 326, 85 N. W. 323. They are all cases where it was sought to defeat a deed upon the ground of fraud, and have no application, as it seems, to a case of this sort where no fraud is claimed, and the only question is whether a deed found in possession of a grantee therein named, which was unquestionably placed in her possession, was delivered to take effect according to its tenor. Doubtless the evidence to efficiently rebut the prima facie effect of such possession should be pretty clear and satisfactory, but it need only be sufficient to so far impair the effect of such possession that it cannot stand, as a

matter of law, as establishing with reasonable certainty full delivery of the instrument. Something quite short of establishing absolute nondelivery beyond all reasonable controversy is sufficient to raise a jury question.

As indicated in the statement, there are these circumstances throwing some doubt upon whether the deed was delivered to Jennie so as to place the same beyond the control of the grantor and with the purpose of vesting the title to the property therein described in the grantees. No claim was made under the deed by respondent's wife during her lifetime, covering a period subsequent to the making of the deed of thirty-four years. It is, at least, quite doubtful whether she had possession of the instrument till some twenty years after it was made. It was made when she was a child, and the indications are that the property was treated by the grantor up to the time of his death regardless of its existence. His failure to recall the instrument, if it were subject to recall, after his daughter died is explained by the circumstance that respondent disclaimed having any knowledge of the whereabouts thereof. The father's conduct in treating the property as he did, and, after waiting some three years subsequent to his daughter's death for the production of the old deed with an assertion of title thereunder, conveying the ⁵⁶¹ land to Frank, and respondent's failure to produce the paper and denial of knowledge of its whereabouts till after Frank had taken possession of the property and improved the same, are significant. All of these circumstances and others that might be mentioned are not entirely consistent with the theory that the deed was delivered to Jennie to take effect according to its import; that the father absolutely parted with control of it. We are constrained to hold that the question involved, under proper instructions, should have been submitted to the jury, and that the learned court below would so have held had the wrong rule of law before mentioned not been applied to the case.

By the COURT. The judgment is reversed, and the cause remanded for a new trial.

What Constitutes a Delivery of a Deed is the subject of a note to Brown v. Westerfield, 53 Am. St. Rep. 537. The possession of a deed by the grantee is prima facie evidence of its delivery: Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151; Furenes v. Eide, 109 Iowa, 511, 77 Am. St. Rep. 545. This presumption is said to be especially strong in the case of a voluntary conveyance: Shields v. Bush, 189 Ill. 534, 82 Am. St. Rep. 474. A strong presumption of the delivery of a deed arises when it is given to one of the grantees and is retained by him for two years and until his death: Hild v. Hild, 129 Iowa, 649, 113 Am. St. Rep. 500.

ILLINOIS STEEL COMPANY v. SCHROEDER.

[133 Wis. 561, 113 N. W. 51.]

EQUITY—Jurisdiction to Prevent Multiplicity of Suits.—That a plaintiff has severally sued many defendants to recover separate tracts of land, that they have combined or conspired to maintain their several defenses, that he has incurred large expense and long delay will arise in the litigation, that one of the actions has already been determined in his favor, that each defendant claims title to his tract through an entry and subsequent adverse possession by M., that he tacks his adverse possession to M.'s and has no title without it, that the determination of M.'s adverse possession will settle the title of all of the defendants—does not confer jurisdiction on a court of equity to determine in one suit the rights of all the parties, for there is not a sufficient community of interest in the subject matter. (p. 983.)

EQUITY.—A Multiplicity of Suits does not Mean a Multitude of suits. The term does not apply merely because each of several parties jointly and severally liable may be independently sued; it applies where one party may be sued several times in relation to the same subject matter in its entirety, or in respect to some element or elements thereof. (p. 985.)

Walter D. Corrigan, for the appellant.

Fiebing & Killilea, Frank M. Hoyt and William F. Adams, for the respondents.

562 KERWIN, J. This action was brought in equity. All the defendants, except Valentine Zelin and wife, demurred on the following grounds: (1) That there is another action pending between the same parties for the same cause; (2) that several causes of action have been improperly united; (3) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained and plaintiff appealed.

The complaint is very voluminous, the material allegations **563** of which, so far as necessary to consider upon this appeal, are in effect that the plaintiff is the owner of certain land situate on what is known as Jones island; that each defendant is in possession of a separate tract of said land; that plaintiff has the record title and is the owner in fee simple absolute; that such lands are bounded on the east by Lake Michigan, on the north by the outlet of Milwaukee river, on the west by the combined waters of the Milwaukee, Menominee, and Kinnickinnic rivers, and on the south by other lands owned and possessed by plaintiff; that there is no means of access to said land except by boat or over other lands of plaintiff, over which no right of passage exists; that said lands are worth forty thousand dollars and comprise the greater

part of Jones island; that each defendant claims to own the land occupied by him under title acquired by adverse possession; that all defendants' titles were acquired starting with one Muza under an alleged entry by Muza in 1872, which adverse possession he held until after August 1, 1886; that plaintiff and its predecessors have always been in possession of Jones island, except as to parts separately intruded into and held by defendants and by others who have attorned to the plaintiff, and others whose alleged claim or source of claim and time and length of possession is other and different than the alleged claim or source of claim and time and length of possession of the defendants; that plaintiff and its predecessors have at all times paid taxes on said premises; that the title of plaintiff and its predecessors has been a matter of public record; that after August 1, 1886, the defendants, and before that time other persons separately and at different times, "squatted" upon or intruded into the possession of separate, specific, distinct, and in most instances disconnected and noncontiguous small portions of the land in question without the consent of the owners and without right; that plaintiff and its predecessors numbered the certain tracts held by defendants, and demanded that they take leases therefor; ⁵⁶⁴ that some of the defendants recognized plaintiff's title; that plaintiff did not know until March 27, 1900, that any attempt was to be made by defendants to claim title by adverse possession, and that no such idea was conceived until about 1899; that defendants and others occupying the tracts of land in question refused to recognize plaintiff's title until they were satisfied by proceeding in court that the plaintiff was the owner and holder of the paper title to said lands; that in February, 1896, plaintiff instituted separate suits against persons occupying said land for the purpose of satisfying defendants that its title was good; that in some of said cases judgments have been rendered in favor of the plaintiff; that in March, 1896, plaintiff commenced an ejectment action against one John Budzisz and August Budzisz to recover a specific piece of said land, and in said action the defendants based their claim upon the entry of Jacob Muza, October, 1872, and adverse possession by him; that the questions of fact and law are the same in said case as the claims of the defendants in the instant case; that said case was appealed to the supreme court, and is reported in 115 Wis. 68, 90 N. W. 1019; that in June, 1897, plaintiff commenced ejectment actions against several of the defendants to recover specific portions of said land; that in some of these actions judg-

ment was rendered in favor of the plaintiff; that in July, 1897, other like actions were commenced; that in September, 1897, and thereafter, other like actions were commenced, and in several of said actions final judgment in favor of the plaintiff has been rendered; that in none of the cases tried has the title to the land in controversy been finally adjudicated to be in the defendant or defendants in such actions; that the trial of said actions consumed a great amount of time; that eighty-four suits against the defendants are pending and undetermined; that a combination and conspiracy has been entered into between the defendants to raise money to unlawfully maintain and conduct the defenses of ⁵⁶⁵ each of the defendants and to assist in said defenses in unlawful and corrupt ways, and by fraudulent and perjured defenses and by unlawful means to accomplish the defeat of the plaintiff and to contribute a fund for such purpose, and such money is being used for such purpose, and that such defenses could not be maintained without it; that until April, 1899, the defense of the statute of limitation had not been set up, and that the defendants entered into a fraudulent scheme to and did set up such statute as a defense, and that the allegations respecting adverse possession are false; that none of defendants have title by adverse possession or otherwise; that the defendants intend to each claim through one Jacob Muza, and to maintain that he took possession of Jones island October, 1872, under claim of title exclusive of any other right and continued to hold adversely; that Jacob Muza did not in fact take possession until sometime in 1878 or 1879, and, if he did then or at any time, his possession embraced none of the land in controversy between the plaintiff and any of the defendants; that neither Muza nor he and his privies combined had adverse possession for twenty years prior to the commencement of the ejectment suits in question nor for twenty years prior to August 1, 1896; that each separate tract claimed by each defendant was separately intruded into and separately occupied; that each of the intrusions was commenced at distinct and different times from the intrusions and occupations of other respective defendants or their predecessors, and all of them were since August 1, 1886; that the defendants and each of them claims title through Jacob Muza by verbal transfers since August 1, 1886, or through some persons who succeeded to the possession or title by verbal transfer from Muza, or by mesne verbal transfers of title and possession thereof, the first of which was by Muza sometime since August 1, 1886, and claim that they respectively

tack their possession and occupation of said particular tract on the alleged possession of Muza and his successors and ⁵⁶⁶ privies; that none of the defendants hold under color of title; that each of the defendants claims only by virtue of tacking their respective possessions upon the alleged adverse possession of Jacob Muza or his successors; that each of the defendants' claims is founded wholly upon the contention that Jacob Muza held and maintained open, notorious and continued possession; that Jacob Muza went upon Jones island in 1872, but did not continue upon it or occupy the whole of it, and abandoned the island in 1873, but returned sometime in 1877 or 1878; that in 1878 or 1879 he took possession of a small part of the island.

The complaint further alleges that the defendants are irresponsible and insolvent, and that great expense has been incurred in the prosecution of the various ejectment suits and will be incurred in the future in consequence of the multiplicity of suits, and that plaintiff has sustained irreparable injury in consequence of carrying on the various ejectment suits pending at the time of the commencement of this action, being in number upward of eighty cases, and that the defendants Valentine Zelin and Mertzy Zelin make claim to some or all of the specific tracts set out in the complaint. The complaint also sets up specifically the tract claimed as intruded into by each defendant and held by him, and prays that the plaintiff be adjudged the owner of each tract and entitled to immediate possession; that defendants be perpetually enjoined from contributing to any fund to assist in the alleged defenses; that the defendants account for rents, profits, and damages; that the plaintiff's claim of title be established against the claims of Valentine Zelin and Mertzy Zelin.

⁵⁶⁷ The main contention of appellant is that equity will take jurisdiction upon the facts stated in the complaint on the ground of interminable litigation, occasioned by multiplicity of suits, fraud, combination and conspiracy between the several defendants in maintaining their defenses, and irreparable loss to the plaintiff. The jurisdiction of courts of equity in a proper case to prevent multiplicity of suits is well established, but the doctrine is not always easy of application. The multiplicity of suits sought to be prevented sometimes constitutes the inadequacy of legal remedies, and calls forth the equitable jurisdiction. When, however, we attempt to define the exact limits of this head of equity jurisdiction, we find much difficulty in prescribing the exact limits of the jurisdiction. This becomes apparent from an ex-

amination of the numerous authorities cited in the able and exhaustive brief presented by the appellant. It is manifest without discussion that the alleged conspiracy and combination on the part of the defendants to maintain their several defenses, or the great expense and delay alone, would not be sufficient to give a court of equity jurisdiction. The right of the plaintiff to proceed in equity, therefore, upon the facts pleaded must be sustained, if at all, on the ground of preventing a multiplicity of suits. This jurisdiction has been classified under four heads: 1. Where from the nature of the wrong and the rules of legal procedure the same party, in order to obtain complete relief, is obliged to bring a number of actions all growing out of one wrongful act and involving similar questions of fact and law. 2. Where a dispute is between two individuals, and one institutes or is about to institute a number of actions against the other, all depending upon the same issues of fact and law. 3. Where a number of persons have separate claims against the same party, arising from some common cause governed by the same legal rule and ⁵⁶⁸ involving similar facts, and the whole matter can be settled in a single suit. 4. Where the same party has or claims to have a common right against several persons: 1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 245. Under these heads the jurisdiction of equity has been invoked to prevent multiplicity of suits. Early instances of the exercise of this jurisdiction appear by what were known as bills of peace and bills to quiet title: 1 Pomeroy's Equity Jurisprudence, 3d ed., secs. 246-248. The appellant contends that his complaint is the "outgrowth from many of the principles which give creation to the bill of peace," "a modern bill of peace." But it is not important under our practice by what name we call the complaint. The question is, Are the facts stated sufficient to entitle the plaintiff to relief in equity? The gist of plaintiff's claim for equitable interference is substantially that, upon the allegations of the complaint, each of the several defendants claims title to his particular tract through entry and adverse possession of one Jacob Muza in 1872, and that each defendant tacks his alleged adverse possession to that of Muza, and without such adverse possession of Muza he has no title, and that the determination of Jacob Muza's adverse possession settles the title and right of all defendants. This presents sharply the main controversy in the case.

As appears from the record before us, the present action was commenced in July, 1906. At that time eighty-four of

the ejectment actions commenced by plaintiff against defendants between February, 1896, and September, 1897, were pending, and the main purpose of the present action is to sweep these ejectment suits into it and determine the rights of all the defendants in one equitable action, on the ground that there is such a community of interest between the plaintiff and each of the defendants, centering in the point in issue, as to warrant a court of equity in taking jurisdiction, and especially since one of the ejectment actions commenced has been determined in favor of the plaintiff by the supreme ⁵⁶⁹ court (115 Wis. 68, 90 N. W. 1019) and others by the trial courts. Reliance is placed upon certain statements in Pomeroy's Equity Jurisprudence and a large number of cases are cited by appellant in support of the contention. While certain general language used by Mr. Pomeroy might be held, when considered in the abstract, to support in some degree the appellant's contention, when construed with other parts of the learned author's work it will be found to except cases like the one at bar. It is true that in discussing the third and fourth classifications heretofore referred to, Professor Pomeroy (1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 268) uses the following very broad, general language, quoted in appellant's brief: "From a careful comparison of the actual decisions, . . . and which are quoted under the foregoing paragraphs, the following propositions are submitted as established by principle and by authority, and as constituting settled rules concerning this branch of the equitable jurisdiction. In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically 'bills of peace,' in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common right, a community of interest in the subject matter of the controversy, or a common title from which all their separate claims and all the questions at issue arise. It is not enough that, the claims of each individual being separate and distinct, there is a community of interest merely in the question of law or of fact involved or in the kind and form of remedy demanded and obtained by or against each individual."

It will be seen that in this quotation from Pomeroy, giving it its broadest scope, there must be a community of interest

in the subject matter of the controversy or a common title from which all the separate claims and all the questions at issue arise. Even this broad language does not bring the plaintiff's case within it. Besides, the language of the first ⁵⁷⁰ part of the quotation is limited by other parts of the work, where it is said that it is not enough that the claims of each be separate and distinct—there must also be a community of interest in the questions of law and fact. And in his last edition (section 251½, third edition) Mr. Pomeroy further emphasizes this exception to the general rule stated. Moreover, the broad rule laid down by Pomeroy is criticised in *Turner v. Mobile*, 135 Ala. 73, 33 South. 132, and *Tribette v. Illinois Cent. R. Co.*, 70 Miss. 182, 35 Am. St. Rep. 642, 12 South. 32, 19 L. R. A. 660. But the case at bar may be brought within the exceptions to the general rule recognized by Mr. Pomeroy. Here there is no such community of interest in the subject matter as is recognized by Pomeroy or a common title from which all the separate claims and all the questions at issue arise. Each defendant claims a separate and distinct tract of land from all others, and the subject matter of his controversy is separate and distinct from the subject matter of every other defendant. Nor does his right to recover depend upon a common title, from which all the questions at issue arise. Even assuming that each defendant claims through Muza, he is obliged to establish his right and title through himself and intervening grantors to Muza, and tack his adverse possession, and the fact that one or several defendants failed to make title by adverse possession to a separate and distinct tract would not necessarily establish that others could not make title as to other separate tracts, even though it be admitted Muza's possession was a common item in the proof. The questions of law and fact and the community of interest are not the same so as to bring the case even within the broad principle laid down by Pomeroy in his statement of a general rule. Perhaps the broadest language of Pomeroy, quoted from at length in appellant's brief, will be found in 1 Pomeroy's *Equity Jurisprudence*, section 269. But even this language, in the light of other parts of the work, must be regarded as stating a rule not applicable to the case before us, and, as it ⁵⁷¹ was intended by the author, must be read in the light of adjudicated cases. The effect to be given this language, in an effort to state a general rule applicable to certain cases, is explained in a note to section 251½ in the last edition of Mr. Pomeroy's valuable work. He there reviews the case of *Turner v. Mo-*

bile, 135 Ala. 73, 33 South. 132, and shows that the rule is not applicable to ejectment actions where each action is based upon a separate tort for a distinct tract of land, since the determination of one of such actions does not necessarily establish or defeat the right of recovery in the others. It is true that it is not easy to reconcile all the judicial dicta upon the subject. Many cases may be found, some of which are cited by counsel for appellant, which tend to support the general proposition contended for by appellant. But a careful examination of them will show that they are quite dissimilar in their facts to the case before us. It is sufficient to say that we have found no case where equity took jurisdiction upon a state of facts similar to those stated in the complaint here.

We have examined the numerous authorities cited by appellant's counsel, but time will not permit a discussion of them. Many of them are cases coming within the principles of bills of peace, and some fall under distinct heads of equity jurisdiction, other than to avoid a multiplicity of suits. Some of these cases are reviewed in a very able opinion in *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. Rep. 244, 47 L. ed. 380, also relied upon by appellant. This was an action by a receiver against several stockholders, where it was claimed that the cause of action against each stockholder was the same. The court, quoting and approving the language of another court said (188 U. S. 79, 23 Sup. Ct. Rep. 253, 47 L. ed. 380): "The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up ⁵⁷² his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality, it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons."

The subject matter of each ejectment suit is not the evidence of title to the land embraced in the suit, but is entirely separate and distinct from every other ejectment action respecting other separate and distinct tracts of land. The complaint in the instant action shows separate and distinct subject matters, and the subject matter of each ejectment suit is not the evidence, or any item of evidence, by which the de-

defendant attempts to prove his title, but the particular tract of land claimed and the distinct tort by which it is claimed he wrongfully withholds it, together with the alleged title of the plaintiff. The subject matter of each ejectment action must be determined from the pleadings in each action. Nor are the issues the same, as appears from the complaint. It avers that each defendant claims a separate and distinct tract, that it is claimed Muza took possession in 1872, and that each defendant claims under Muza or some grantee or successor of Muza, presumably of different parcels and at different times after 1872; so the extent of Muza's holding, as well as the extent of his entry, is at issue in each ejectment action. Now, since each defendant claims a separate and distinct tract through Muza or some grantee or successor of Muza, it is manifest that the claim of adverse possession and continuity of holding of each defendant as to his separate tract under the allegations of the complaint is separate and distinct, and the establishment of title or want of title in one defendant by adverse possession does not necessarily settle the question of other defendants' rights. The issues, therefore, are not the same, even if it is admitted that one item in the proof be the same in all the actions, to say nothing of ⁵⁷³ the issues to be tried in each action in case plaintiff prevails respecting improvements made in good faith while each defendant held adversely. The eighty-four ejectment actions are a bundle of separate suits: 1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 251½, and note; Hale v. Allison, 188 U. S. 56, 23 Sup. Ct. Rep. 244, 47 L. ed. 380. A multiplicity of suits does not mean a multitude of suits, as said in Johnson v. Swanke, 128 Wis. 68, 107 N. W. 481, 5 L. R. A., N. S., 1048: "There is nothing alleged which can bring the case under that head of equity relating to the prevention of a multiplicity of suits. That does not apply merely because each of several parties jointly and severally liable may be independently sued. It applies where one party may be sued several times in relation to the same subject matter in its entirety, or in respect to some element or elements thereof."

The statutes of this state secure to a person in possession of land two jury trials. It does not appear from the complaint that two trials were ever had in any case against any party claiming to hold under Muza, not even in the Budzisz case, referred to and relied upon by appellant: 115 Wis. 68, 90 N. W. 1019. In the Budzisz case the defendant recovered below, and judgment was ordered by this court for plaintiff on the ground that the evidence conclusively established

that defendants made no title to the tract or part of the island claimed by them. This, however, does not establish that the defendants might not on other evidence recover upon a new trial. Much less is it conclusive upon the rights of other defendants claiming other separate and distinct tracts of the island. Nor do we see why the defendants should be precluded from making title to their respective tracts in some other way than through Muza, by the mere allegations of the complaint to the effect that they claim through him in an action brought for the purpose of sweeping them into equity, and thus depriving each of his right not only to one but to two jury trials. Upon any theory of the facts set up in the ⁵⁷⁴ complaint it is considered that equity ought not to take jurisdiction: *Barnes v. Beloit*, 19 Wis. 93; *Brown v. Cohn*, 88 Wis. 627, 60 N. W. 826; *Johnson v. Swanke*, 128 Wis. 68, 107 N. W. 481, 5 L. R. A., N. S., 1048; *Turner v. Mobile*, 135 Ala. 73, 33 South. 132; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. Rep. 276, 34 L. ed. 873; *Phelps v. Harris*, 51 Miss. 789; *Rogers v. Rogers*, 17 R. I. 623, 24 Atl. 46; *Hughes v. Hannah*, 39 Fla. 365, 22 South. 613; *Thomas v. Council Bluffs C. Co.*, 92 Fed. 422, 34 C. C. A. 428; *Merrill v. Lake*, 16 Ohio, 373, 47 Am. Dec. 377; 1 *Pomeroy's Equity Jurisprudence*, 3d ed., sec. 177.

As has often been said by this and other courts, it is difficult to lay down any definite rule as to what special circumstances will enable the injured party to invoke the jurisdiction of a court of equity. Each case must rest in a large degree upon its own particular facts. As said in *Johnson v. Swanke*, 128 Wis. 68, 107 N. W. 481, 5 L. R. A., N. S., 1048: "Manifestly, whether a case does or does not satisfy the test as to whether equity jurisdiction should be afforded is not always easy to determine. It must often be a matter of judgment, and necessarily so, where the precedents are not sufficiently clear to furnish the court a certain guide. In the latter situation the decision of the trial court should not be disturbed unless manifestly wrong. Where no certain guide exists as to any particular situation, by way of the general rule illustrated by precedents, as to whether it should be dealt with by equity jurisdiction, the matter, in a large degree, must be solved by the exercise of judicial discretion."

The court below refused to exercise its equitable jurisdiction and sustained the demurrer, and we cannot say that in the light of the authorities its judgment should be disturbed.

By the COURT. The order appealed from is affirmed.

Marshall, J., Dissenting. "It seems best to write briefly in this case, stating, without extended discussion or citation of authorities, what, to my mind, are principles firmly intrenched in the jurisprudence of this state and govern this case; principles which are important and have been worked out so carefully and stated so considerably and repeatedly that it would be a misfortune to have any of them overlooked or given such little significance as to create doubt in a field where so much has been done to render the law easily understood.

"In determining whether a complaint states a good cause of action in equity, the paramount inquiry is, Does it, on the whole, come under one of the established heads of equity jurisprudence? The prevention of a multiplicity of suits is one of such heads.

"When the paramount inquiry mentioned shall have been solved in favor of a pleading, the next important inquiry is whether the pleader has been successful in his efforts to state a cause of action under the head selected with sufficient clearness to warrant equity jurisdiction in dealing with the matter.

"The pleader in the case in hand unquestionably chose one of the recognized heads of equity jurisprudence as fitting the situation he desired to bring to the attention of the court. There were a very large number of pending suits and situations forming separate and sufficient grounds for judicial interference. The situation in that regard was one of the most distressing from the standpoint of the plaintiff and the judicial forum having to deal therewith that was ever presented for judicial consideration.

"Where it is desired to prevent a multiplicity of suits, the fact that many or all of them, if treated separately, would necessarily be legal actions, each involving the constitutional right of a separate trial by jury, is, of itself, not necessarily material, nor is the fact necessarily material that in many of the controversies there are issues not common to others, or that the parties interested in some of the issues as to some controversies are not interested in others, or that the controversy as between some parties in some or many respects is independent of the controversy as between others, so long as they all originated in one transaction or are connected with a single subject matter, either directly or through the questions involved.

"The mere fact that by taking the multitude of controversies into one suit a very complicated matter will be presented is not of itself a fatal objection if, notwithstanding such complexity, simplicity is produced as compared with a multitude of separate actions requiring separate trials, each requiring more or less of the ground traversed at great expense in time and money in one to be again traversed in each of the others with like expenditures. The crowning feature of equity jurisprudence is its competency to take hold of a multitude of matters involving parties however numerous and interests however diversified, so long as they all have a common source or are connected with a single subject matter, either directly or substantially, and treat all the issues of fact and law common to the many controversies, and those affecting them separately in an aggregation including the whole, and

pronounce the right of the matter as to each of the parties interested in a single decree.

"No common title as to one entire thing or community of rights in such thing, each party being interested in the one particular thing, title or right to be settled by litigation, is absolutely essential to an action to prevent a multiplicity of suits. It is sufficient if there are sufficient common points as to title, rights or questions of law or fact to warrant the court in the particular situation in opening its doors. The claims involved may be separate in time, and the relief required as to each may be different in kind, if there are so many common points of dispute that, under all the circumstances, in the judgment of the court, justice requires the situation to be dealt with as an entirety.

"Subject to the principle stated, whether a particular situation is one proper to be judicially handled in equity as an entirety is to be judged by its own particular facts unrestrained by any arbitrary or certain rules. The scope of the judicial view in reaching a conclusion should not be regarded as limited by precedent. The principle marks the boundaries. The precedents are to be regarded as guides but not as limitations. Where the given situation is clearly within the principles, but not within any precedent that can be found, the doors of equity should swing open and a new precedent be made, illustrating anew the crowning merit of its jurisprudence and its capacity to expand so as to deal with all new situations as they arise.

"When the case is laid under an established head of equity jurisprudence, as that to prevent a multiplicity of suits, and it is clear that such multiplicity exists, and there are numerous points of law or fact, or both, involved, or title, or rights, or subject matters rendering the numerous separate controversies parts of one large subject matter, regardless of whether several or all of the numerous matters would, separately treated, judicially form separate grounds for separate legal actions with constitutional incidents, a question of fact is presented as to whether a court of equity ought or ought not to deal with the situation entire.

"When a point is reached as above indicated, the primary tribunal has a pretty wide scope within which to exercise judgment, and its conclusion should not be disturbed on review unless it appears to be clearly wrong; so manifestly wrong as not to leave any substantial doubt on the question.

"The last foregoing rule does not apply where it is plain that the court reached its conclusion guided by mistaken notions as to the legal principles involved.

"Now, we will briefly apply the principles stated to the complaint before us.

"As before indicated, the complaint shows the existence of a very large number of controversies requiring judicial solution. The number is so large and the time required to try each by itself so great that, if separate trials be accorded, either there must be such delay in the final determination of all the litigation as to render the legal remedy

very inefficient as regards the plaintiff, or most or all other matters which have equal claims with the particular matter to be heard, and which of themselves require much, if not most, of the time of the court, must give way, to the prejudice and perhaps in many cases practical denial of justice. The expense of trying one or more subject matters separate from the rest would be very large, and would be necessarily repeated as to each such matter. In the aggregate, the expense would be many times more as to the plaintiff than it would be if the entire controversy could be settled in one action, and if so settled the expense as to each defendant would, in all probability, whether he prevailed or not, be very much less than in case of a separate trial in a separate action, whether he prevailed or not. Trials relating to the matters involved, of the same nature as each of those which would be required if the numerous matters were tried separately, have been had in the past, covering a period of many years, characterized by many appeals to this court without any material progress having been made, as appears, respecting the facts, toward a final determination of the entire litigation.

"The claim of the appellant primarily and in its general nature as to each defendant is the same. All of the adverse claims had a common origin—the alleged adverse entry and holding of the entire tract of land by Muza. The adverse claims have many important common points of law and fact. The claim of the plaintiff as to interruptions of the adverse holding by Muza, if such adverse holding ever existed, is common to most, if not all, of the defendants. The dominant issues characterized by the most serious difficulties, both as to the law and the facts, relate to the claimed adverse holding by Muza, and the litigation in that regard must necessarily be the same as to each, or nearly so, of the defendants.

"Taking the situation as above pictured, and the picture, we think, is inadequately rather than over drawn, did the trial court fail in the exercise of judgment? At this point we hesitate. Great respect should be entertained here for the decision of trial courts on matters of fact. It should stop, at least, very little, if any, short of the dignity given to decisions by juries. Where there was a mistake as to legal guidance, the matter must be treated here substantially as a court of original jurisdiction or sent back for retrial in the light of correct legal principles.

"While it is very difficult to see how the trial court reached the conclusion complained of, it seems there is reasonable doubt on the question; yet the case is so near the boundary line between reasonable doubt and absence of it as to cause hesitation. There is good ground for belief that the trial court reached its conclusion by mistake of law. That belief may well be acted upon, and probably ought to be. To our minds, assuming, as we may fairly do, that the prevailing party below contended there as to the law the same as here, it may well be that important legal principles were wholly overlooked or not adequately appreciated, and the decision complained of was the result.

In our judgment, a court of equity ought, on the facts stated, to open its doors and put its strong arms around the entire situation involving all the numerous separate minor controversies mentioned in the complaint, and settle the same in one trial and by one judgment.

"To that end it seems the order appealed from should be reversed and the cause remanded with proper directions.

"A few words seem to be advisable directed specially to the opinion of the court, to the end that if it be wrong the effect as regards future cases may be minimized.

"As I understand it, the discussion includes much that is not matter of decision. The conclusion upon which the final decision rests, I take it, is found in the concluding paragraphs, in which the rule of *Johnson v. Swanke*, 128 Wis. 68, 107 N. W. 481, 5 L. R. A., N. S., 1048, is adopted. The difficulty is that the question of whether the court below decided the matter guided by proper rules of law was overlooked. It is well, as it seems, it is held that upon the facts it was for the trial court to determine by the exercise of judgment whether equity jurisdiction should be exercised or not.

"The reference to the language in *Johnson v. Swanke*, 128 Wis. 68, 107 N. W. 481, 5 L. R. A., N. S., 1048, as if it negatived the idea that when one person has a cause of action against each of several he cannot, under any circumstances, sue all in one action in equity and thereby prevent a multiplicity of suits, is quite misleading. It is not supposed any member of the court thought the language quoted from the *Johnson* case in the court's opinion here would be regarded as holding that one cannot sue all of a class as well as a class, or any one of them in behalf of all sue one in a proper case for the prevention of a multiplicity of suits. The contrary would be out of harmony with the most familiar of elementary principles in equity: 1 Pomeroy's *Equity Jurisprudence*, 3d ed., sec. 251. It is there said, the prime essential in each case is that 'there must be some common relation, some common interest, some common question,' but not necessarily any relation between the individual members of the class and their common adversary 'constituting privity' as that term is ordinarily understood. In view of the quoted language and the following, in the summing up of the matter after reviewing a multitude of authorities, 'the jurisdiction has been exercised in a great variety of cases where the individual claimants were completely separate and distinct, and the only community of interest among them was in the question at issue and perhaps in the kind of relief' (1 Pomeroy's *Equity Jurisprudence*, sec. 269), it hardly can be said that the complaint in hand is not supported by Pomeroy to the extent of presenting a question of fact as to whether equity should open its doors or not.

"I take issue most decidedly with the statement of my brethren that portions of the text in Pomeroy are inconsistent with that in sections 268 and 269. All seem to be in perfect harmony when one keeps in mind the author's division of situations into four classes, his presentation of diverse views of courts, with some of which he does not agree,

and his final summing up in the section referred to as to the particular class of circumstances to which the instance in hand belongs.

"I would not discredit, as it seems the opinion of the court does, the views of so eminent an author as Professor Pomeroy expressed in the sections above referred to, by quoting from a court, which, though of high repute, is without special prominence in the field of equity jurisprudence, since our own court has gone quite as far as the author suggests, and the criticised language has been quoted with approval by the supreme court of the United States and most of the courts of this country. An examination of the note to section 269 aforesaid shows that one can almost call the roll of the federal and state courts on the subject. In *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. Rep. 244, 47 L. ed. 380, it was said: 'We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases on behalf of a single complainant against a number of defendants, although there is no common title or community of rights or interests in the subject matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy.'

"Is it not a mistake to say that, according to Pomeroy, there must be some community of interest in the subject matter, or community of title from which all the claims arise, in view of the quoted language?

"From the rules we have stated, which are fully sanctioned by the authorities, the fact that in each of the minor controversies here there may be an issue as to betterments requiring substantially independent consideration, also an issue as to continuity of possession after Muza's possession terminated does not preclude the exercise of equity jurisdiction. Such diversity of issues and questions is common in equity cases.

"SIEBECKER, J. I concur in the opinion of Marshall, J."

EQUITY—WHEN WILL JURISDICTION BE ENTERTAINED IN AN ACTION TO QUIET TITLE AND OBTAIN POSSESSION OF LAND, AGAINST NUMEROUS PERSONS WHO HOLD UNDER A COMMON SOURCE, BUT EACH CLAIMS A SEPARATE AND DISTINCT TRACT OF THE LAND?

I. Scope, 991.

II. General Principle Controlling, 992.

III. Illustrations.

a. Where Equity Jurisdiction was Denied, 994.

b. Where Equity Jurisdiction was Upheld, 998.

IV. Conclusion, 1001.

I. Scope.

The discussion in this note is confined to the one question presented by the principal case, namely, whether the general doctrine that equity will entertain jurisdiction to prevent a multiplicity of suits can be applied to an action to quiet title and obtain possession of land held by numerous claimants under a common source of title,

when each claims a separate and distinct tract of the land. Any attempt to enter into a general discussion of the question of equity jurisdiction for the purpose of preventing a multiplicity of suits would require a note of unreasonable length. In fact, the discretionary powers of a chancellor are so broad, that the question whether or not the court will entertain jurisdiction in any particular case depends more upon the facts and circumstances of the case than upon any arbitrary or fixed rules. Consequently we reserve for future consideration the doctrine of "multiplicity of suits" as applied to cases other than those in the nature of bills of peace or suits to quiet title and obtain possession of land under the circumstances first above mentioned. In the note appended to *Woodward v. Seely*, 50 Am. Dec. 449, will be found a discussion of bills of peace and a collation of the early English cases showing where equity would entertain jurisdiction of such bills.

II. General Principle Controlling.

There is no conflict among the cases over the correctness of the general rule stated in *Pomeroy's Equity Jurisprudence*, third edition, volume 1, section 245, that equity will entertain jurisdiction in order to prevent a multiplicity of suits where the same party has a common right against several persons, and in order to obtain complete relief is obliged to bring a number of actions, all growing out of one wrongful act and involving similar questions of law and fact. But the applications of this general rule to suits to quiet title and obtain possession of land held by numerous persons, each of whom claim a separate and distinct tract of the land, is very difficult, for both the adjudged cases and the law texts are quite conflicting as to the limitations upon courts of equity when the doctrine of multiplicity of suits is applied to this particular class of cases. Thus the same distinguished author who announced the above rule says: "In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically 'bills of peace,' in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common right, a community of interest in the subject matter of the controversy, or a common title from which all their separate claims and all the questions at issue arise; it is not enough that the claims of each individual being separate and distinct, there is a community of interest merely in the questions of law or of fact involved, or in the kind and form of remedy demanded and obtained by or against each individual": 1 *Pomeroy's Equity Jurisprudence*, 3d ed., sec. 268. But again, he declares in section 269 that, jurisdiction based upon the prevention of multiplicity of suits has long been extended to cases which are analogous to or within the principles of bills of peace, and that as to these "the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party

against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject matter' among the individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." With these two apparently conflicting conclusions as to how the general rule should be applied in suits to quiet title and obtain possession of land, recognized by such an acknowledged authority on equity jurisprudence, it is not surprising that the courts have been unable to reach any harmonious conclusion in applying any general rule to the question considered in this note. One line of cases sustains the rule adopted in *Illinois Steel Co. v. Schroeder*, 133 Wis. 561, ante, p. 977, 113 N. W. 51, 14 L. R. A. 239, and hold that equity will not entertain jurisdiction for the sole purpose of preventing a multiplicity of suits unless there exists between the numerous defendants, or between each of them and their single adversary, a community of interest in the subject matter of the controversy, or a common title from which all their separate claims and all questions at issue arise—that a community of interest merely in the question of law or fact involved is not sufficient to justify equity jurisdiction; and this rule is not satisfied in a suit to quiet title and obtain possession of land, brought by one having a common right against numerous defendants, each of whom claims a separate and distinct tract of the land, by adverse possession, although all claim under a common source, because each defendant is obliged to establish his right and title through himself and his intervening grantors to the common source and tack his adverse possession, and consequently the failure of one defendant to establish title by adverse possession to his distinct tract would not establish that the other defendants could not make their title as to the other tracts. Another line of cases upholds the rule contended for in the dissenting opinion of two of the justices in the principal case, namely, that in an action to prevent a multiplicity of suits, it is not absolutely essential to equity jurisdiction that there should exist a common title to one entire thing, or a community of rights in such a thing—where each party is interested in the one particular thing, title or right to be settled—that when a case is laid under an established head of equity jurisprudence, as that to prevent a multiplicity of suits, and it is clear that such multiplicity exists, and there are numerous points of law or fact, or both, involved, or title or rights, or subject matters, rendering the numerous separate controversies parts of one large subject matter, equity jurisdiction should not be denied if there is a community of interest among the defendants in the questions of law and fact involved in the general controversy, although there is no common title in or community of right in the subject matter.

The particular class of cases with which we are now concerned are not numerous, and the full force of the decisions where the general

principle above stated has been applied can best be appreciated by reviewing each case separately.

III. Illustrations.

a. Where Equity Jurisdiction was Denied.—In *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 132, certain owners of separate lots within the city of Mobile, in behalf of themselves and others similarly situated, sought to enjoin thirty or more suits in ejectment which had been commenced by the city for the recovery from each defendant separately of the distinct lot claimed by him and to quiet their title to the lots. The alleged equity in the bills was the prevention of a multiplicity of suits. The claim or title of the city was the same in each of the several ejectment suits; and the attitudes and rights of the defendant in each of these actions was the same as, or similar to, the rights of the complainants in the bill. The thirty or more defendants in the ejectment suits did not claim a common title to the lot for which each was sued, but they all had a common interest in the question of law and fact involved. It was held that a mere community of interest in the question of law and fact was no ground for equity to prevent a multiplicity of suits. This case seems to have been given very careful consideration; the two conflicting views expressed by Mr. Pomeroy which we have quoted (*Pomeroy's Equity Jurisprudence*, 3d ed., secs. 268, 269) were reviewed by the court at length, and speaking of the statement by that eminent author in the latter section Chief Justice McClellan said: "If it is true, as stated by Mr. Pomeroy, and some quoting him, that mere community of interest in matters of law and fact makes it admissible to bring all into one suit in chancery, in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle. Any limitation would be purely arbitrary. It must be of universal application, and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages, instituted in a dozen different counties. . . . If Pomeroy's test be maintained, all of these numerous plaintiffs, having a community of interest in the questions of fact and law, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages), could be brought before a chancery court in one suit to avoid a multiplicity of suits. But we forbear. Surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it, and makes it possible. . . . The intolerable consequences to which the recognition of such a doctrine would logically lead are sufficiently indicated in the cases to which we have referred. But, putting that consideration aside, the doctrine contended for cannot be sustained on principle. It would seem to be an elementary and fundamental proposition that a party who seeks to come into equity must himself have an equity. His equity may be derivative; it may rest in him because of privity between him and others by force of contract or in estate. But however it comes to him, it must exist in him, or he cannot maintain a bill. When his title is legal, where his de-

fense is at law, where all his rights, remedies and defenses are cognizable in a legal forum, and he therefore has in his own capacity and right no standing in a court of chancery, it is altogether plain and clear to us, Mr. Pomeroy and some courts to the contrary notwithstanding, that the wholly fortuitous, accidental and collateral fact that numerous other persons have like, but entirely independent and disconnected, legal rights, estates or defenses, cannot upon any conceivable principle invest him with any right, legal or equitable, and that his rights, whatever they may be, are precisely the same as if no other person had similar rights. It is palpably illogical to say that one man may acquire rights of any sort from others with whom he has absolutely no connection or relation by blood, in estate, or by convention. It is a palpable non sequitur to say that when numerous persons have like, but independent, legal estates or legal rights in respect of which severally they have no right to invoke the jurisdiction of chancery, yet, because they are numerous, the separate legal right of each is metamorphosed into an equity right in all, or in one for all. Jurisdiction in equity is not entertained on any notion that the court has an equity—that it will take jurisdiction to prevent a multiplicity of suits in order to lessen its own labors or those of other courts. The equity upon which the invocation is made must reside in the party making it. When numerous parties have each the same equity, they may, in a proper case, unite in one bill for its declaration and effectuation. Each having the separate right to come into equity upon an identical ground, they will be allowed to come in together, on the theory of preventing a multiplicity of suits.”

In *Ritchie v. Dorland*, 6 Cal. 33, plaintiffs filed their bill in chancery to quiet title and recover possession of a tract of land against over three hundred squatters in possession. Plaintiff's title to the land had been upheld by the United States district court in an action of ejectment brought by him against one of the defendants for a recovery of another portion of the tract. All of the defendants claimed under a common source, and equity interference was sought upon the ground of preventing a multiplicity of suit. A judgment sustaining a demurrer to the complaint for want of equity was upheld, both because all of the defendants could have been made parties defendant to a suit in ejectment and for the further reason, as said by the court, “It may well be doubted whether such a bill can be sustained by a party out of possession, particularly where no privity exists between him and the defendants.”

In *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464, plaintiff, claiming legal title, filed his bill to recover possession against numerous persons, each claiming separate and distinct tracts of the land. The interposition of equity was invoked upon the ground of preventing a multiplicity of suits. “The jurisdiction of a court of equity,” said the court, “cannot be invoked simply on the ground that the party seeking its interposition has a multitude of suits to bring, whether they be against defendants in suits of ejectment or in other actions. . . . This species of equity jurisdiction is consequential rather than original,

and is exercised chiefly in regard to matters springing out of subjects belonging appropriately to its own jurisdiction." So, too, in *Hughes v. Hannah*, 39 Fla. 365, 22 South. 613, the complainants, in a bill against twenty-seven defendants, claimed to be the rightful owners of certain described land, and sought to quiet title and recover possession from defendants, all of whom held possession by numerous mesne conveyances from the grantee in a void tax deed. Equity jurisdiction was invoked upon the ground of preventing a multiplicity of suits. It was held that no ground of equitable interference was shown, and further, that defendants, being in possession of different portions of the lands, asserting title under an independent source from that of complainants, had a constitutional right to have their claims tried by a jury. Speaking to the contention that the prevention of the multiplicity of suits had long been a recognized head of equity jurisdiction, the court said: "It was, however, never the rule in equity to assume jurisdiction simply because a complainant had numerous suits at law to institute."

In *Waddingham v. Robledo*, 6 N. M. 347, 28 Pac. 663, complainant, claiming to be the rightful owner of a large tract of land, filed his bill against numerous persons who had separate and distinct parts of the land, all claiming under an inchoate grant from Mexico. The defendants also claimed the right to possess other portions of the tract, and sought to take possession thereof and irrigate and improve the same. The object of the bill was to restrain the defendants from enjoying the improvements on the land of which they were in possession, and from taking possession of other portions of the tract. One of the grounds upon which equity jurisdiction was invoked was to prevent a multiplicity of suits. The lower court dismissed the bill. On appeal it was held that equity would not take jurisdiction to prevent a multiplicity of suits, at the instance of one not in possession, claiming to be the rightful owner, to gain possession, against numerous persons in actual possession (*pedis possessio*) and claiming separate and distinct tracts of the land. It was further held, however, that the bill was improperly dismissed, as the court should have entertained jurisdiction to restrain the defendants from taking possession of other portions of the land which was constructively in plaintiff's possession, upon the ground of preventing a multiplicity of suits. Likewise, in *McGuire v. Pensacola City Co.*, 105 Fed. 677, 44 C. C. A. 670, where a large number of persons all claimed title under a void judgment but each in possession of a corporate and distinct tract of land, it was held that the aid of equity could not be invoked to prevent a multiplicity of suits by the rightful owner of the land against the numerous claimants to obtain possession. Like the case of *Hughes v. Hannah*, 39 Fla. 365, 22 South. 613, cited above, the ruling in this case is based on the constitutional right of one in possession of land to have his claim of title and right of possession submitted to a jury. It was alleged in the bill that the numerous defendants had obtained possession by force, but the court said if that allegation was true the defendants were trespassers and could all be joined as defendants in one action of ejectment.

In *Hipp v. Babin*, 19 How. (U. S.) 271, 15 L. ed. 633, the general doctrine sustained by the foregoing cases was applied. In this case those claiming to have the legal title filed this bill against numerous owners of separate tracts of the land to recover possession. One of the grounds upon which equity jurisdiction was invoked was to prevent a multiplicity of suits. The bill alleged that an executrix's deed, which was a common source of title of the defendants, was void. The defendants claimed to be bona fide purchasers from persons deriving their title in good faith from the purchaser at the executrix sale, and had maintained possession for a long period, and there had been no unity of possession. It was held that the case did not justify the interposition of equity upon the ground of preventing a multiplicity of suits.

And whenever the subject of the controversy can be determined by one suit at law, a court of equity will not entertain jurisdiction: *Livingston County Bldg. & Loan Assn. v. Keach*, 219 Ill. 9, 76 N. E. 72; *Burroughs v. Cutter*, 98 Me. 178, 99 Am. St. Rep. 392, 56 Atl. 649; *New Jersey & N. C. Land Co. v. Gardner Lacy Lumber Co.*, 161 Fed. 768. These decisions are based on the fundamental proposition that prevention for a multiplicity of suits is not an independent source of equity jurisdiction, but that jurisdiction is entertained in such cases only upon the ground that the expense and delay of bringing a large number of separate actions at law renders the legal remedy inadequate; and consequently when the whole matter can be disposed of in one suit at law, an adequate legal remedy exists, and there is no ground for the interposition of equity. In line with this doctrine, it is also held that an action in the nature of a bill of peace will not be entertained by a court of equity, where the right is controverted by two persons only, until after the right has been satisfactorily established by a trial at law: *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 26 Am. Dec. 696; *Eldridge v. Hill*, 2 Johns. Ch. (N. Y.) 281; *New Jersey etc. Land Co. v. Gardner Lacy Lumber Co.*, 161 Fed. 768. These cases, however, clearly recognize the right of a court of equity to exercise its jurisdiction to prevent a multiplicity of suits, though legal questions alone are involved, when the litigants are numerous and the remedy at law is not adequate. Thus, in *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 26 Am. Dec. 696, the court said: "Courts of equity will also interpose to prevent a multiplicity of suits, when the subject matter of controversy is held by one individual, in opposition to a number of persons who controvert his right, and who hold separate and distinct interests depending upon a common source. Not that it is for the purpose of adjudicating upon the legal rights of the parties litigant, but to direct their ascertainment under the superintendence of the courts, upon issues framed by it. The right of the court of chancery thus to interpose is regarded as amongst the most salutary portions of its jurisdiction." So, too, in those jurisdictions where, under the practice act, a plaintiff in ejectment can join any number of parties defendant, without regard to the extent or character of their possession, equity will not

entertain jurisdiction upon the ground of avoiding a multiplicity of suits: *Ritchie v. Dorland*, 6 Cal. 33; *San Francisco v. Beideman*, 17 Cal. 443; *Smythe v. New Orleans Canal & Banking Co.* (C. C.), 34 Fed. 825, affirming 141 U. S. 656, 12 Sup. Ct. Rep. 113, 35 L. ed. 891; *Northern Pacific R. Co. v. Amacker*, 46 Fed. 233, 49 Fed. 529, 1 C. C. A. 345, 7 U. S. App. 33.

b. Where Equity Jurisdiction was Upheld.—One of the oldest cases which upholds the doctrine that equity will take jurisdiction in suits to establish title and obtain possession of land against numerous persons, in order to prevent a multiplicity of suits, is that of *Trustees of Huntington v. Nicoll*, 3 Johns. (N. Y.) 566. The court in this case seems to have had the benefit of the most thorough research on the part of counsel on both sides, and to have reached a decision after very careful consideration and a review of the earlier English cases bearing upon the question involved. The original action—*Nicoll v. Trustees of the Town of Huntington*, 1 Johns. Ch. (N. Y.) 166—was brought by one claiming the legal title to land against numerous adverse claimants, to quiet his title and restrain acts of trespass and waste. From the pleadings in this action it appears that the premises in dispute were three uninhabitable and uninclosed islands. The complainant claimed title under a patent issued to his ancestor. The defendants claimed title under certain grants made to them. The islands were not in the actual possession of any of the parties to the bill, but numerous inhabitants of the town of Huntington had entered upon the islands, under authority of the trustees of said town, and carried away the products thereon. It was further alleged in the bill that the defendants not only declared their intention to persist in their claim, but encouraged others to enter upon the islands and take away the products thereon. Equity jurisdiction was invoked to prevent a multiplicity of suits, and the chancellor entertained the bill. It was held on appeal that the case was a proper one for equity jurisdiction upon the ground of avoiding a multiplicity of suits. It was admitted, however, by Van Ness, J., in his opinion, "that there is no case which, in all its parts, is analogous to the present. But it is enough if this comes within the reason of those cases where equity has taken cognizance of the legal rights of parties, with a view of terminating endless and ruinous litigation. It is time that we should, for the purpose of rendering the administration of justice more perfect and complete, take the lead, instead of waiting for precedents in order to follow them." The decision in this case is also based, in part at least, on the fact that an action in ejectment under the peculiar circumstances of this case would be inadequate. This is apparent from the language of Chief Justice Kent: "If the respondent was to bring an ordinary action of ejectment, he must make out in proof that the person against whom he brings his suit was in actual possession of the premises, or he would be nonsuited upon the trial; and how could Nicoll prove that the trustees of Huntington, or any inhabitant of that town, was in possession of those islands? If acts of entry to cut grass make a person

a tenant in possession, then the islands are as much in the possession of one party as the other, for they have mutually entered and cut grass, and there are now mutual actions of trespass pending in the supreme court." In *Brown v. Tilley*, 25 R. I. 579, 57 Atl. 80, a widow filed a bill against numerous grantees of her deceased husband to separate and distinct parcels of land, to enforce payment by the grantees of the annuities provided for in their several deeds. The jurisdiction in this case was attacked upon the ground of multifariousness, but it was held that although the bill was, in absolute strictness, multifarious, because involving the claims of different owners to different parcels of land, having no interest in each other's parcels, yet as the case depended upon the construction of similar language in the different deeds, so that separate suits would be of no advantage to the parties and would be cumbersome and expensive, equity would entertain jurisdiction. So, too, in *Withers' Admr. v. Sims*, 80 Va. 651, the object of the bill was to construe a will and recover separate and distinct parcels of land in possession of numerous persons claiming under the will. It was held that as the question whether the defendants were to retain or lose their property depended upon the construction of the will, they have such common interest and defense that they may be joined in the same suit. Said the court: "For whilst it is not competent for a plaintiff to demand several matters of different natures against several defendants, yet a demurrer will not lie, even though the defendants be unconnected with each other, if they have a common interest centering in the point in issue in the cause. . . . Of course a bill in equity will not lie merely to prevent a party plaintiff from the necessity of having to bring several actions of ejectment, but in a case where the very title of all the parties to the property in controversy depends upon the construction to be given to the will of the testator, no good reason can be perceived for putting the parties to the expense and delay of separate actions of ejectment against each occupier of the land, and that, too, in advance of a determination of the proper construction of the will, a question in which the interests of all of the defendants are vitally involved."

Quite a number of federal decisions sustain the construction of the minority opinion in *Illinois Steel Co. v. Schroeder*, 133 Wis. 561, ante, p. 977, 113 N. W. 51, 14 L. R. A., N. S., 239, and hold that equity will entertain jurisdiction of an action to quiet title and recover possession of land, at the instance of one having a common right against numerous persons who hold under a common source of title, but each of whom claims separate and distinct tracts of the land—that is, that a community of interest in the questions of law and fact, and not necessarily of the subject matter, is sufficient to justify a court of equity in assuming jurisdiction for the purpose of preventing a multiplicity of suits: *Dodge v. Briggs* (C. C.), 27 Fed. 160; *De Forest v. Thompson*, 40 Fed. 375; *Osborne v. Wisconsin C. R. Co.*, 43 Fed. 824; *Preteca v. Maxwell Land Grant Co.*, 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326.

In *Dodge v. Briggs*, 27 Fed. 160, this doctrine was recognized when a single complainant sought to have his title granted to fifteen hundred lots of land against numerous persons claiming under a common source, but in possession of separate and distinct lots. The bill in this case, however, was not to recover possession of the lands, as in an action of ejectment, but to prevent fraudulent interference and irreparable injury to the lands and title of the complainant, and as all the numerous defendants were charged with being parties to the fraud, this is undoubtedly one of the grounds upon which equity jurisdiction was assumed. But in *De Forest v. Thompson* (C. C.), 40 Fed. 375, the question of "community of interest" was squarely before the court. The complainant in this case sought to recover a large tract of land from numerous defendants, each of whom claimed separate and distinct parcels thereof, but all claimed under a sale of the land for nonpayment of taxes made under a decree of court. In entertaining jurisdiction of the bill in order to avoid a multiplicity of suits, Judge Jackson, speaking for himself and Justice Harlan, of the circuit court of West Virginia, said: "Each defendant's title depends upon the same questions, and those questions all have relation to the proceedings in the Boone circuit court, and to the attempt to forfeit the lands for nonpayment of taxes. It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants, and succeeded, the judgment would not conclude the other defendants, although the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands, the possession of which is withheld by the defendants, each claiming a particular parcel, but all basing their claims upon the same proceedings instituted by the officers of the state, may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing in equity and bringing all the defendants before the court in an action they can avoid a multiplicity of suits? I think they can." And in *Osborne v. Wisconsin C. R. Co.* (C. C.), 43 Fed. 824, the defendant railway company had threatened to bring actions of ejectment and trespass against numerous individuals who were in possession of, and each of whom claimed, distinct parcels of land under homestead entry, to which the railway company claimed title. This bill was filed by these numerous persons to enjoin the railway company from bringing the threatened suits and to establish the title of the complainants to the separate tracts claimed by each. A demurrer to the bill presented the question whether equity should take jurisdiction to prevent a multiplicity of suits, or whether the title to each tract—all the tracts being within the larger boundary, and the whole being claimed by the railway company as a part of its place lands—should be determined in separate actions of ejectment against the respective plaintiffs. In holding that the case was a proper one for equity intervention, Justice Harlan said: "While the plaintiffs have sepa-

rate and distinct interests because of their respective claims of ownership of separate and distinct tracts of land, they have a community of interest in the subject matter of the controversy relating to their lands, and a common source of title, namely, the action of the land department opening these lands for entry under the homestead and pre-emption laws of the United States. They have thus a community of interest in the questions of law and fact upon which the issue between the railroad company and each plaintiff depends. The company's claim is good or bad against all the plaintiffs, as it may be good or bad against any one of them; and yet a judgment in favor of one, in an action of ejectment brought by the company, would not avail the others in separate actions against them. The case is peculiarly one in which the jurisdiction of a court of equity may be invoked in order to avoid a multiplicity of suits."

In *Preteca v. Maxwell Land Grant Co.*, 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 226, the bill alleged that the complainant was the legal owner of the land in dispute, and that his title had been established at law by divers actions of ejectment. It was directed against numerous persons in possession of separate and distinct tracts of land. It did not appear that the defendants claimed under the same source of title, or that their defenses would be based upon the same state of facts, though it was alleged that the different actions in ejectment in which complainant's title had been established involved and depended on the same questions of title set up by the bill between the complainant and each of the defendants. It was alleged that the defendants were committing acts of trespass and waste. The relief prayed for was a decree quieting title and injunction against trespass and waste. It was held to be a proper case for equity jurisdiction to prevent a multiplicity of suits. True, it was said in this case that the defendants were irresponsible and that actions in ejectment would not afford adequate remedy to the complainant against the defendants' acts of trespass and waste; and the court was doubtless influenced somewhat by this fact, but as this alone would not be sufficient to overcome an objection that the bill was multifarious, in that the numerous defendants had no community of interest in the different matters sought to be litigated, it is fair to presume that jurisdiction was entertained principally upon the ground of preventing a multiplicity of suits.

IV. Conclusion.

In applying the principles upon which equity jurisdiction has been suggested, the cases bearing upon the particular question discussed in this note are so various that it is impossible to adduce from them any plain and uniform rule by which the profession can be guided. It would seem that a majority of the state courts sustain the doctrine laid down in *Illinois Steel Co. v. Schroeder*, 133 Wis. 561, ante, p. 977, 113 N. W. 51, 14 L. R. A., N. S., 239, namely, that the community of interest must extend to the subject matter of the litigation, and that a community of interest in the question of law

and fact involved will not be sufficient to justify equity jurisdiction; hence, equity will not interpose in suits to quiet title and obtain possession of land to prevent a multiplicity of suits, at the instance of one having a common right against numerous persons who hold under a common source of title, when each possessor claims a separate and distinct tract of the land. On the other hand, a majority of the federal courts seem to coincide with the views of the minority opinion in the Schroeder case, and hold that it is the duty of a court of equity in such cases to take jurisdiction on the ground of avoiding a multiplicity of suits, and the position assumed by this latter class of cases seems to be justified by language of the supreme court of the United States in *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. Rep. 244, 47 L. ed. 380. This was not a case involving title or possession of land, but the question whether equity should take jurisdiction in order to prevent a multiplicity of suits was presented in a suit by a receiver to enforce the liability of a foreign corporation. In deciding the case, however, the court referred to the quotations from *Pomeroy's Equity Jurisprudence*, which we have heretofore given, reviewed several cases where the principles had been applied to suits involving land, and its language seems broad enough to cover all classes of cases between a single individual and numerous defendants when the question of equity jurisdiction invoked upon the ground of preventing a multiplicity of suits depends upon the determination of what constitutes a sufficient "community of interest." After referring to the text in *Pomeroy's Equity Jurisprudence* quoted at the beginning of this note, the proper rule to be followed, in the opinion of the supreme court, was thus stated by Mr. Justice Peckham: "Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all the parties, the adequacy of the legal remedy, the situation of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied. . . . We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title, nor community of rights or interest in the subject matter among such defendants, but when there is a community of interest among them in the questions of law and fact in the general controversy."

STATE v. REDMON.

[134 Wis. 89, 114 N. W. 137.]

CONSTITUTIONAL LAW—Exercise of Police Power.—A police regulation is no more legitimate and valid than a law in any other field, if it in fact violates any principle entrenched in the constitution. (p. 1008.)

CONSTITUTIONAL LAW.—The Police Power is the power to make all laws which, in the contemplation of the constitution, promote the public welfare. (p. 1008.)

CONSTITUTIONAL LAW—Legitimate Exercise of Police Power.—It is a legislative function primarily to determine the manner of dealing with a subject involving the exercise of the police power, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitations, express or implied. (p. 1008.)

CONSTITUTIONAL LAW—Exercise of Police Power.—The police power extends to legislation reasonably regulating matters appertaining to the lives, limbs, health, comfort, good morals, peace and safety of society. (p. 1008.)

CONSTITUTIONAL LAW—Police Power.—A Law is not Necessarily One to Promote the Public Health, Welfare and Comfort of the people generally, or of a legitimate class thereof, merely because such is its declared purpose. (p. 1010.)

CONSTITUTIONAL LAW—Exercise of Police Power—Judicial Functions.—It is a judicial function to define the proper subjects for the exercise of the police power, and the court has the right to decide as to any enactment, whether it really relates to a subject legitimately within the exercise of the police power, or whether, under the guise of doing so, it violates rights of persons or property. (p. 1010.)

CONSTITUTIONAL LAW—Exercise of Police Power.—It is not every enactment which will to some extent promote the public health, comfort, or convenience, that is a legitimate exercise of the police power. (p. 1011.)

CONSTITUTIONAL LAW—Exercise of Police Power—Exigency Required.—To constitute a legitimate exercise of the police power, the exigency to be met must so concern the public welfare and be sufficiently vital thereto as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment. (p. 1012.)

CONSTITUTIONAL LAW—Sleeping-car Regulations.—A law giving to the occupant of a lower berth in a sleeping-car absolute control, at his option, of the upper berth if it is not occupied is not a legitimate exercise of the police power, and is unconstitutional as an arbitrary appropriation of the property of one for the benefit of another. (p. 1014.)

CONSTITUTIONAL LAW—Police Power.—Legislative Interference with Property or Other Private Rights for the ostensible purpose of promoting public health and comfort, or both, to be valid must be adapted to that end, and not merely to make effective mere individual dictation. (p. 1015.)

POLICE POWER.—All Police Regulations must bear the judicial test of reasonableness under all of the circumstances. (pp. 1015, 1016.)

F. L. Gilbert, attorney general, and R. Jackson, for the plaintiff.

H. O. Fairchild, for the defendant.

⁹¹ MARSHALL, J. Reports in two prosecutions under section 1636p of Statutes (Laws of 1907, c. 266).

The first action was for a violation of such chapter September 5, 1907, and the second for a violation thereof August 26, 1907. The person whose rights under such law were violated in the latter was a passenger between points within the state, and the one in the former was an interstate passenger.

The report shows that defendant was convicted in each case in due form of law, and the existence of all circumstances necessary to raise the question of whether the enactment, supposed to warrant the prosecution, is constitutional. The purpose of the report is to obtain a determination of such question. These facts with others are in substance stated: The ⁹² sleeping-car in question was divided into a stateroom, a smoking-room, and twelve sections, each of such sections containing a double upper and double lower berth arranged in the usual way common to ordinary Pullman sleeping-cars. The price charged for a berth varied somewhat according to distance and time of use. The price in the first case was one dollar and fifty cents and in the second two dollars. Prior to the passage of the law it had been customary, upon making up the lower berth for use of a customer, to let down the upper berth, whether it had been theretofore engaged or not, and to prepare it, in whole or in part, for occupancy and to use it for sleeping or other purposes. The complainant in each case engaged and paid for a double lower berth and ordered the accused, who was the porter of the car, to leave the upper berth closed, since it had not been sold and there was no one to occupy it; the porter nevertheless, following the usual custom, under orders from his employer, let down the upper berth, notifying the complainant that he was required to do that unless such berth was paid for.

The law in question is as follows:

"An act . . . relating to the health and comfort of occupants of sleeping-car berths.

"The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

"1. Whenever a person pays for the use of a double lower berth in a sleeping-car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and

the proprietor of the car and the person in charge of it shall comply with such direction.

"2. Any person or corporation violating the provisions of this act shall be punished by imprisonment in the county jail not more than six months, or by a fine not exceeding one hundred dollars."

¹⁰¹ It is conceded that the legislation in question was an attempt to exercise the police power of the state which is inherent in sovereign authority under such limitations as exist in the national and state constitutions, and that if, as a police regulation, it is not legitimate, it is not the law though possessing the form thereof. A legislative enactment approved by the executive and duly published is not necessarily a law or binding on anyone in respect to his liberty, his business, or his property. It is such if it is susceptible of passing the judicial test of whether it is warranted by the fundamental law, which our constitutional system contemplates may be applied to all such enactments. Perhaps the thought sometimes expressed that the vital feature suggested, which every good law must possess, is not as fully appreciated by the law-making power as it ought to be, leading to infractions of some express limitation as well as that broad general restriction of legislative power contained in the declaration that "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Too much dignity cannot well be given to that declaration. That it was intended to cover a broad field not practicable to circumscribe by any specific limitation or limitations cannot well be doubted. This court has given thereto its proper place in unmistakable language, particularly in recent decisions: *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *State v. Burdge*, 95 Wis. 390, 70 N. W. 347; *State* ¹⁰² *v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; *State v. Kreutzberg*, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098, 58 L. R. A. 748; *State v. Froehlich*, 115 Wis. 32, 95 Am. St. Rep. 894, 91 N. W. 115, 58 L. R. A. 757; *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500, 3 L. R. A., N. S., 1115. Doubtless the fathers of the constitution foresaw the likelihood and danger of the security of personal rights, which the fundamental law was intended to firmly entrench with the judiciary as its efficient defender, being jeopardized at times by excessive regulation of the ordinary affairs of life, and

with that in view incorporated in the fundamental law at section 22, article 1, that admonition so full of meaning: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

The idea is found expressed now and then that the police power is something not dealt with or affected by the constitution, at least in any marked degree, which is a mistake hardly excusable. The error suggested here and there, that the police power is "a sovereign power in the state, to be exercised by the legislature, which is outside, and in a sense above, the constitution (*Donnelly v. Decker*, 58-Wis. 461, 46 Am. Rep. 637, 17 N. W. 389), or that a police regulation which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness (*Tiedeman on State and Federal Control*, sec. 3), or that no police regulation, not condemned by some express constitutional prohibition, is illegitimate, or that legislation not so condemned is legitimate if the law-making power so wills, though it violates some fundamental principles of justice, or that the reasonableness of a police regulation, and whether it unjustly deprives the citizen of natural rights, is wholly of legislative concern (*Hedderich v. State*, 101 Ind. 564, 1 N. E. 47), and others of a similar character now and then found in legal opinions and text-books, ¹⁰³ are highly misleading," and have been distinctly discarded by this court: *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500, 3 L. R. A., N. S., 1115. As was there said, "If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the constitution as to very much of the field of civil government would be of no use whatever. The contrary has been the rule without any legitimate question since *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60."

The following significant expressions of this court as to the constitutional limitations in the exercise of the police power leave nothing further to be said on the subject:

"As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions": *State v. Burdge*, 95 Wis. 390, 70 N. W. 347.

“At this late day it cannot be doubted that this declaration of the purpose to be accomplished is to be construed as a limitation upon the powers given. By the preamble, preservation of liberty is given precedence over the establishment of government. It would be inconceivable that the people of Wisconsin, in establishing a government to secure the rights of life, liberty and the pursuit of happiness, should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights; and in this view it has been held by this court that legislative acts conflicting with that declared purpose are forbidden by the constitution, and must be denied efficacy by the courts”: *State v. Kreutzberg*, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098, 58 L. R. A. 748.

“The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous. An act which the constitution clearly prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition”: ¹⁰⁴ *State v. Froehlich*, 115 Wis. 32, 95 Am. St. Rep. 894, 91 N. W. 115, 58 L. R. A. 757.

“So legislation referring to police authority for legitimacy, like any other exercise of the law-making power, must bear the test of constitutional limitations, which will be found upon all sides. On the one side, it may meet the barrier of an express prohibition; on another, the implied prohibition of any law not in harmony with the all-prevailing purposes of the constitution; on another, the implied inhibition involved in the declaration that ‘the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles’”: *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500, 3 L. R. A., N. S., 1115.

Doubtless in most, if not all, of the instances above referred to where language was used descriptive of police authority, which, as indicated, are misleading, the ideas in the minds of the judicial writers were in the main, at least, correct, but the manner of expressing them was not altogether fortunate.

The police power is so obviously essential to the public welfare that it is presumed the framers of the constitution did not intend to prohibit its exercise where reasonably necessary therefor, though such exercise might invade the scope, viewing the language in the literal sense, of some fundamental prohibition, as that against taking property for public use

without rendering just compensation therefor. So it is said that a law authorizing the destruction by public authority of private property without the owner's consent, where necessary to prevent the spread of a contagious disease, is legitimate, not because the police power is above or superior to or not dealt with by the constitution, but because it was not intended to deal with the suggested situations by such express prohibition. Therefore, the law is not to be regarded as a violation thereof, though if the field of reasonable necessity were exceeded, that of the prohibition would be invaded. Up to the boundary between the two the police authority is not restricted by the ¹⁰⁵ prohibition, while the existence of it is rather guaranteed by the general declaration breathing the dominant purpose of civil government. So a police regulation, correctly speaking, is no more legitimate than a law in any other field if it in fact violates any principle entrenched in the constitution.

What is this police power about which so much is said, and which is so commonly and, generally speaking, legitimately invoked as a justification for legislation regulating the affairs of life? In view of the multiplication of legislative enactments hedging the citizen about as to many of such affairs and in a manner quite novel as compared with former conditions, it is quite important that the character of that broad power and its limitations by the fundamental law should be as accurately understood as practicable.

Many attempts have been made to define police power. There is good reason to say that the multitude of such attempts with the many variations in phrasing the matter have not added very much to the simple expression, that it is the power to make all laws which in contemplation of the constitution promote the public welfare. That both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the proper subject to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing therewith, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitation, express or implied.

This court, in common with others, has said that the police power extends to legislation regulating, reasonably—that is, to an extent not entering the realms of the destructive—all matters appertaining to the lives, limbs, health, comfort, good morals, peace and safety of society: *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *State v. Ryan*, 70 Wis. 676, 36 N. W. 823;

State v. Heinemann, 80 Wis. 253, 27 Am. St. Rep. 34, 49 N. W. 818; Bittenhaus v. Johnson, 92 Wis. 588, ¹⁰⁶ 66 N. W. 805, 32 L. R. A. 380; State v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252. Again, this court said, by way of approval of expressions of standard authors and opinions in leading cases, the police power includes "all laws for the protection of life, limb, and health, for the quiet of the person and for the security of property." "All persons and property are subjected to all necessary restraints and burdens to secure the general comfort, health, and prosperity of the state." "It is coextensive with self-protection, and is not inaptly termed 'the law of necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society": State v. Burdge, 95 Wis. 390, 70 N. W. 347. These and many other similar phrasings, meaning the same thing, are far from being entirely satisfactory. They are misleading to one who reads them without having in mind the idea that all legislative regulations of human affairs interfering with personal liberty or other private rights, to be legitimate, tested by constitutional limitations, must be reasonably for the public benefit.

It were better to always say that the police power extends to and permits legislation regulating reasonably matters appertaining to the public welfare, since anything beyond that must necessarily fall at the threshold of some constitutional defense. It is a great power, having more to do with the well-being of society than any other, yet one which, if exercised autocratically, would supersede some of the most cherished principles of constitutional freedom. It may be extended disastrously, or restrained and administered beneficially, according as the judiciary shall perform its constitutional functions. Confined within its legitimate field of reasonable regulation it is essential, as we have heretofore indicated, to the full accomplishment of the purposes of civil government.

There may be autocracy of the sovereign, whether the term is used in a personal sense or as representing the people in ¹⁰⁷ the aggregate acting through their representatives. One might be quite as dangerous as the other without the restraints of a written constitution and an independent and courageous judiciary to stand guard at the boundaries thereof.

With our system the danger of destruction of impairment of inherent rights by well-meant but improvident legislation is too remote to be disturbing as to the future, for, as said,

in effect, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, no enactment is controlling if the tribunal created by the constitution to pass upon its character cannot reasonably escape the conclusion that the paramount law condemns it.

With the foregoing general observations as to the character and limitations upon the police power, we shall proceed to consider, respecting the law in question, these propositions: Is it a police regulation, laying aside, for the purposes of the inquiry, the question of whether it is within the constitutional field? Second, if it be such a regulation, is it outside the field of reasonable interference with private rights?

The ostensible purpose of the law, as indicated by its title, is to promote the "health and comfort of occupants of sleeping-car berths." Words were used in such title *ex industria*, seemingly, to give to the enactment, unmistakably, the character of a police regulation, but a law is not necessarily one to promote the public health and comfort of people generally, or of a legitimate class thereof, merely because such is its declared purpose.

As it is a judicial function to define the proper subjects for the exercise of police power (*Lake View v. Rose Hill C. Co.*, 70 Ill. 191, 22 Am. Rep. 71), it must be to decide, as to any enactment, whether it really relates to a legitimate subject, or, under the guise of doing so, violates rights of persons or property. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the legislature so determines, is, as we have seen, a heresy, and one ¹⁰⁸ which was repudiated sufficiently for all time by the early decision, heretofore referred to, in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the legislature and the judiciary thereto and to each other. The doctrine there laid down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately or ignorantly.

These words of the supreme court of the United States, speaking by Mr. Justice Harlan, in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, express in a different form the spirit of the opinion in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to

look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

That states the law as it has been uniformly administered. Many examples might be given of like judicial treatment of the matter. We will rest the subject with one further citation. In *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, an act declared, as in this case, to be for the promotion of the public health was condemned as an unconstitutional interference with private rights, the court saying: "It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

¹⁰⁹ It is not every enactment which will to some extent promote the public health, comfort, or convenience, which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government. An expert on sanitation, or one on the manner of living best calculated to promote long and enjoyable life, who has become an enthusiast in his special study of the matter, could doubtless suggest a multitude of really, or apparently, good rules to be followed; the temperature of the air of sleeping-rooms, the proper size of the rooms as regards the number of occupants, the arrangements for frequently changing the air by displacing that within for that without the habitation, the hours for sleeping, for retiring, and for arising, the amount and kind of food to eat, the proper number of meals per day, the proper admixture of solids and liquids and length of time for each meal, the amount and kind of exercise required, and other things too numerous to mention might be suggested for legislative interference, each with a provision for a severe penalty for its violation, with a division of the penalty, perhaps, between the informer and the public, till one would be placed in such a straight-jacket, so to speak, that liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property—those things commonly supposed to

make a nation intelligent, progressive, prosperous and great—would be largely impaired and in some cases destroyed. That such an extreme would be regulation run mad and is quite improbable, 'tis true, but it would be possible without limitations of some sort, if a police law be conclusively legitimate merely because it promotes, however trifling in degree, public health, comfort, or convenience.

To take a view of a possible extreme running into the absurd is sometimes a most helpful method of illustrating that which must be regarded as false from its very absurdity. ¹¹⁰ Law can never legitimately go clearly beyond the boundaries of reason.

Illustrating the matter as above, in *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664, the court said: "The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is twenty-four hours old, yet it would strike us with surprise to see the legislature making a crime of the sale of fresh bread. . . . So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant."

The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power. Not that a police regulation, in form or pretense, to be one in fact must supply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto, as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter. No more definite rule can be well worked out except as it may be evolved by the process of inclusion and exclusion in the treatment of cases as they arise.

Illustrations of the necessary degree of exigency are cases of the deprivation of liberty by isolation to prevent the spread of contagious diseases, deprivation of property without the consent of the owner and without rendering a compensation

therefor, as the destruction of animals in case of ¹¹¹ their being afflicted with incurable diseases, or the destruction of buildings as the only practicable method of staying the spread of a conflagration, or of bedding used in caring for persons affected with serious contagious diseases, where fumigation or some other comparatively inexpensive method of removing the dangerous germs from the articles is not practicable; the prevention of the pollution of water supply, the regulation of the construction or arrangement and care of buildings, especially in cities or where large numbers of persons are wont to congregate, to avoid very serious dangers which experience shows would otherwise exist; dangers so serious as to challenge the attention of anyone of ordinary intelligence conversant with such matters. As said in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

To the same effect are: *In re Wilshire*, 103 Fed. 620; *Toledo etc. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, 29 L. R. A. 79; *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30, 57 N. E. 41, 49 L. R. A. 181; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Health Dept. v. Trinity Church*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833; *Chicago etc. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 66 N. W. 624, 41 L. R. A. 481.

Controlling significance should be attached to the words above quoted, "the interests of the public generally," etc., "require such interference." Not that some individuals now and then, or even generally, demand it, or require it, but that the interests of the people generally require it. In other words, that it is reasonably essential or necessary to such interests that the subject thereof should be dealt with by the legislature.

¹¹² Further discussion on this subject might be indulged in at great length, which, though it might be interesting, would not be necessary or perhaps helpful in the decision of this or future cases.

The inquiries to be solved in testing an enactment purporting to be for the promotion of the public health as to

whether it is fairly within the field of police power are well stated at section 143 of Freund on Police Power, thus: "Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?"

The judgment of the legislature, of course, as to all of them is to be taken as correct, unless it appear to be clearly wrong, and also it is to be taken as true that its ostensible is its actual purpose, unless the contrary clearly appears.

Now, how is it with sleeping-cars, as regards whether the upper berths are open or closed when the lower ones are occupied, respecting any substantial danger, inconvenience, or discomfort to persons generally patronizing such utilities—danger sufficient to challenge attention as one reasonably requiring for the public interests a remedy? Persons so circumstanced as a rule, we apprehend, are so indifferent as to whether the upper berth is closed or not that they would not seriously think of having it closed at their expense or to the extent of even a small sum. Many, probably, would prefer to have it open if they were permitted to deposit some of their belongings therein in case of its not being otherwise occupied, which is commonly allowed. That is recognized in the law itself. Had it been thought that there is a substantial reason why, in the public interests, an upper berth should be closed when unoccupied, in case of the lower one being in use, the law would have so provided in all cases, instead of leaving it to the mere dictation, whether springing from ¹¹³ judgment or mere whim, of each individual customer for a lower berth to control the upper one, in respect to the matter. To thus leave such matter to the mere caprice of the occupant of the lower berth is a confession on the face of the act that it was not treated by the legislature as one deemed to be reasonably vital to the public interests. So the law is not, in reality, a police regulation, but an unwarranted interference with property rights; an attempt in the circumstances specified to give to any person, at his option, who pays for a part of a section in a sleeping-car the use, free of charge, of the balance thereof; an obvious, though well meant, attempt, it would seem, through mistaken notions of legislative power, to appropriate the property of one for the benefit of another in violation of several constitutional safeguards that might be referred to, but particularly the guaranty that "no person shall be . . . deprived of life, liberty, or property with-

out due process of law," and the further guaranty that "private property shall not be taken for public use without just compensation therefor," and the safeguard springing from the whole constitutional system that private property shall not be taken at all for private use, except in the enforcement of obligations inter partes. In the foregoing it is not intended to foreclose the question of whether the scope of police power extends to preventing, as a rule, the letting down of upper berths in sleeping-cars when not occupied or engaged, in cases where the lower ones are occupied.

The proposition as to whether, if it were legitimate under the police power, in the interests of public health and comfort, to burden the business of operating sleeping-cars with a regulation giving an occupant of a lower berth dominion over the upper one, it is reasonable to do so in the manner provided, need not necessarily be treated, especially since it is incidentally involved and fairly covered in what has been said. Therefore, we will rest the case without much further discussion.

114 As we have seen, legislative interference with property or other private rights for the ostensible purpose of promoting public health and comfort, or both, to be valid must be adapted to that end, not merely to make effective mere individual dictation. It must neither deal with a matter not in reason forming a proper subject for police regulation, nor deal with a proper subject therefor by means which are clearly unreasonable for the accomplishment of the purpose nor which are oppressive: *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. So, courts have held the law may properly provide for the summary destruction of property which is of little value and being illegally used, while one for such destruction of property of considerable value for proper use, the annihilation thereof not being necessary to remedy the improper use, would be invalid: *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385. A house may not be lawfully torn down because of its use for an unlawful purpose: *Ely v. Niagara Co.*, 36 N. Y. 297. A regulation requiring a railroad to keep a flagman at every crossing, regardless of the amount of traffic and the degree of danger, is invalid upon the ground of unreasonableness: *Toledo etc. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

In general, as before shown, all police regulations must bear the judicial test of reasonableness under all the circumstances. This doctrine is being more and more emphasized as the number of police regulations multiply, evincing a tend-

ency to fence in individual freedom as to matters not formerly so narrowed by legislative enactments. The writers declare that the supervision which courts widely exercise regarding the adjustment of means to ends in the protection of public interests as to ordinances extends to legislative enactments as to health and safety: Freund on Police Power, sec. 142. Illustrative of that it is said in *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. Rep. 1138, 41 L. ed. 256, that every legislative exercise of the police power must be reasonable, and in *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81, that reasonableness is one of the inherent limitations of such power.

¹¹⁵ In the foregoing it is not intended, even impliedly, to make any suggestion as to the wisdom of the increase of police regulations mentioned. That is beyond our functions. We only point to such increase as a circumstance which has aroused into greater activity and significance than formerly was apparent the judicial power of supervision which was entrenched in the constitution to prevent excesses.

It follows that an arbitrary appropriation in the name of law of the space of an upper berth in a sleeping-car for the greater comfort and safety, as regards the health of the occupant of the lower berth, at his option, if such use of such space were reasonably necessary, is highly oppressive. A regulation under the police power securing such privilege, in case of the upper berth not being engaged, by paying for it, would present a different question.

The learned deputy attorney general suggests that the law in question was borrowed from the state of New Hampshire, where it was adopted in 1883: Laws 1883, sec. 2, c. 40; N. H. Pub. Stats. 1901, c. 160, sec. 11. We are unable to find its validity to have been passed upon in that state. In any event, in our judgment, it is clearly unconstitutional, both because the subject as dealt with is not within the scope of police power, but is a mere matter, as to the persons sought to be benefited, of individual concern, and because if it were otherwise the character of the remedy, under the circumstances, is not within the boundaries of reason, and so is an interference with constitutional rights of property.

By the COURT. The question submitted for decision in the first case is answered in the negative, and the same question submitted in the second case is likewise answered.

TIMLIN, J. I concur in the result upon the ground that the act in question constitutes such a restriction upon the

ordinary use of property, and such an interference with the dominion of the owner over his property, as to bring it within the inhibition of sections 9 and 13, article 1, constitution, as interpreted ¹¹⁶ in *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128, 8 L. R. A. 808, and cases there cited. Consequently, it could only be justified as a valid exercise of the police power of the state. But I consider the act in question not a valid exercise of the police power, because committing to the discretion of the occupant of the lower berth the matter of compelling either the raising or the lowering of the upper berth negatives the idea that the law is based upon considerations of public health, peace, morals or safety. So far as anything in the opinion of the court may be fairly understood to imply that the regulation of sleeping-cars is not within the field of police power, or to imply that this court has any power to declare void an act of the legislature which does not conflict with some express provision or reasonable implication of the constitution, and merely because the act is, (1) in the opinion of the court, unreasonable, and (2) a police regulation, I desire to record my dissent therefrom.

Common Carriers are Subject to Reasonable Regulations by the legislatures of the several states. A statute making railway corporations guilty of a misdemeanor if they fail to furnish drinking water for their passengers is constitutional, although the only punishment which can be inflicted is by fine, whereas natural persons guilty of misdemeanor may be punished by fine or imprisonment, or by both: *Southern Ry. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203.

BARKER v. WESTERN UNION TELEGRAPH COMPANY.

[134 Wis. 147, 114 N. W. 439.]

TELEGRAPH COMPANIES—Liability for Failure to Deliver Message.—A statute making telegraph companies "liable for all damages occasioned" by failure or negligence in performing their duty to correctly transmit and deliver messages removes, as a condition of liability, all necessity that the company should have had in contemplation, or had any notice or suggestion of probability of, such damages as are in fact occasioned. (p. 1019.)

TELEGRAPH COMPANIES—Liability for Failure to Deliver Messages—Damages—Speculative.—In an action against a telegraph company for failure to deliver to a physician a telegram summoning him for a consultation with another physician and to attend a patient, he is not entitled to establish by his own testimony directly that he would have made pecuniary gains if he had received the telegram, and was prevented from so doing solely by its nondelivery without any in-

tervening independent cause, yet he is entitled to establish facts by proof, from which the jury may legitimately infer a probable course of conduct which would have secured him such gains if the telegram had been properly delivered. (pp. 1019, 1020.)

EVIDENCE—Inference from Facts Proved.—If a well-settled design is proved to exist, it is a legitimate inference that it will be persisted in and acted upon unless it appears that there is some supervening obstacle. (p. 1021.)

TELEGRAPH COMPANIES—Failure to Deliver Telegram—Damages.—In an action against a telegraph company to recover for failure to deliver to a physician a telegram summoning him for a consultation with another physician and to attend a patient, the plaintiff is entitled to recover the amount of the fee which he would have received for the consultation. (p. 1022.)

Richard, Jackman & Swansen, for the appellant.

A. G. Zimmerman, R. B. Smith and G. H. Fearons, for the respondent.

148 DODGE, J. Appeal from order sustaining demurrer to the complaint. That instrument alleges that plaintiff has built up an active practice in the treatment of certain diseases in and around Madison, Wisconsin, extending as far as Chicago, and in said business was well known to defendant and its agents and employes; that on April 22, 1905, a certain Chicago man, whose condition was desperate, learning of plaintiff's abilities, had decided and determined to abandon a trip to Arizona and to take treatment from plaintiff if the latter was in a position to receive him therefor; that thereupon he caused to be sent to plaintiff a telegram, signed by a mutual acquaintance, as follows:

“Englewood, Ill., April 22, 1905.

“To Mr. Chas. E. Barker, care of Harnan House, Madison, Wis.:

“Will you be in Madison Sunday or will you come to Chicago. Have a man that wants to see you at once. Wire me care Goes Litho. Co. 158 Adams street.

“J. J. HANSBERRY.”

Defendant, through negligence, failed and neglected to deliver said message to the plaintiff, whereby the Chicago man, receiving no response, and having transportation for Arizona already purchased, left before plaintiff learned of his desire for treatment or of the sending of the telegram. Had said message been delivered to plaintiff, he could and would have gone to Chicago in pursuance thereof, and said Chicago man would have returned with plaintiff and taken a course of treatment, as he had already fully determined to do; that, wholly because of the negligence of the defendant, ¹⁴⁹ this

result was prevented, to the pecuniary damage of the plaintiff; and also that the defendant's negligence was gross and malicious, wherefore exemplary damages are also claimed.

¹⁵¹ The liability of telegraph companies for failure to perform their duty to correctly transmit and deliver messages, whether that duty result from a contract or otherwise, has been the subject of a vast amount of litigation and discussion. One question which has pervaded and confused a considerable majority of the decided cases has been eliminated by our statute, section 1778, Statutes of 1898, making them "liable for all damages occasioned" by failure or negligence in performance of that duty. That statute, last carefully construed in *Fisher v. Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545, has removed, as a condition of liability, all necessity that the telegraph company should have had in contemplation, or had any notice or suggestion of probability of, such damages as are in fact occasioned.

"It is only necessary as to any particular result that it shall have been a natural consequence of the injury, having regard to the usual course of nature and of cause and effect in line of unbroken physical causation": *Fisher v. Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545.

We are therefore absolved from consideration of whether there was anything upon the face of this telegram to suggest that loss of the character claimed would be suffered by reason of nondelivery. Indeed, counsel frankly concede this, as also that, upon the allegations of the complaint, a legal wrong was done plaintiff when defendant in breach of its duty, hence wrongfully, deprived him of the information conveyed by the telegram; and that such wrong would be actionable if any injury can be shown to have resulted with reasonable certainty and beyond mere conjecture.

The concrete question with which we are confronted, ¹⁵² therefore, is whether, under the allegations of this complaint, it is conceivable that evidence may be given that might satisfy a jury, not by conjecture, but by reasonable inferences from established facts according to the known course of nature and human nature, that plaintiff would have made pecuniary gains if he had received the telegram, and was prevented from so doing solely by its nondelivery without any intervening independent cause. We may concede that he cannot establish this by his testimony directly that he would have done one thing or another, because that would be merely expressing his opinion upon the very question of inference which the jury must answer if it is capable of answer at all:

Hill v. American S. Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691. But might not facts consistent with the allegations of the complaint be established so that the jury might legitimately infer a probable course of conduct? The law is full of illustrations based upon inferences as to future conduct, some so plain that they may be drawn without evidence by application of mere common knowledge of human and natural tendencies, others needing the aid of evidence as to custom, interest or formed intent, and the like: *Allison v. Chandler*, 11 Mich. 542. Thus in *Hill v. American S. Co.*, 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691, the inference as to what insurance companies would have done but for the negligence which denied them the opportunity was sustained by the proof of their custom under similar circumstances. Loss of earnings resulting from tortious injury can be established only by inference that the injured person would work: 1 Sedgwick on Damages, 8th ed., sec. 180. Loss of profits can be established by inference from previous course of business: 1 Sedgwick on Damages, 8th ed., sec. 182. In *Derry v. Flitner*, 118 Mass. 131, defendant wrongfully occupied a place of shelter to which plaintiff's vessels were entitled. Two of the latter were exposed to and sunk by storm. The court sustained inference that but for defendant's wrong they would have been in the place of safety. Damages for sales ¹⁵³ induced by tort are allowed merely on proof that sales could have been made at higher prices, the inference being drawn without evidence that plaintiff would have so sold: *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 11 S. W. 783, 4 L. R. A. 660; *Potter v. Necedah L. Co.*, 105 Wis. 25, 80 N. W. 88, 81 N. W. 118. On the inference that a minor child would assist needy parents after majority damages are allowed: *Potter v. Chicago etc. R. Co.*, 21 Wis. 372, 94 Am. Dec. 548. Such illustrations of the drawing of inferences as to what would have happened but for wrongful prevention might be multiplied without limit. No good reason is apparent why the same principle of reasonable probability may not be shown against a telegraph company which wrongfully withholds information as well as in the ordinary run of cases, and yet there are several cases cited by the respondent which exclude damages in such case which would be considered entirely relevant if they resulted from a conspiracy or trespass. An examination of these cases, however, will show almost uniformly that the matter is complicated by the application of the rule in *Hadley v. Baxendale*, 9 Ex. 341, which requires the damages to have been

within the reasonable contemplation of the parties, a rule which, as stated, has no application to the present case. The plaintiff here is entitled to damages the same as if he were intercepted after he had received this telegram by an assault or other tort which disabled him from acting in response thereto. The complaint alleges him to have been building up a practice in Chicago. That is a fact, of course, if it can be proved. He was invited to come to Chicago to see a man professionally. Is it beyond the realm of reasonable inference that he would have responded to this call? Again, it is alleged that the patient in Chicago had fully determined to take treatment with him. Such an intent already formed is a fact just as much as any other physical fact: 1 Jones on Evidence, sec. 167; *Bowe v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074. Nothing is better established in the law than ¹⁵⁴ that when a settled design is proved to exist, it is a legitimate inference that it will be persisted in and acted upon, unless it appear that there is some supervening obstacle: 1 Wigmore on Evidence, secs. 102, 112. We think such fact, if established, sufficient to justify reasonable inference that he would have taken treatment with plaintiff. Of course the fact that plaintiff would have made gains from such treatment could be proved if it is not inferable without proof. The trial court in his opinion conceded that, if the telegram would have either made a contract or enabled plaintiff to make one by his own act, then such a degree of certainty of conduct would be attained as might justify recovery. This assumes the fallacy that the obligation of a contract is the only provable motive sufficiently certain to affect human conduct to justify the inference that it would do so. This is, of course, not true, for the great majority of human acts follow other motives and obligations quite as surely. A man threatened with death and offered an escape has as strong motive to grasp at it as if he had previously contracted to do so. A struggling physician or lawyer tendered a fee needs no contract to induce him to accept it. While the law undoubtedly takes special cognizance of contract duties, and does infer that they will be performed in absence of any showing to the contrary, it equally as well infers that other motives will induce people to act. But even on this narrower ground of contract we think there is enough alleged in the complaint to enable proof that plaintiff would at least have earned compensation for the journey for consultation. It is alleged that this telegram was sent to plaintiff at the request

of the prospective patient. If so, why would not the party have been bound to pay for a professional response thereto? Our attention is of course urged to *Fisher v. Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545, as an illustration of the exclusion of damages as too uncertain. There, it must be borne in mind, the court had before it all the evidence. Here we have ¹⁵⁵ merely a complaint which must be construed most favorably to the plaintiff, and we must consider the case upon the most favorable state of evidence possible under it. In the *Fisher* case the parties, by virtue of the telegram, merely severed all negotiation, and it was held that it was entirely problematical on the proof whether they would renew negotiation or not. Here the telegram invited relations and contact, and, if it can be proved under the rules above stated that the result of such contact would have been the gaining of profits by the plaintiff, we are satisfied that he should be given an opportunity to prove it. This, we think, is in accordance with the great weight of authorities elsewhere, except as they are permeated, and the view of the court controlled, by the rule that the results must have been within contemplation. We shall not extend this opinion by a review of those cases. Suffice it to cite a few of them: *Western Union Tel. Co. v. Collins*, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; *Western Union Tel. Co. v. Landis* (Pa.), 12 Atl. 467; *Western Union Tel. Co. v. McLaurin*, 70 Miss. 26, 13 South. 36; *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa, 160, 70 Am. St. Rep. 181, 77 N. W. 1034; *McPeck v. Western Union Tel. Co.*, 107 Iowa, 356, 70 Am. St. Rep. 205, 78 N. W. 63, 43 L. R. A. 214; *Texas etc. Co. v. McKenzie*, 36 Tex. Civ. App. 178, 81 S. W. 581; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Wallingford v. Western Union Tel. Co.*, 60 S. C. 201, 38 S. E. 443, 629; *Swan v. Western Union Tel. Co.*, 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153.

By the COURT. Order appealed from is reversed, and cause remanded with directions to overrule the demurrer.

Damages Which may be Recovered Against Telegraph Companies for negligence in transmitting or delivering messages are discussed in the note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 779. In *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 12 Am. St. Rep. 316, it was held where the nondelivery of a telegram in time to enable the party to whom it is sent to meet a train and comply with the direction of the sender does not cause the former party to suffer any damage, but simply to lose a mere opportunity or possibility to make some money, the company is not liable to him in damages for such nondelivery. The measure of damages against a telephone company for

wrongfully disconnecting a telephone on account of a mistake as to the payment of rent is such sum as will compensate its patron for the injury caused by the breach of the contract. He is not entitled to recover punitive damages: *Cumberland Telephone etc. Co. v. Hendon*, 114 Ky. 501, 102 Am. St. Rep. 290.

LAKESIDE LUMBER COMPANY v. JACOBS.

[134 Wis. 188, 114 N. W. 446.]

MUNICIPAL CORPORATIONS—Power to Devote Municipal Property to Private Use.—The power of municipal officers to hold and own real estate for public uses confers no power to apply it to any other than a public purpose. (p. 1024.)

MUNICIPAL CORPORATIONS.—Under the power of municipal boards to hold and own real estate for public uses, such boards act as a trustee for the public, and as such trustee, in exercising the public functions of the town, they can only deal with public property by devoting it to public uses. (p. 1024.)

MUNICIPAL CORPORATIONS—Authority to Devote Municipal Property to Private Use.—Municipal boards holding and owning real estate for public use have no power to confer on persons for their private use and benefit any right in or to any such property of the town which is entirely unrelated to any of the governmental functions of the town. (p. 1024.)

MUNICIPAL CORPORATIONS—Power to Confer Special Privileges in Property of.—Any grant by a municipal board attempting to confer on private persons any interest or right in public property amounts to a diversion of such property from its rightful use, and is unauthorized and void. (p. 1024.)

MUNICIPAL CORPORATIONS—Grant of Special Privileges in Property of.—An attempt by a municipal board to grant to a private person a right to lay a steam-pipe across a town lot is an attempt to confer on him the right to devote such property to a merely private use, wholly unrelated to any public town purpose, is beyond the power of the board, void, and cannot be enforced. (pp. 1024, 1025.)

W. N. Fuller, for the appellant.

A. L. Bugbee, for the respondent.

¹⁸⁹ SIEBECKER, J. The plaintiff's right to relief restraining defendant from hindering and preventing it from laying a steam-pipe across the lot of the town is based on the resolution of the town board of September 11, 1905, granting it ¹⁹⁰ permission "to lay a steam-pipe across the town lot, . . . said pipe to lay at least three feet underground and not in any way to interfere with the town property. The town reserves the right to take up said steam-pipe if at any time it would become necessary to use the ground for any other purpose." The court held that this action of the town

conferred no rights on the plaintiff, that it was therefore a trespasser on the lot at such time, and hence that it possessed no rights the defendant could invade by hindering and preventing it from laying the pipe. Plaintiff's right to enter the premises and lay this pipe rests wholly on this resolution of the town board. Among the powers of village boards enumerated in section 893, chapter 40, Statutes of 1898, and conferred by the electors on the town, is the power "To receive, purchase and hold for the use of the [town] village any estate, real and personal, and to sell and convey the same." The authority of the town board to contract with the defendant for the operation of the water and light plant, and the regularity of the proceedings of the electors and of the town board in constructing and maintaining it, need not be considered or determined upon this appeal. Whether plaintiff has the right to maintain this action must be determined by the provisions of the resolution of the board under which it asserts the right to lay the steam-pipe across the lot of the town on which is located the water and light plant. Concededly this pipe was to be laid to serve plaintiff's private interest and purpose. It was in no way connected with the operation of the town's enterprises. The question is whether the town board had any power to confer on plaintiff the right to use this public property for such private purpose.

The power of village boards to hold and own real estate for public uses confers no power to apply it to any purposes other than public purposes. Under such a power it acts as trustee for the public, and as such trustee, in exercising the public functions of the town, it can only deal with public ¹⁹¹ property by devoting it to public uses. Such restriction of the power forbids the town board from conferring on persons for their private use and benefit any right in or to any property of the town which is entirely unrelated to any of the governmental functions of the town. Any grant of the town board attempting to confer on private persons any interest or right in public property amounts to a diversion of such property from its rightful use, and is unauthorized and unlawful: 2 Abbott on Municipal Corporations, sec. 815; Attorney General v. Eau Claire, 37 Wis. 400. The action of the town board in attempting to grant plaintiff a right to lay its steam-pipe across the town lot seeks to confer on plaintiff the right to devote this property to a merely private use wholly unrelated to any public town purposes. The resolution in terms grants a right in the nature of an easement to plaintiff. Such a grant is beyond the power of the board,

hence void, and under it the plaintiff acquired no right to enter upon the lot to dig the trench and lay the pipe. From this it necessarily follows that the attempt of the plaintiff and its agents to do this is unauthorized, and that it has failed to establish a ground for the enforcement of its claim to occupy and use the lot for this purpose. The trial court properly awarded judgment dismissing the complaint.

By the COURT. Judgment affirmed.

A City cannot Grant for a Private Use property which it holds in trust for the public benefit: See the note to Commonwealth v. Morrison, 125 Am. St. Rep. 343.

RYAN v. DOCKERY.

[134 Wis. 431, 114 N. W. 820.]

HUSBAND AND WIFE—Duty of Support—Avoidance of by Contract.—The law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health, and a husband cannot shirk such duty even by contract with his wife. (p. 1026.)

HUSBAND AND WIFE—Contracts Between.—Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. (p. 1026.)

HUSBAND AND WIFE—Contracts Between for Personal Services—Consideration.—A promise by a husband to care for, nurse and support his wife after their marriage is a promise only to do that which the law requires of him in any event, and such promise is no consideration for an agreement by his wife to bequeath him her property. (p. 1026.)

HUSBAND AND WIFE—Contracts Between—Nudum Pactum. A contract by a wife to bequeath to her husband her property in consideration of his contract to care for, nurse and support her after their marriage, is a nudum pactum, and no recovery can be had thereon. (p. 1026.)

Action upon a quantum meruit. One E. Ryan on the same day and just prior to his marriage entered into a contract with the woman whom he contemplated marrying, that in consideration of his services in caring for, supporting and nursing her she would bequeath him all her property should he survive her. She failed to keep her contract, and after her death he filed a claim against her estate for his care, support and nursing of his wife from the time of their marriage

up to the time of her death. Judgment was rendered against him and he appealed.

Kaftan & Reynolds, for the appellant.

J. F. Watermolen and P. H. Martin, for the respondent.

433 WINSLOW, C. J. We think that the court was entirely right in changing the answer to the second question of the verdict; but, as a verdict for the defendant should have been directed upon the undisputed evidence, neither this question **434** nor the other detail errors claimed by the plaintiff are important.

One consideration alone disposes of the plaintiff's claim adversely to him. The law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage-earners, but may still be performing some of the most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself: Schouler on Domestic Relations, 5th ed., sec. 171; 21 Cyc. 1242. It results from this that, when the plaintiff promised to care for, nurse and support the deceased after marriage, he promised only to do that which the law required him to do in any event, and neither the doing of what one is in law bound to do nor the promising so to do is any consideration for another's promise: 1 Page on Contracts, sec. 311; Post v. Campbell, 110 Wis. 378, 85 N. W. 1032. The alleged promise of the deceased was therefore nudum pactum. The plaintiff simply performed duties required of him by law as a husband which he could not avoid or contract away, and there can be no recovery upon express contract, nor will the law imply a contract.

By the COURT. Judgment affirmed.

A Contract by Which a Wife, in Consideration of a Conveyance to her of real estate by her husband, agrees to support him during his natural life, is void, and the husband cannot maintain an action to recover damages for the breach thereof: Coreoran v. Coreoran, 119 Ind. 138, 12 Am. St. Rep. 390. But where a husband and wife are living

apart, and she has sufficient grounds for a divorce, and has prepared a petition therefor, her forgiving him and resuming marital relations is sufficient consideration for his agreement to convey property to their children: *Moayou v. Moayou*, 114 Ky. 855, 102 Am. St. Rep. 303. See, also, *Ward v. Goodrich*, 34 Colo. 369, 114 Am. St. Rep. 167.

EISENTRAUT v. CORNELIUS.

[134 Wis. 532, 115 N. W. 142.]

EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equity Jurisdiction.—If an administratrix alleges her ignorance of the amount, condition and nature of the estate and property claimed to be withheld by certain defendants, under claim of ownership, she may institute an equitable action in the circuit court during the pendency of the administration of the estate in the county court for a discovery of the property of the estate of the deceased and for an accounting. (p. 1028.)

EXECUTORS AND ADMINISTRATORS—Discovery of Estates—Equity Jurisdiction.—Although discovery may be had in the county court during administration, if the administratrix alleges ignorance of the amount, condition and nature of property claimed to be withheld by defendant under a claim of ownership, yet the necessity of bringing an action, either at law or in equity, as exigency may demand, to enforce delivery or restoration to the estate of the property discovered, results in such circuity and multiplicity of action that it is of itself sufficient ground for suing in equity. (p. 1028.)

EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Judgment—Form of Decree.—If, during the pendency of the administration of an estate, the administratrix institutes an action in equity for a discovery of property of the estate alleged to be withheld by defendant under a claim of ownership and an accounting, the court should not limit the relief awarded to an adjudication of the amount the defendant is found to have obtained from the estate of the deceased, and enter judgment that plaintiff recover such amount from defendant for the benefit of the estate, without determining defendant's rights to credits for any sums which he claims to have paid to the heirs of the deceased, and upon debts and claims against the deceased and his estate. In such case the court should adjudicate a final and complete settlement of the whole controversy between the parties having an interest in the subject matter of the action. (p. 1028.)

EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equity Jurisdiction—Parties.—If an administratrix institutes an action in equity for the discovery of the property of the estate claimed to be withheld by defendant under a claim of ownership, and for an accounting during the pendency of the administration of the estate in the county court, and some of the heirs have released their rights to the defendant, and he is found entitled to receive their shares of whatever estate may be found should be distributed, such heirs should be made parties to the action to enable their right to any portion of the estate to be litigated if controverted by any interested party, so that the court may, upon a final accounting, require the defendant to account to the administratrix for any part of the estate found to be

in his possession and required for the administration of the estate, and the payment of the amount found due to the other distributees. (p. 1029.)

EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equitable Action—Form of Judgment.—If, during the pendency of the administration of an estate, the administratrix institutes another action in equity for the discovery of the property of the estate and for an accounting, and the proof discloses that the property for which recovery is sought is held separately by two defendants, the court must ascertain the separate liability of each defendant and award judgment as to each accordingly. (p. 1030.)

EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equitable Action—Evidence.—If an administratrix, during the administration of an estate in one court, begins an equitable action in another court for the discovery of some of the property of the estate alleged to be withheld by the defendants under a claim of ownership, and they are examined as witnesses in plaintiff's behalf as to their course of dealing with the decedent, and are required to give evidence of communications and transactions through which they obtained possession of the property in dispute, and of the repayment of some specific sums collected by them, they are entitled to testify in their own behalf and give the details of such communications and transactions covering the negotiations. (p. 1031.)

Marsh & Schoengarth and J. Wickham, for the appellants.

F. E. Withrow and E. C. Higbee, for the respondent.

537 SIEBECKER, J. This is an action in equity by the plaintiff, as administratrix of the estate of Carl Nitzsche, deceased, for a discovery of the property of his estate and for an accounting with the defendants. Since the administratrix alleges her ignorance of the amount, the condition, and the nature of the estate and property claimed to be withheld by the defendants under claim of ownership, she may institute this equitable action in the circuit court during the pendency of the administration of the estate in county court. Though discovery in county courts may be had under such circumstances pursuant to section 3825, Statutes of 1898, yet the necessity of bringing an action, either at law or in equity, as exigency ⁵³⁸ may demand, to enforce delivery or restoration to the estate of property discovered, results in such circuitry and multiplicity of action that it is in itself sufficient grounds for suing in equity: Meyer v. Garthwaite, 92 Wis. 571, 66 N. W. 704; Burnham v. Norton, 100 Wis. 8, 75 N. W. 304.

The plaintiff demands that the defendants make discovery and account for any money or property in their possession belonging to the estate of Carl Nitzsche, deceased. The trial court, however, did not proceed to an accounting between the parties, but limited the relief awarded to an adjudication of the amount the defendants were found to have obtained from

the estate of the deceased, and entered judgment that plaintiff recover such amount from defendants for the benefit of the estate, without determining defendants' right to credits for any sums which they claim to have paid to the heirs of the deceased and upon debts and claims against the deceased and his estate. The court suggested that the question of such credits to defendants, if any should be allowed them on the amount they received from the decedent's estate, could not properly be determined in this action and must be litigated in county court in the settlement of the estate. Such a course would obviously deprive the parties of the very benefit sought to be gained by this equitable action in the circuit court, namely, the avoidance of a circuitry and multiplicity of actions, and a final and complete settlement of the whole controversy between the parties having an interest in the subject matter of the action. It was held in *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111, that the jurisdiction of courts of equity "over estates, interests, and primary rights, purely equitable, and to administer equitable remedies, is nowhere lost merely because the interest, right, or remedy grows out of, or is connected with, the estate of a deceased person which is in course of administration." The circumstances of this case clearly make it a proper one for an equitable accounting in the circuit court, and it is proper that ⁵³⁹ when that court has entertained the cause it should retain it to settle the rights of all the parties interested in the litigation. This necessarily entitled defendants to litigate their claims respecting the allowance of credits for any sums they claim to have paid the heirs of the decedent out of the estate which came into their hands and for any other sums they have properly disbursed in payment of claims against the deceased or his estate. These claims of defendants are appropriately embraced within the issues of the action for an accounting between the representative of the estate and the defendants, and can be most efficiently and expeditiously tried and determined in this action.

The argument is made that such a course of proceeding would involve issues between the defendants and some of the decedent's heirs who are not parties to the action. As to this the record discloses that the defendant, Charles Cornelius, avers that he has settled with three of such heirs and that they have released to him all their claims to the estate. This situation presents no obstacle to a full determination of the rights of all these parties arising out of these circumstances.

The object of the action is to accumulate and secure the custody of the assets of the estate so that they may be distributed among those rightfully entitled to them. If some of the heirs have in fact released their rights to the defendant, Charles Cornelius, and he is found entitled to receive their shares of whatever estate may be found should be distributed, we can conceive of no more appropriate, expeditious and efficient proceeding than to make such persons parties to this action and to litigate the question of his right thereto, if it is controverted by any interested party; and the court may, upon a final accounting, require defendants to account to the administratrix for any part of the estate found to be in their possession, and direct them to pay to the administratrix the amount thereof required for administration of the estate and the payment of the amounts found due the other distributees. It would be a ⁵⁴⁰ useless and an idle ceremony to require defendants to turn over to the administratrix any property or money which may be found due them upon distribution of the estate.

It is urged that such a disposition of the rights of the parties cannot be accomplished because the administration of the estate in county court is incomplete, and that the circuit court is therefore unable to ascertain what portion of the estate will be required for the payment of debts and expenses of administration. True, the record is silent as to these facts, but if the administration in county court has progressed to the stage where these amounts are ascertained, then proof thereof can readily be adduced in circuit court to enable it to enter a decree covering the situation, and, if time is required to carry the administration in county court to this point, the circuit court can hold the proceeding in abeyance until such facts may be shown.

The circuit court awarded judgment that plaintiff recover from defendants jointly an amount equal to the total amount of the property that both defendants were found to have obtained from the decedents. This was erroneous. The proof discloses that the property for which recovery is sought was held separately by the two defendants. Under such circumstances, in an equitable action for an accounting, the court must ascertain the separate liability of each defendant and award judgment as to each accordingly.

As to the issues litigated and determined, the court found that the defendants, by the exercise of undue influence over the minds of Carl Nitzsche and his wife, induced them to transfer and deliver to the defendants all of Nitzsche's prop-

erty, including the homestead, of a total value of at least fifteen thousand dollars. The appellants urge as error on this branch of the case, that, after plaintiff had examined them in her behalf concerning communications and transactions they had had with the decedents in the course of which they obtained possession of some property, they were refused an opportunity ⁵⁴¹ to give their evidence and explanation of such communications and transactions. The defendants were examined as witnesses in plaintiff's behalf as to their course of dealing with the decedent, and were required to give evidence of communications and transactions through which they obtained possession of the property in question and of the repayment of some specific sums collected by them. This examination covered in general terms all of the property that came into the defendants' possession, and referred to transactions between them and the decedents involving the receipt and payment of moneys realized out of the securities. When defendants offered to testify in their behalf and give the details of such communications and transactions covering the negotiations, the court excluded parts as incompetent because they related to personal transactions with the decedents and were not specifically covered by plaintiff's evidence. They were, however, the details of the transactions concerning which they had been examined by the plaintiff. Under these circumstances such evidence should have been admitted as part of the communications and transactions concerning which plaintiff had first examined them. The import and force of the evidence so offered cannot now be determined from the record. Its exclusion may have been very prejudicial, and especially so in view of the conclusion of the trial court that many transactions were not satisfactorily explained by the defendant, Charles Cornelius. We are impressed that the court placed much stress upon the want of such explanations in arriving at the conclusion that defendants obtained decedents' property by undue influence, and are led to the conclusion that the finding of undue influence should not stand as final on the evidence now before the court, but that it should be set aside, with directions to find upon this issue after all the evidence the parties may hereafter adduce has been received.

Appellants vigorously assail the finding that they received ⁵⁴² the sum of at least fifteen thousand dollars of the property and the estate of Carl Nitzsche. The finding of the court does not specify what property they received, aside from the specification that they received all of his real and personal

property. This leaves the finding somewhat indefinite, since there is no finding specifying what property Mr. Nitzsche actually owned when he removed to Neillsville in June, 1901. We are persuaded that the trial should be reopened as to this issue for further consideration upon all the evidence that may be received in the case.

It is urged, in view of the fiduciary relation of the defendants with decedents, that the trial court in effect imposed on defendants the burden of disproving the charge of undue influence under its interpretation of the decision of *Davis v. Dean*, 66 Wis. 100, 26 N. W. 737. The record does not disclose that this burden was so imposed on appellants. The proper application of *Davis v. Dean*, 66 Wis. 100, 26 N. W. 737, was considered and explained in *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220. We do not deem it necessary to elaborate the subject in view of the full discussion in this last case.

Upon the foregoing considerations the judgment of the trial court must be reversed and the cause remanded, with directions that the court proceed to bring in all the parties necessary to a complete determination or settlement of the questions involved in the controversy, that the court proceed to so frame the issues that the rights of all the parties having an interest in the subject of the action may be tried, that the court reopen the case for the reception of such other material evidence as may be produced by the parties and which was not introduced at the former trial, and that it make its findings of facts upon the issues after having received the evidence in the case.

By the COURT. It is so ordered.

In Some States Courts of Equity Assume Jurisdiction in the settlement of estates of deceased persons when the powers of the probate court are inadequate to deal with the question at issue: *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *Domestic and Foreign Missionary Society v. Eells*, 68 Vt. 497, 54 Am. St. Rep. 888; *Bailey v. Bailey*, 67 Vt. 494, 48 Am. St. Rep. 826. And probably in all of the states equity has a revisory jurisdiction in probate matters in cases of fraud, mistake and other grounds of equitable intervention: *Ewing v. Lamphere*, 147 Mich. 659, 118 Am. St. Rep. 563; *Froeblich v. Lane*, 45 Or. 13, 106 Am. St. Rep. 634, and note.

An Administrator or Executor may, in a Proper Case, maintain a suit in equity for discovery: *Kirby v. Lake Shore etc. Co.*, 14 Fed. 261; *Shotwell v. Struble*, 21 N. J. Eq. 31.

COMSTOCK v. BOYLE.

[134 Wis. 613, 114 N. W. 1110.]

JUDGMENTS IN EJECTMENT—When Erroneous.—If, in an action of ejectment, the answer contains neither an affirmative defense nor a counterclaim, but only a general denial, and the plaintiff fails to prove title, any other judgment than a judgment of nonsuit is erroneous but not necessarily void. (p. 1034.)

JURISDICTION—Ejectment.—The circuit court has jurisdiction of actions of ejectment, and if the plaintiff properly commences such an action in that court and serves his summons on the defendant, complete jurisdiction of both the subject matter and the parties is acquired by the court, and the contentions of the parties may be heard and decided. (p. 1035.)

JURISDICTION—Absence of Party from Trial.—If complete jurisdiction of both the subject matter and the parties has been acquired, the absence of one of the parties from the trial cannot deprive the court of jurisdiction to proceed, although it may affect the nature of the judgment which should be properly rendered, but if the court renders a wrong judgment, such action is erroneous merely and not void. (p. 1035.)

JUDGMENTS—Setting Aside After Term.—If a judgment is rendered at one term of the court, the court cannot against objection set aside either the judgment or the findings on which it was based at a subsequent term merely because error has been committed. (p. 1035.)

JUDGMENTS—Correcting After Term.—If the court pronounces judgment from the bench, and all that remains to be done is the clerical duty of reducing the judgment to writing or entering it, or both, the judicial act is complete, and if a mistake is made in the entry so that the judgment as entered does not accord with the judgment ordered, such mistake may be corrected at a subsequent term, but no change can be made after the trial term in the judgment actually ordered on the ground that it is erroneous. (p. 1036.)

E. S. Bragg and J. G. Hardgrove, for the appellant.

F. L. Gilbert, attorney general, and R. Jackson, deputy attorney general, for the respondents.

614 WINSLOW, C. J. Ejectment to recover a parcel of land in the city of Fond du Lac. The answer was a general denial. The case was on the calendar of the February, 1907, term of the circuit court for Fond du Lac county and was reached February 13, 1907, on which day, the plaintiff not appearing, the court received testimony upon the merits, and thereafter made findings of fact to the effect that the legal title to the land in question was in respondents, and that appellant's title was based upon tax deeds for taxes levied on the land at a time when it was owned by the state and not subject to taxation, and further found as conclusions of law that appellant's tax deeds were void, and that he acquired no claim or title whatsoever thereby, and directed judgment

to be entered in accordance with the findings. These findings were served on plaintiff's attorneys March 9th and filed March 13th following, being still of the February term. The clerk did not, however, enter the judgment as ordered, and on March 19th the appellant served notice of motion to set aside the findings, on the ground that the court had no jurisdiction to try the case in the absence of the plaintiff. Two other grounds were alleged in the motion papers, but as they were subsequently waived it is unnecessary to refer to them. The motion was made returnable on the first day of the May term of said court. On the same day that the motion papers were served ⁶¹⁵ the appellant obtained from a court commissioner an order purporting to stay all further proceedings in the action until the hearing and determination of the motion. Upon the hearing of the motion the court denied the same, and further ordered the clerk to sign and enter a judgment in accordance with the findings (which had been presented to him for signature March 14, 1907) as of the last-named date nunc pro tunc. The plaintiff appeals both from this order and from the judgment.

It was conceded by respondents that the judgment was erroneous and must be reversed, because the answer contained neither affirmative defense nor counterclaim, but only a general denial, and in such case the proper judgment, if plaintiff fails to prove title, is a judgment of nonsuit: *Weld v. Johnson Mfg. Co.*, 86 Wis. 549, 57 N. W. 378; *Zander v. Valentine Blatz B. Co.*, 89 Wis. 164, 61 N. W. 763; *Keator v. Glaspie*, 44 Minn. 448, 47 N. W. 52.

But the appellant makes a much broader claim, to the effect that when he failed to appear at the trial he thereby deprived the court of all jurisdiction to render any judgment except a judgment of nonsuit, and therefore that the judgment actually rendered was not only erroneous but void. From this premise he argues that the trial court should have set aside the findings, even though the term had passed at which the action was tried and the judgment ordered. We are entirely unable to agree with this contention. Jurisdiction of actions of ejectment has been given to the circuit courts by the statute: Const., sec. 8, art. 7; Stats. 1898, secs. 2420, 3073 et seq. This is jurisdiction of the subject ⁶¹⁶ matter. When the plaintiff properly commences such an action in the proper court and serves his summons on the defendant, jurisdiction of the parties is obtained, and thus complete jurisdiction of both the subject matter and the parties is acquired by the court and the contentions of the parties may

be heard and decided. Absence of a party from the trial cannot deprive the court of jurisdiction to proceed unless, indeed, there be some statutory provision to that effect. Such absence may affect the nature of the judgment which should properly be rendered, but if the court renders a wrong judgment, such action is an error only—it is not an act without jurisdiction. Having jurisdiction of both the subject matter and the parties, the court has jurisdiction to render not only a right judgment but an erroneous judgment as well. The logic of the appellant's argument leads inevitably to the conclusion that whenever a court errs it acts without jurisdiction—a conclusion which, of course, it is impossible to sustain: *State v. Circuit Court*, 98 Wis. 143, 73 N. W. 788. If the judgment in question was in fact rendered during the February term, the court could not against objection set aside either the judgment or the findings on which it was based at a subsequent term merely because error had been committed. This principle of the common law has frequently been affirmed by this court: *Aetna L. Ins. Co. v. McCormick*, 20 Wis. 265; *Scheer v. Keown*, 34 Wis. 349; *Fornette v. Carmichael*, 38 Wis. 236; *Challoner v. Howard*, 41 Wis. 355; *Whitney v. Karner*, 44 Wis. 563; *Egan v. Sengpiel*, 46 Wis. 703, 1 N. W. 467; *Gilbert-Arnold L. Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *Bassett v. Bassett*, 99 Wis. 344, 67 Am. St. Rep. 863, 74 N. W. 780; *Dufur v. Home Inv. Co.*, 122 Wis. 470, 100 N. W. 831; *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540. Whether it could set the judgment aside by consent of the parties is a question concerning ⁶¹⁷ which there may be considerable doubt: 1 *Freeman on Judgments*, 4th ed., sec. 96. Some decisions of this court seem to carry the idea that consent may give the court such power, but in none of them was the question raised, and we express no opinion upon it here as it is not presented: *Baker v. Baker*, 51 Wis. 538, 8 N. W. 289; *Steinhofel v. Chicago etc. R. Co.*, 92 Wis. 123, 65 N. W. 852; *Hogan v. La Crosse*, 104 Wis. 106, 80 N. W. 105; *Nelson v. Jacobs*, 99 Wis. 547, 75 N. W. 406.

The principle is also well settled in this state that if the court pronounces judgment from the bench, and all that remains to be done is the clerical duty of reducing the judgment to writing or entering the same, or both, the judicial act is complete. So far as the court is concerned, judgment has been rendered notwithstanding the fact that the clerical acts necessary to preserve the evidence of the judgment have not been performed: *Baker v. Baker*, 51 Wis. 538, 8 N. W. 289; *Fulton v. State*, 103 Wis. 238, 79 N. W. 234;

Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436; Allen v. Voje, 114 Wis. 1, 89 N. W. 924; German-American Bank v. Powell, 121 Wis. 575, 99 N. W. 222; Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552. In the present case the court filed findings and ordered the entry of judgment in accordance therewith. The entire judicial act was then performed. There only remained the purely clerical duty of reducing it to writing and entering it of record. If mistake was made in the entry, so that the judgment as entered did not accord with the judgment ordered, such mistake might be corrected even at subsequent term, or relief might be granted under section 2832, Statutes of 1898, but no change could be made after the trial term in the judgment actually ordered on the ground that it was erroneous.

These considerations demonstrate that the trial court was ⁶¹⁸ right in refusing to set aside the findings upon motion made returnable at a subsequent term, and necessitate affirmation of the order appealed from.

By the COURT. The order appealed from is affirmed without costs, and the judgment appealed from is reversed with costs, and the action is remanded for a new trial.

Timlin, J., took no part.

A Judgment Free from Jurisdictional Defects cannot be set aside after the term when it was rendered, or after the time prescribed by statute: Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845; State v. Tate, 109 Mo. 265, 32 Am. St. Rep. 664; Alabama etc. Ry. Co. v. Bolding, 69 Miss. 255, 30 Am. St. Rep. 541; State Nat. Bank v. Neel, 53 Ark. 110, 22 Am. St. Rep. 185; Liddell v. Bodenheimer, 78 Ark. 364, 115 Am. St. Rep. 42. But a judgment void by reason of an entire lack of jurisdiction may be denied or contested at any time in any proceeding, direct or collateral: Flowers v. King, 145 N. C. 234, 122 Am. St. Rep. 444, and cases cited in the cross-reference note thereto.

A Judgment is the Act of the Court and the Final Determination of the rights of the parties. Its entry in the record is the act of the clerk and merely ministerial, and while the judgment may be proven only by the record, yet it derives its force, not from its entry on the record, but from its rendition by the court: State v. Henderson, 164 Mo. 347, 86 Am. St. Rep. 618, and see cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

McLEAN v. STATE.

[81 Ark. 304, 98 S. W. 729.]

CONSTITUTIONAL LAW.—It is Within the Power of the State to Adopt a Uniform System of Weights and Measures, and to require all persons whose business transactions require the use of the same to conform thereto. (p. 1039.)

CONSTITUTIONAL LAW—Meaning of Statute Restricting the Right to Screen Coal Before Weighing.—A statute making it unlawful for any mine owner, when more than ten men are employed to mine coal by the bushel or ton, to pass the output of coal over any screen or other device that shall take any part from the value thereof before weighing and crediting the employés, and depriving the latter of all right to waive the benefits of the statute, is within the scope of the police power and not unconstitutional, where the statute gives the owner the right to accept or reject the coal at the surface. (p. 1039.)

CONSTITUTIONAL LAW—Classification by the Number of Employés, When not Forbidden.—For the purpose of protecting miners from fraud or imposition, a broad latitude is given the legislature in the matter of the classification of mines and miners, and it may therefore enact a statute applicable only in mines where more than ten men are employed. (p. 1041.)

Ira D. Oglesby, for the appellant.

Robert L. Rogers, attorney general, and Brizzolara & Fitzhugh, for the appellee.

306 **WOOD, J.** This appeal questions the constitutionality of the following statute:

“It shall be unlawful for any mine owner, lessee, or operator of coal mines in this state, where ten or more men are employed underground, employing miners at bushel or ton rates or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employé sending the same to the surface, and accounted for at the legal rate

of weights as fixed by the laws of Arkansas, and no employé, within the meaning of this act, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract, or agreement between mine owners, lessees or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled, shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and, if accepted, shall be weighed in accordance with the provisions of this act, and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent, lessee, or operator of any coal mine in this state, where ten or more men are employed underground, ³⁰⁷ who shall knowingly violate any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for each offense, or by imprisonment in the county jail for a period of not less than sixty days nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall be a separate and distinct offense; proceedings to be instituted in any court having competent jurisdiction": Acts 1905, c. 219, sec. 1.

This legislation is clearly within the scope of the police power. The manifest purpose of the statute is to prevent those who operate coal mines from perpetrating fraud upon laborers whom they have employed to mine coal by the quantity. It will be observed that the act does not interfere with the right of the operator to contract with the miners in his employ for the mining of coal by the hour or day, or in any other manner, regardless of quantity, that he deems proper. He is not compelled to have his coal mined and pay for same according to the quantity produced. But if he elects to employ miners to mine coal and to pay for same according to the quantity produced, then the purpose of this law is to secure the laborer against the use by him of any screen or other device "that shall take any part from the value thereof before the same shall have been weighed and duly credited to the employé" producing same. Under the provisions of the statute, the operator who has contracted to have his coal mined by the quantity is not required to accept the coal sent to the surface by the miners. The coal "shall be accepted or rejected." But "if accepted," then it "shall be weighed in accordance with the provisions of the act."

The plain purpose of the act, therefore, is not to prevent the parties from contracting in any manner they deem proper for the production of coal, but rather, after they have contracted for its production according to the quantity produced, to see that such quantity is ascertained by a fixed and definite standard by which neither of the parties can be defrauded. In other words, under this statute, the miner, having contracted with the mine owner or operator to produce a bushel, ton, or ³⁰⁸ any other quantity of coal at a certain price for the quantity produced, is entitled to have such quantity ascertained by the legal rate or system of weights adopted by the state of Arkansas; and that, too, without having the output or quantity of coal mined passed over any screen or other device which would take any part from the value thereof, i. e., which would reduce, as ascertained by the weight, the quantity of coal which he had actually mined under his contract. It is certainly within the police power of the state to adopt a uniform system of weights and measures, and to require that all persons whose business transactions require the use of same conform thereto: Kirby's Digest, c. 159; Blaker v. Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; State v. Wilson, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71; State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; Freund on Police Power, secs. 272-275. The purpose of these statutes, as applicable to coal mines, is, as said by Mr. Snyder, "to furnish a reliable means upon which to base the miner's compensation, and to protect him in the payment for all the coal he mines." He therefore "not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it": 2 Snyder on Mines, sec. 1675.

The operators are prohibited from using screens or other device "which shall take any part from the value thereof." The words quoted show the intent of the legislature to protect the miner from the use of any device by his employer that will enable such employer to deprive the miner of the value of his labor on the basis of the quantity mined as per contract.

We see nothing in the statute under consideration that contravenes the provisions in our state and federal constitutions securing to all persons liberty and equality of rights under the law: State Const., art. 2, secs. 2, 3, 8; Fed. Const., Fourteenth Amendment.

That the law applies only to mine owner, lessee or operator of coal mines where ten or more men are employed under-

ground does not subject it to the interdiction of the above provisions. The coal industry of our state, on account of the great number engaged in it and dependent upon it for a livelihood, and the still greater number who are affected by it, is of vast importance. Indeed, it can be truthfully said to be an ³⁰⁹ industry of great interest to the public, if not affected by a public use. It is eminently proper that the legislature should take supervision over it for the protection and benefit primarily of those who are engaged in it and dependent upon it, and, secondarily, for the welfare of those who are incidentally affected by it. This duty has been recognized and entered upon, as evidenced by laws intended to insure, as far as practicable, the safety, health and comfort of the miner while engaged in his hazardous employment; and also to insure him, if possible, against any fraud or imposition that might or could be practiced upon him by an unscrupulous employer, if there should be one, who would defraud him of the fruits of his toil: Kirby's Digest, secs. 5337-5358, inclusive. Legislation of the latter class is as much warranted under the police power as the former. As the object of such legislation is to protect those miners who need protection from fraud, broad latitude must be given the legislature in the matter of the classification of the mines and miners. The principle announced in the case of Consolidated Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. Rep. 616, 46 L. ed. 872, is applicable here. "In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operators would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a large scale, or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for discrimination here."

The supreme court of West Virginia, in passing upon a similar clause in a similar statute, said: "The distinction drawn in favor of the smaller operators would indicate that the legislature thought that the evils of fraud and danger of imposition did not extend to the smaller classes of operators, and hence the remedy was not extended to their employes. It is impossible to see how this distinction renders

the act amenable to ³¹⁰ the charge of violating the fourteenth amendment of the federal constitution''; citing *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. ed. 247. See *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385. The authorities are quite numerous holding that the legislature may make classifications and discriminations between different classes of corporations and individuals. Likewise that such laws are not open to impeachment by the courts as violative of the fourteenth amendment of the federal constitution, and the rights of civil liberty and equality, and of contract, guaranteed by state and federal constitutions, so long as equal protection is not denied to all persons similarly situated, and where it appears from the face of the act that no unreasonable, arbitrary or unjust discrimination was intended or could be effected. Along this line see the many authorities cited in the able brief of counsel for appellee.

We do not consider the cases decided by the supreme court of the United States cited and relied upon in the brief of learned counsel for appellant as applicable to the statute under consideration. We believe the opinion we hold conforms to the decisions of the supreme court of the United States. No unjust or unreasonable discrimination against one class of persons or corporations and in favor of others can be found in this statute, as was found in the statutes in the cases cited that fell under the condemnation of the supreme court of the United States because repugnant to the fourteenth amendment of the constitution. It must be presumed that the legislature, through the local members from the districts affected especially by the legislation, or its committees appointed for the purpose, received information of the conditions which made such legislation necessary or expedient, and that it intended to put its enactments in the form to meet the requirements.

The act applies to "coal mines in this state, where ten or more men are employed underground." It may be fairly inferred from this language that the legislature considered as mines only those places that had developed to the extent of requiring the labor of ten or more men underground in the work of mining coal. Those places where the development work had not been carried on to the extent of requiring the labor of ten men underground were evidently regarded by the ³¹¹ legislature as only in the prospective or experimental stage. We have no right to assume, from the act, that the

legislature intended to discriminate against them, but rather that they were not included because they did not need the protection afforded the class mentioned.

Similar laws have been enacted in several of the coal-producing states, and where tested, have received the sanction of the highest courts of the states, as a valid exercise of police power: Dig. Mo. Stats. 1899, sec. 8786; W. Va. Acts 1891, c. 82; *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; Kan. Stats. 1899, secs. 4000-4005; *State v. Wilson*, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71; Ind. Rev. Stats., sec. 7840.

This court, in *Woodson v. State*, 69 Ark. 521, 65 S. W. 465, upheld a similar law as to a corporation, under the state's constitutional power to amend charter, and to prescribe conditions on which foreign corporations might continue to do business in this state. As the appellant in this case is the agent of a foreign corporation, the act could be sustained under the authority of that decision. For we do not find that the present law is so essentially different from that as to require a different ruling, and, in the opinion of the court, that case announces the correct doctrine.

Finding no error, the judgment is affirmed.

On Writ of Error to the Supreme Court of the United States the judgment of the state court was affirmed, Mr. Justice Day delivering the opinion of the court as follows:

"The objections to the judgment of the state supreme court of a constitutional nature are twofold: First, that the statute is an unwarranted invasion of the liberty of contract secured by the fourteenth amendment of the constitution of the United States; second, that the law, being applicable only to mines where more than ten men are employed, is discriminatory, and deprives the plaintiff in error of the equal protection of the laws, within the inhibition of the same amendment.

"That the constitution of the United States, in the fourteenth amendment thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business, against hostile state legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation: *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 832; *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. Rep. 277, 52 L. ed. 436. But, in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. It would extend this

opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced. Some of them are collected in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780, in which it was held that the hours of work in mines might be limited.

"In *Knoxville Iron Co. v. Harbisen*, 183 U. S. 13, 22 Sup. Ct. Rep. 1, 46 L. ed. 55, it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employés, did not conflict with any provisions of the constitution of the United States, protecting the right of contract.

"In *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. Rep. 586, 39 L. ed. 657, the act of Congress prohibiting attorneys from contracting for a larger fee than ten dollars for prosecuting pension claims was held to be a valid exercise of police power.

"In *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. ed. 1145, a statute of California, making it unlawful for employés to work in laundries between the hours of 10 P. M. and 6 A. M. was sustained.

"The statute fixing maximum charges for the storage of grain, and prohibiting contracts for larger amounts, was held valid: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

"In *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. Rep. 821, 47 L. ed. 1002, this court held that an act of Congress making it a misdemeanor for a shipmaster to pay a sailor any part of his wages in advance was held to be valid.

"In *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725, this court summarized the doctrine as follows: 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.'

"In *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. 643, 3 Am. & Eng. Ann. Cas. 765, this court said: 'The liberty secured by the constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.'

"It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by

the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people.

"It is also true that the police power of the state is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

"The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power: *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. 643, 3 Am. & Eng. Ann. Cas. 765; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. Rep. 862, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. Rep. 124, 48 L. ed. 148.

"If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government.

"We take it that there is no dispute about the fundamental propositions of law which we have thus far stated; the difficulties and differences of opinion arise in their application to the facts of a given case. Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law? Looking to the law itself, we find its curtailment of the right of free contract to consist in the requirement that the coal mined shall not be passed over any screen where the miner is employed at quantity rates, whereby any part of the value thereof is taken from it before the same shall have been weighed and credited to the employé sending the same to the surface; and the coal is required to be accounted for according to the legal rate of weights, as fixed by the law of Arkansas, and contracts contrary to this provision are invalid. This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week or month; it does not prevent the operator from rejecting coal improperly or negligently mined, and shown to be unduly mingled with dirt or refuse. The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

"If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.

"While such laws have not been uniformly sustained when brought before the state courts, the legislatures of a number of the states have deemed them necessary in the public interests. Such laws have been passed in Illinois, West Virginia, Colorado, and perhaps in other states. In Illinois they have been condemned as unconstitutional: *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853. The same conclusion has been reached in Colorado, citing and following the Illinois case: *In re House Bill No. 203*, 21 Colo. 27, 39 N. E. 431.

"In West Virginia, while at first sustained by a unanimous court, such an act was afterward, upon rehearing, maintained by a divided court: *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

"We are not disposed to discuss these state cases. It is enough for our present purpose to say that the legislative bodies of the states referred to, in the exercise of the right of judgment conferred upon them, have deemed such laws to be necessary.

"Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 18, 1898: 30 Stats. at Large, 476, c. 466. Volume 12 of the report of that commission is devoted to the subject of 'Capital and Labor Employed in the Mining Industry.' In that investigation, as the report shows, many witnesses were called and testified concerning the conditions of the mining industry in this country, and a number of them gave their views as to the use of screens as a means of determining the compensation to be paid operatives in coal mines. Differences of opinion were developed in the testimony. Some witnesses favored the 'run of the mine' system, by which the coal is weighed and paid for in the form in which it is originally mined; others thought the screens useful in the business, promotive of skilled mining, and that they worked no practical discrimination against the miner. A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between the operators and the miners. This condition was testified to have been the result, not only of the introduction of screens as a basis of paying the miners for screened coal only, but, after the screens had been introduced, differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it, or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as the basis of paying the miners' wages.

"We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the harmonious relations of capital and labor engaged in a great industry in the state.

"Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although, in compelling certain modes of dealing, they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on 'Police Power,' wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of five hundred pounds or more by weight; that milk shall be sold in wine measure, and kindred enactments: Freund on Police Power, sec. 274.

"Upon this branch of the case it is argued for the validity of this law that its tendency is to require the miner to be honestly paid for the coal actually mined and sold. It is insisted that the miner is deprived of a portion of his just due when paid upon the basis of screened coal, because, while the price may be higher, and theoretically he may be compensated for all the coal mined in the price paid him for screened coal, that practically, owing to the manner of the operation of the screen itself, and its different operation when differently adjusted, or when out of order, the miner is deprived of payment for the coal which he has actually mined. It is not denied that the coal which passes through the screen is sold in the market. It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation.

"The law is attacked upon the further ground that it denies the equal protection of the law, in that it is applicable only to mines employing ten or more men. This question is closely analogous to one that was before this court in the case of Consolidated Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. Rep. 616, 46 L. ed. 872, wherein an inspection law of the state was argued to be clearly unconstitutional by reason of its limitation to mines where more than five men are employed at any one time, and in that case, as in this, it was contended that the classification was arbitrary and unreasonable—that there was no just reason for the discrimination. Of that contention this court said (page 207): 'This is a species of classification which the legislature is at liberty to adopt, provided it be not wholly arbitrary or unreasonable, as it was in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. ed. 92, in which an act defining what should constitute public stockyards, and regulating all charges connected therewith, was held to be unconstitutional, because it applied only to one particular company,

and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation of coal mines of ordinary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here.'

"This language is equally apposite in the present case. There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the state employing more than ten men underground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the supreme court of Arkansas, which has affirmed its validity. The judgment of that court is affirmed": *Mc Lean v. State*. (U. S.), 29 Sup. Ct. Rep. 370.

HAMMOND PACKING COMPANY v. STATE.

[81 Ark. 519, 100 S. W. 407, 1199.]

CONSTITUTIONAL LAW—Criminal Proceeding—What is not.

A proceeding to recover the penalty given by the anti-trust act of 1905 is not a criminal proceeding within the meaning of section 8 of article 2 of the constitution, declaring that no person shall be held to answer a criminal charge unless on presentment or indictment of the grand jury. (p. 1051.)

CONSTITUTIONAL LAW—Unreasonable Searches and Seizures.—That part of the anti-trust act by which, in proceedings against corporations thereunder, the prosecuting attorney may file a statement of the names of the persons whose testimony he wishes to take, and the court may thereupon make an order for the taking of their testimony and the production of any books, papers or documents in the possession or control of the witnesses, and authorizing the striking out of the answer of the defendant on the refusal of a person so named to appear and testify or to produce the books and papers, and the entry of judgment against the defendant corporation, does not authorize an unreasonable search and seizure of the books, papers or documents contrary to the fourth amendment to the constitution of the United States, and that provision of similar purport in the constitution of Arkansas. (p. 1053.)

CONSTITUTION of the United States—When not Applicable to State Legislation.—The first ten amendments to the constitution of the United States operate on the national government only, and cannot be invoked against state legislation. (p. 1053.)

CONSTITUTIONAL LAW—Construction of the Supreme Court of the United States, When Controls the State Courts.—If the provisions of the national and of the state constitution on any subject are identical, the state courts are controlled by the decisions of the national courts interpreting and applying such provisions. (p. 1053.)

FOREIGN CORPORATIONS Doing Business Within the State under laws permitting them to do so are subject to the same control as domestic corporations. (p. 1054.)

CONSTITUTIONAL LAW—Anti-trust Statute Respecting the Production of Testimony—Interpretation of.—Sections 8 and 9 of the anti-trust statute, providing that the prosecuting attorneys may, in proceedings under the act, apply for an order to take the testimony of persons, and that the defendant's attorneys and officers may be notified to request the officers, agents or employes of the defendant to appear and testify, and authorizing the striking out of the defendant's answer for refusal to so appear, do not require more of the defendant than that it shall make an honest effort to produce the testimony called for. (p. 1055.)

CONSTITUTIONAL LAW—Statute Authorizing the Striking Out of an Answer, and the Taking of a Judgment as by Default.—The operation of the anti-trust act authorizing the striking out of the answer and the taking of judgment, on the refusal of the defendant to produce books and papers when ordered by the court to do so, relates to matters of procedure, and is not unconstitutional as denying due process of law. (p. 1059.)

Action in the name of the state of Arkansas by its attorney general, charging the defendant, a foreign corporation, with being a member of a pool trust combination or conspiracy to fix and maintain prices in violation of the terms of the anti-trust act.

A motion made by the defendant to compel the plaintiff to make the allegations of the complaint more definite and certain, so as to show when the trust charge was made and what were its terms and conditions, was denied.

On motion of the plaintiff a commissioner was appointed in Chicago to take depositions there, and an order was made by the court designating fifteen persons, all alleged to be officers and employes of the defendant, to be produced before the commissioner with all books, papers and documents in their possession or under their control, relating to the issues in the case.

A motion by the defendant that the plaintiff be required to set out specifically what it expected to prove by each witness was overruled.

The order directing the production of the books and papers provided that the examination of witnesses and books should not be such at any one time as to interfere with the defendant's business.

On a showing that the defendant refuses to produce any witness or any books, papers or documents, its answer was stricken out and a judgment entered against it as by default.

Sections 8 and 9 of the anti-trust act, under which the proceedings were conducted and the judgment entered, were as follows:

“Section 8. Whenever any proceeding shall be commenced in any court of competent jurisdiction in this state by the attorney general and prosecuting attorney against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this state, or to recover the penalties in this act provided, then and in such case, if the attorney general or prosecuting attorney desires to take the testimony of any officer, director, agent, or employé of any corporation, or joint stock association proceeded against, or, in case of copartnership, any of the members of said partnership, or any employé thereof, in any court in which said action may be pending, and the individual or individuals whose testimony is desired are without the jurisdiction of this state, or reside without the state of Arkansas, then in such case the attorney general or prosecuting attorney may file in said court in term time, or with the judge thereof in vacation, a statement in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons and for the production of any books, papers and documents in his possession or under his control relating to the merits of any suit, or to any evidence therein, shall appoint a commissioner for that purpose, who shall be an officer authorized by law to take depositions in this state, and said commissioner shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said case, or agent, or officer, or other employé, that the testimony of the person named in the application of the attorney general or the prosecuting attorney is desired, and requesting said attorney, or attorneys of record, or said officer, agent or employé to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employé, representative of said copartnership, or agent thereof,

whose evidence it is desired to take, together with such books, papers and documents, at the place named in the application of the attorney general or the prosecuting attorney, and at the time fixed in the application, then and there to testify; provided, however, that such application shall always allow in affixing said time the same number of days' travel to reach the designated place in Arkansas that would now be allowed by law in case of taking depositions; provided, also, in addition to the above-named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer or employé on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice as returned in writing may be made by anyone authorized by law to serve a subpoena.

"Section 9. Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director or employé to attend before any court, or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers and documents they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the attorney general or prosecuting attorney, to strike out the answer, motion, reply, demurrer, or other pleading then or thereafter filed in said action or proceeding by the said corporation, joint stock association or copartnership, whose officer, agent, director or employé has neglected or failed to attend and testify and produce all books, papers and documents he or they shall have been ordered to produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render judgment by default against said corporation, joint stock association or copartnership. And it is further provided that in case any officer, agent, employé, director or representative of any corporation, joint stock association or copartnership in such proceeding, as hereinbefore mentioned, who shall reside or be found in this state, shall be subpoenaed to appear and testify or to produce books, papers and documents, and shall fail, neglect or refuse to do so, then the answer, motion, demurrer or other pleading then and thereafter filed by said corporation, joint stock association or copartnership in any such proceeding, shall, on motion of the attorney general or prosecuting attorney, be stricken out and

judgment in said cause rendered against said corporation, joint stock association or copartnership."

The several proceedings in the state court are more fully disclosed in the opinion of the supreme court of the United States hereto appended.

Rose, Hemingway, Cantrell & Longhborough and Mehaffey & Armistead, for the appellant.

R. L. Rogers, Lewis Rhoton, J. H. Stevenson, F. G. Fulk W. M. Lewis and W. L. Terry, for the state.

536 HILL, C. J. This is an action brought by the state of Arkansas on the relation of the attorney general against the Hammond Packing Company, alleging that it was doing business in the state contrary to the anti-trust act of 1905. After answer a commission was issued to a commissioner in Chicago to take testimony. Upon a refusal to comply with the order of court requiring production of witnesses and documents, after notice, the answer was stricken out, and judgment rendered against the appellant as by default, and it appealed.

1. The nature of the "conspiracy to defraud" denounced by section 1 of the act of January 23, 1905, the "anti-trust act," is the first subject requiring attention. Appellant contends that the complaint, framed in the language of that section, does not constitute a cause of action, because the acts therein complained of constitute a crime, and under article 2, section 8 of the constitution of Arkansas, "no person shall be held to answer a criminal charge unless on presentment or indictment of a grand jury" (with certain exceptions not pertinent to this issue).

The same contention was made in regard to the offense **537** described in the first section of the anti-trust act of 1899: Acts 1899, p. 50. The difference between section 1 of the act of 1899 and section 1 of this act is immaterial on this issue. The court, in construing the act of 1899 in *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348, ruled this point, it is true, *sub silentio*, against the contention of the appellant. That an attempted monopoly, an agreement to restrain the freedom of trade, was a criminal conspiracy at common law is undoubtedly true. This subject is fully discussed, and also the applicability of the law of criminal conspiracy to modern combinations in restraint of trade, in *Eddy on Combinations*, sections 335, 336, and *Beach on Monopolies*, sections 77, 78.

When the ingredients constituting the criminal conspiracy at common law and the ingredients constituting the "conspir-

acy to defraud" under anti-trust acts are examined, it is apparent that the offenses are not identical. The latter is doing business while a member of an illegal combination, while the former is a conspiracy to do an unlawful act or a conspiracy to do a lawful act in an unlawful manner. The remedies against the common-law conspiracy were indictment for the criminal conspiracy and an action on the case for damages by an aggrieved party or quo warranto by the state against an offending corporation: Eddy on Combinations, secs. 338, 371. This action is entirely different, and is purely a statutory action to recover the penalties of the statute for doing business in the state contrary to its terms. These penalties are twofold: one a money judgment for each day the offense continues, and the other, as to corporations, a forfeiture of charter if a domestic corporation and forfeiture of right in the state if a foreign corporation: Anti-trust Act 1905, secs. 2, 3.

St. Louis etc. Ry. Co. v. State, 56 Ark. 166, 19 S. W. 572, is applicable here. It was therein demonstrated that a statutory penalty for a matter not a crime at common law and not made a crime by the statute was recoverable in a civil action, and was not a "criminal charge," within the meaning of section 8, article 2, of the constitution. The fact that there is a further penalty in case the offender is a corporation—that penalty being the civil death of the corporation if it is created by this state and its exile if created by another state—cannot change the effect of the money penalty. It is just an added penalty where the offender is an artificial person, and falls ⁵³⁸ equally, to the extent of the state's power, on foreign and domestic corporations.

It is sought to distinguish the Hartford case (Hartford Fire Ins. Co. v. State, 76 Ark. 303, 89 S. W. 42) from this one on the ground that in the Hartford case only the ouster of a foreign insurance corporation was considered, while this case presents an appeal from a money judgment only. The matter of money judgment in the Hartford case was covered by an agreement of parties (see page 305), and the decision was limited to the facts presented, but it was expressly held that the corporation had subjected itself to the penalty of the act. That this judgment is not of ouster as well as for the money penalty is not a cause of complaint by appellant, for it is liable to that penalty likewise if liable for the money penalty. Therefore, the court treats the action as purely a statutory one for the recovery of a penalty named in the statute.

2. It is contended that sections 8 and 9 of the anti-trust act of 1905 subject defendants proceeded against under them to unreasonable search and seizure of papers, books and documents, contrary to the fourth amendment of the constitution of the United States, and contrary to a similar provision in section 15, article 2, constitution of Arkansas.

The first ten amendments of the constitution of the United States operate on the federal government only, and cannot be invoked against state legislation: *Jack v. Kansas*, 199 U. S. 372, 26 Sup. Ct. Rep. 73, 50 L. ed. 234; *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. Rep. 77, 44 L. ed. 119. Where, however, the provisions of a state constitution are identical with provisions in these amendments, the courts of the state should, and do, regard as controlling decisions of the supreme court of the United States upon them.

Appellant relies upon *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746, as establishing the principles that the "search and seizure" clause reaches to an order of court under a statute providing for a production of books and papers under penalty that the complaint be confessed in an action to recover a penalty; and if such order effects an unreasonable search, it is contrary to such provision; and actions seeking penalties should in this respect be treated as criminal cases.

The scope of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746, is narrowed when applied ⁵³⁹ to corporations by the recent decision in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, and the case at bar must be determined in these respects by the last enunciation of that court on this subject. It is established in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, that the interdiction of the fifth amendment to the federal constitution that "no person . . . shall be compelled in any criminal case to be a witness against himself" does not apply to corporations but to natural persons. The exact language above quoted is also found in section 8, article 2, constitution of Arkansas. It is further settled by *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, that a corporation is entitled to immunity by reason of the fourth amendment from unreasonable search.

As to whether the order in question was an unreasonable search of appellant's books is not properly before the court under the facts. The order for the production of the books was coupled with an order to produce named witnesses for oral examination, and J. Ogden Armour, one of those named in the order, was the first witness called for oral examina-

tion. Instead of producing him or showing inability to do so, the appellant declined in toto to obey the order.

If appellant had obeyed so much of the order as required the production of witnesses for oral examination, or showed its inability to do so, and showed an attempt to comply with the order to that extent, and had refused to obey the order as to the production of books and papers, then the question would be squarely for determination whether the order in question amounted to an unreasonable search of books and papers. It is pointed out in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, that a subpoena duces tecum which practically called for all the books, papers and documents of a large business to be brought into court under a sweeping clause was unreasonable and void, but the fact that it was void as to the production of the books and papers did not justify its disobedience as to appearing to testify. In this case the order is very broad, but its harshness is somewhat ameliorated by a proviso that at the examination the witnesses and books should not be required to be produced at any one time in such numbers as to interfere with the business of the defendant. But, as indicated, it would be obiter dictum to determine the reasonableness of the order in question in so far as production of books and papers is concerned. Sufficient to say that the statute is valid under the decision in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, in so far as it authorizes a reasonable order for the production of books, papers and documents of a corporation over which the state has control, and what may be a reasonable order must be determined in each case as it arises.

Foreign corporations doing business in this state under laws permitting them to do so would in this respect be subject to like state control as domestic corporations: *Woodson v. State*, 69 Ark. 521, 65 S. W. 465; *St. Louis etc. Ry. Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; *St. Louis etc. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484, 39 L. ed. 567. The control of the government over state corporations engaged in interstate commerce surely cannot be as far-reaching as the control of a state over a foreign corporation within its borders by its permission and corporations created by it; and as *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652, sustains the right of the government to require a production of books, papers and documents in order for the government to ascertain in a proper action whether a corporation engaged in interstate commerce is proceeding in its

business along legal lines, provided such order is reasonable in its terms, it follows, a fortiori, that a state may do so over foreign and domestic corporations doing business under authority of its laws.

The question narrows to whether the statute, in so far as it authorizes the order to produce witnesses, is constitutional. The provisions of sections 8 and 9 are attacked as unreasonable, in derogation of natural rights and various clauses of the state and federal constitutions. These sections, with a few differences immaterial to this issue, are copied from the Missouri anti-trust act, and the clauses under fire here were recently sustained as constitutional by the supreme court of Missouri in *State v. Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062.

It is insisted here, as it was in Missouri, that this statute lays a duty on a corporation to produce its officers and employes, or be defaulted for a failure to do so.

If these provisions mean that the corporation must be a policeman, and bring into court on demand its president, bookkeeper or doorkeeper *vi et armis*, certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. These sections evidently mean this, and nothing more: that the corporation shall, on demand, request any given officer, agent or employé to be present at the time ⁵⁴¹ named for examination as a witness (and in case of production of books and papers that the given officer or agent produce the given books or papers), and on a failure to comply with these requirements that it be defaulted. Of course, this necessarily contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with; when it is not, as in this case where the defendant corporation refused to obey any part of the order, then the statute is not complied with, and that brings up the gravest question of the case.

3. Is section 9 authorizing the answer to be stricken out and default judgment rendered when the defendant refuses to obey the order made pursuant to section 8 due process of law? The case most strongly pressed upon the court to sustain the contention that such action is not due process is *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215.

The supreme court of the District of Columbia, sitting as a chancery court, made an order on defendants to pay over certain funds which had been paid them by a receiver of the court. This order was disobeyed, and, after citation to show cause against it, the answer of defendants was stricken

from the files, and thereafter the bill was taken pro confesso, and judgment rendered accordingly. Subsequently suit was brought on the judgment in New York, and the case reached the supreme court of the United States on the question whether this was due process of law. Mr. Justice White for the court learnedly and exhaustively reviewed the authorities as to the power of a chancery court to punish for contempt by striking out the answer and proceeding on the bill as confessed, and demonstrated that such power did not exist. He says that in England no single case is found sustaining it, and in America only two—Walker v. Walker, 82 N. Y. 260, and Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545. These two cases are condemned as unsound. It is interesting to note that the court in Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545, simply followed the New York case of Walker v. Walker, 82 N. Y. 260, but Mr. Justice Eakin filed a dissenting opinion, and reviewed the authorities on the subject, and stated the law as it was done subsequently by Mr. Justice White in this case. The court, after reaching the conclusion that the chancery court did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and ignore the ⁵⁴² proof taken in support of it, then passed to the question whether a judgment thus rendered contrary to law was void for want of jurisdiction and subject to collateral attack. It was determined that the judgment was one substantially without hearing, and analogous to a judgment determined upon issues not raised in the pleadings and in the absence of the party. The decision was expressly rested "on the want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and after so doing to render a decree pro confesso as in case of default for the want of an answer." In the case at bar the court did not lack power to strike out the answer and proceed as in case of default if it was competent for the state to confer that power on the court. Hence the question here is, not the power or want of power in the court, but the power or want of power in the state to enact the statute under review. If the court in Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, had held, as did this court in Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545, that the power to strike out the answer and proceed as in case of default was an inherent power of the court, and still a judgment rendered under it was taking property without due process of law, then Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, would be conclusive of this issue. But the decision was predicated upon the

premise that the power exercised was contrary to the law of the land, and the sequence followed that property was taken without due process.

In the first judiciary act passed by Congress, in 1789, a statute was enacted giving United States courts in the trial of actions at law the power to require the parties to produce books and writings in their possession or control which contain evidence pertinent to the issue, in cases and under circumstances where the same might be compelled in chancery, and this was the penalty named for a violation of such order: "If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default": Rev. Stats., sec. 724.

An examination of the 3 Federal Statutes Annotated, pages 2-5, shows this statute has been constantly applied by many of the ablest jurists who have adorned the federal bench for the past one hundred and eighteen years, and in none of the many decisions applying it and defining ⁵⁴³ its scope has it been held contrary to due process of law.

The Revised Statutes of Arkansas, adopted in 1837, gave the power to any court of record to compel a party to a suit pending therein to produce any books, papers and documents in his possession or under his control relating to the merits of such suit or to any defense therein. It was provided, as a penalty for failure to obey such order, that the court may nonsuit him, or strike out any pleas or notice of setoff, or debar him from any particular defense in relation to such books, papers and documents: Rev. Stats., c. 116, secs. 88-92, now found in Kirby's Digest, secs. 3074-3078. There were similar provisions enacted for courts of chancery to proceed as on confession against a party failing to obey an order to produce books, papers and documents: Kirby's Digest, secs. 3079, 3080.

These statutes have been constantly invoked in the courts of this state almost since its admission into the Union, and their enforcement not opposed as depriving the recalcitrant party of his property without due process. The section under inquiry does not differ in principle or much in detail from section 724 of the federal statutes nor these statutes so long upon the statute book of this state, in so far as striking out the answer is concerned.

The industry of counsel for appellee develops the fact that such statutes are common in other states. They may be found

referred to in the brief. These considerations are important only as indicating that such statutes have long been accepted by bench and bar, state and federal, as being part of the law of the land. This question was before the supreme court of Mississippi under a statute authorizing a default for a failure to answer interrogations; and the statute was attacked as unconstitutional on the strength of the opinion in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215. The court said: "It was a declaration of the Magna Charta that no one should be deprived of a right without being heard in his defense; and this principle is embodied in section 14 of our state constitution, which provides that 'no person shall be deprived of life, liberty or property, except by due process of law.' However wholesome this doctrine is when applied to courts and to persons exercising judicial or quasi-judicial functions, it has never been supposed that it deprived the legislature of the power of changing the rules ⁵⁴⁴ of evidence, or of modifying or abrogating altogether the presumptions indulged by the principles of the common law. If the legislature may provide for a discovery of evidence in the hands of the adversary, it must be competent for it to impose upon such party the conditions of a failure to make such discovery; for when the legislature requires the discovery to be made, and imposed the conditions of a refusal, such conditions must become the law of the land, and to pursue the statute is due process of law: *Bagg's Case*, cited in *Hovey v. Elliott*, 167 U. S. 416, 17 Sup. Ct. Rep. 841, 42 L. ed. 215"; *Illinois Cent. R. R. v. Sandford*, 75 Miss. 862, 23 South. 355, 942.

This case is criticised as reasoning in a circle, but the criticism is not just if the statute is valid. Of course, an invalid statute gives no force, and is not the law of the land, and proceedings under it are not pursuant to due process; but where the statute is valid, then its provisions become as much the law of the land as any common law inherited from England. The question then passes to whether the state has power to enact a statute visiting the penalty of a default judgment upon a party required to produce evidence in court who fails and refuses to do so. The power of the state in such matters is thus stated by Mr. Justice Brewer, speaking for the federal supreme court: "The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not make a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution.

.... The state is not tied down by any provision of the federal constitution to the practice and procedure which existed at common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary": *Brown v. New Jersey*, 175 U. S. 172, 20 Sup. Ct. Rep. 77, 44 L. ed. 119. See, also, *Wilson v. North Carolina*, 169 U. S. 586, 18 Sup. Ct. Rep. 435, 42 L. ed. 865; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 28 L. ed. 232.

In *Louisville & Nashville Ry. Co. v. Schmidt*, 177 U. S. 230, 20 Sup. Ct. Rep. 620, 44 L. ed. 747, Mr. Justice White for the court said, at page 236: "It is no longer open to contention that the due process clause of the fourteenth amendment to the constitution of the United States does not control mere forms of procedure in the state courts or regulate practice therein. All its requirements are complied with, in the proceedings which are claimed not to have been due process of ⁵⁴⁵ law, provided the person condemned has had sufficient notice and an adequate opportunity afforded him to defend": See, also, *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. Rep. 836, 45 L. ed. 1165.

Applying these principles, it cannot be doubted that the statute in question, like section 724 of the Revised Statutes of the United States and sections 3079, 3080 of Kirby's Digest, is a matter of procedure and practice in procuring testimony in trials and enforcing orders for production of material and relevant evidence, and in the proceeding leading up to its enforcement it requires sufficient notice and an adequate opportunity to defend, first against the order, secondly it provides for an opportunity, after notice, to obey it, before any default can be taken; and these provisions meet the requirements of the fourteenth amendment.

4. Appellant presents arguments against the construction placed on section 1 of this act in *Hartford Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42, but the rule of stare decisis forbids a re-examination of these questions.

Other matters have been presented and considered, but the views expressed heretofore are fatal to appellant's contentions.

Judgment affirmed.

Battle, J., dissents.

WOOD, J., Concurring. The construction given the first section of the anti-trust law of 1905 in *Hartford Ins. Co. v.*

State, 76 Ark. 303, 89 S. W. 42, in my opinion renders the whole act unconstitutional. The offense, or act interdicted by the law, is the "being," "creating," "entering into," "becoming a member of," a trust to regulate or fix prices. That is the "conspiracy to defraud" of which the parties are adjudged guilty. That is the unlawful act which subjects the parties named in the act to a penalty. If the act thus made unlawful is not committed in this state, if the trust has no reference whatever to prices in this state, and does not in any manner affect persons or property in this state, then the legislature has no power to prohibit, or prescribe money penalties for the commission of, such acts. I care not how altruistic or philanthropic such legislation may be from the view-point of political doctrinaires, it is unconstitutional and void. I repeat now, I hope for the last time, what ⁵⁴⁶ I have said twice before, that our legislature in the anti-trust law of 1899 and 1905 never intended their enactment to have any such extraterritorial effect, and this court, in my opinion, with all due respect, has not correctly construed it. See my concurring opinion in *State v. Lancashire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348, and my dissenting opinion in *Hartford Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42. The first sections of the anti-trust acts of March 6, 1899, and of January 23, 1905, are in language almost identical and in legal effect precisely the same. We gave the correct construction and reached the correct conclusion in construing the first section of this law in *State v. Lancashire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348.

The words "whether made in this state or elsewhere" were added to the first section of the act of 1905 to make the language of that act conform to the decision of the court in *State v. Lancashire Ins. Co.*, 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348. The effect of these added words was to make any act done, no matter where, in furtherance of the conspiracy to defraud the people of Arkansas by entering into a trust to control prices in this state a violation of the law.

If the act had been framed as an exclusion statute for foreign corporations doing business in this state, or as prescribing the terms upon which foreign corporations might be admitted to do business in the state, the lawmakers would never have embraced private individuals and domestic corporations within the provisions of the law, as framed, creating the offense, and prescribing the pecuniary punishment thereof. We must presume that the legislature knew that private individuals could not be punished for entering a trust

beyond the limits of the state that did not affect prices in the state, and that domestic corporations could not have penalties adjudged against them for doing some act out of the jurisdiction of the state that did not affect prices in the state. Would one of our merchants in Little Rock who entered a confederation in London, England, to control the price of an article that was sold and used only in London be subject to the penalties of this law for entering such confederation? Could one of our citizens be deprived of his livelihood and of his property by execution to satisfy a judgment that might be rendered against him as a penalty for an act committed in London? Could domestic corporations be held liable, under similar circumstances, ⁵⁴⁷ and mulcted in fines, and have their charters forfeited and their property confiscated, simply because they are creatures of the state? In my opinion, such procedure would be in derogation of charter rights, and could not be justified by any power reserved in the legislature to "alter, revoke, or amend" the charter of domestic corporations, for charters can only be altered, revoked or annulled "in such a manner that no injustice shall be done to the corporators": Ark. Const. 1874, art. 12, sec. 6. Such procedure would be most unreasonable and unjust to the corporators who may have invested millions in our state, and who at the time of the passage of the act were engaged in a perfectly legitimate business. If they are in a trust of any kind anywhere at the time of the passage of the act, although not to affect prices in this state, they are penalized under this statute, and the statute is *ex post facto* in that respect. It may be impossible for them, within sixty days, to arrange their affairs so as to come within the provisions of the act, without an absolute sacrifice or confiscation of their property, still, if they do not, they are subject to the heavy pecuniary penalties of this law. Well, if individuals and domestic corporations cannot be penalized in heavy money judgments for acts done beyond the jurisdiction of the state, under this law, neither can foreign corporations. The act should be so construed as to make the law equal and uniform in the money penalty to be adjudged against those who come within its inhibition. I have no doubt that such was the intention of the legislature.

It must be kept in mind that in this, as well as in *Hartford Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42, the only judgment sought is a pecuniary penalty. It is not a proceeding to forfeit a charter, but to punish for acts done out of the state under a charter that was good when issued and that

has never been forfeited or called in question. The appeal only calls in question the validity of the pecuniary judgment. When a foreign corporation has been licensed to do business in the state, it must have the equal protection of the laws. The state can keep it out, but it cannot admit it, and permit it to remain, and at the same time subject it to money penalties that could not be imposed upon domestic corporations or individuals for the same offense. "Such (foreign) corporation shall be entitled to all rights and privileges and subject to all the penalties conferred and imposed by the laws ⁵⁴⁸ of this state upon similar corporations formed and existing under the laws of this state": Kirby's Digest, sec. 828.

These are a few of the numerous considerations which, it seems to me, demonstrate the error in the construction given the law, and show its unconstitutionality as construed.

The provisions of the first section of the act as applicable to the classes named therein cannot be separated. This court cannot enter upon the work of legislation. The provisions of the act are so interdependent that this court cannot enter upon the work of classification and segregation. The first section cannot be held constitutional as applied to individuals and domestic corporations, and therefore it cannot be held constitutional when applied to foreign corporations: See *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. Rep. 198, 51 L. ed. 393.

The law, to be constitutional, must be confined in its operation to trusts that are formed in this state or elsewhere to affect prices in this state. It must be presumed that the legislature intended to act within its jurisdiction, that it intended to benefit the people of the state by laws that would protect them from dishonest, unjust and oppressive combinations in restraint of trade, and confederations and monopolies designed to fix, control and regulate the price of some commodities essential to the life, comfort and happiness of the people.

The language of the law, in my opinion, does not warrant a construction that puts the Arkansas legislature in the unenviable attitude of driving from our state those individuals and corporations who would come here and, by engaging in competitive business, lower the price of the various articles enumerated in the statute. I am unwilling to convict the legislature of the unwisdom involved in a policy that can but bring dire disaster to the business interests of the state, and ruin to the people whom the legislature must be presumed to have intended to benefit and protect.

The law, as construed, does not relieve the people of the necessity of buying trust-made articles, and at trust-fixed prices, but it only compels them to go into other states for them and to pay the increased cost. For there is no law in Arkansas that can prevent the merchants of New York, St. Louis, and Memphis from selling our merchants and people their goods, wares and ⁵⁴⁹ merchandise at trust-fixed prices, and there is no law, and can be none, that will prevent the insurance companies of foreign states and countries from entering into trusts and combinations to fix the rates of insurance for property elsewhere. There can be no law to prevent our people, when the exigencies of their business require, from insuring their property in old-line insurance companies that have been driven from the state. But all this adds to the burden of the people, instead of making it lighter. Hence, I still contend that this court made a great mistake in looking to executive messages, political platforms of the dominant party, and other so-called contemporaneous "history of the times," to aid in the construction of language which, in my opinion, really needs no construction, but which plainly limits the operation and effect of the law to territory within the jurisdiction of the legislature—to Arkansas. But I am powerless, as an individual judge, to overrule *Hartford Fire Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42; and, as I see nothing in sections 8 and 9 to render the act unconstitutional, for reasons stated by the chief justice, under the rule of *stare decisis*, I concur in the judgment only.

The Judgment in the Principal Case was Affirmed by the Supreme Court of the United States, the Chief Justice and Mr. Justice Peckham dissenting, in an opinion by Mr. Justice White as follows:

"The Hammond Packing Company, an Illinois corporation—hereafter called the Hammond company—seeks to reverse a judgment for ten thousand dollars as penalties for alleged violations of a state law referred to as the anti-trust act of 1905.

"The Hammond company challenged the authority which the act purported to exert and the forms of procedure which the statute authorized and which were employed to enforce its requirements, because of their alleged repugnancy to the constitution of the United States, in particulars which were enumerated. The supreme court of Arkansas held that the acts which the Hammond company was charged with having committed were within the prohibitions of the law of 1905, and that the statute was in no respect repugnant to the constitution of the United States. These conclusions were sustained by considering prior cognate legislation, and a construction given thereto, as well as by an analysis of the act of 1905, elucidated by a prior decision made concerning the same. Before recurring par-

ticularly to the procedure and judgment in this case, we advert to these subjects, as they are essential to a comprehension of the matters here arising for decision.

"The constitution of Arkansas of 1874 (section 11, article 12) authorized foreign corporations to do business in the state, subject to the same regulations and with the same rights as those enjoyed by domestic corporations. Carrying these provisions into effect, the legislature (Kirby's Digest Laws, secs. 824-827) authorized permits to be issued to foreign corporations, subjecting them to like control and entitling them to the same privileges as domestic corporations on payment of the same fees as were exacted from a domestic corporation, and on compliance with other statutory requirements. In section 16, article 12, of the same constitution, there was contained a reservation of the power of the legislature to repeal, alter or amend charters of incorporation, subject, however, to the limitation that thereby 'no injustice shall be done to corporators.'

"The Hammond company obtained a permit and engaged in business within the state of Arkansas.

"In 1899 what was known as the Rector act was enacted for the punishment of pools, trusts, and conspiracies to control prices, etc. Under this law an action was commenced to recover penalties against the Lancashire Fire Insurance Company, a foreign corporation doing business under a permit. The case was in 1899 decided by the supreme court of Arkansas against the state: 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348. The court held that it [the statute] 'did not intend to prohibit or punish acts done or agreements made in foreign countries by corporations doing business here, when such acts or agreements have reference only to persons, property, or prices in such foreign countries.'

"In January, 1905, the Rector act was repealed and the statute now in question was enacted. The first section of the new law re-enacted the first section of the old act with certain additions. Various sections were added to the new law, of which only sections 8 and 9 are particularly relevant to this controversy. As we shall hereafter have occasion to specially consider these sections, they are presently put out of view.

"The Hartford Fire Insurance Company—a Connecticut corporation—was proceeded against for alleged violations of the act of 1905. The company defended on the ground that it was not a member of or a party to any pool, etc., made in Arkansas, and that it was not a member of any pool, etc., which in any manner affected the premium for insuring property within that state.

"In disposing of the case the supreme court of Arkansas (76 Ark. 303, 89 S. W. 2) considered two questions: First, the proper construction of the act; and second, its constitutionality as construed. The first question was thus stated:

"1. Does the act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkansas while such corporation is a member of a pool, trust or combination to fix

insurance rates anywhere, although such pool, trust, or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas? To state the proposition by illustration: Assume that the appellant is a member of a trust—called a rating bureau—created and maintained in New York City, to fix [and maintain] insurance rates in New York City and St. Petersburg, but which does not fix or affect rates in Arkansas—is it guilty of a violation of the act if it transacts an insurance business in Arkansas upon complying with all the statutes of this state, except the one at bar?

"In solving this question the court deemed that the correct meaning of the statute was to be ascertained by its text, as illustrated by the history of the times, indicating the motives which led to the adoption of the act. On this subject it was pointed out that after the decision in the Lancashire case public agitation concerning the effect of that decision had arisen and had occasioned an introduction in the legislature at different times of a proposed bill, known as the King bill, intended to counteract the effect of the decision in the Lancashire case, but which bill had failed of passage. The court said:

"In 1904 the dominant political party in this state, through its party platform, demanded of the next general assembly the passage of the King bill, and of the purpose of said bill said: "Whereby all foreign corporations shall be prevented from doing business in this state, if they are members of any trust, pool, combination or conspiracy against trade, whether such trust, pool, combination, or conspiracy affects or is intended to affect prices or rates in Arkansas or not." The General Assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable unanimity and rapidity passed the King bill, which had been rejected by the two preceding general assemblies, and in less than a fortnight of its organization it was approved, and it is the statute now at bar."

"It was decided (Wood and Battle, JJ., dissenting) 'that the General Assembly intended by this act to subject to the penalty of it any foreign corporation doing business in this state while a member of a trust formed to fix prices anywhere.'

"The act, as thus interpreted, was sustained upon the theory that 'the state has dictated these terms upon which foreign insurance companies can do business in this state,' and the state 'possesses the right to declare that foreign insurance corporations cannot do business in this state while belonging to a pool, trust, combination, conspiracy or confederation to fix or affect insurance rates anywhere.'

"Shortly after the decision in the Hartford case this action was commenced by the state against the Hammond company for a forfeiture of its permit to do business in Arkansas and for money penalties. As finally amended the complaint consisted of four paragraphs or counts. As, however, during the progress of the cause, counsel stipulated that, if any relief was awarded against the Hammond company, it should be confined to the matters charged in the

first paragraph of the complaint, and be limited to a money recovery not exceeding ten thousand dollars, and effect was given to the stipulation in the final action of the court, we put all but the first paragraph out of view.

"In the first paragraph the existence of the Hammond company and its carrying on the business of dealing in livestock and the products thereof in Arkansas at a date named was averred. It was then charged that on the date mentioned, and other stated days, the company, in violation of the act of 1905, was a member or party to a pool or trust, agreement, combination, or understanding with corporations and persons, named and unnamed, who were engaged in the same line of business, to regulate the prices of slaughtered livestock, and to maintain such prices as so regulated and fixed. The paragraph concluded with the prayer for 'judgment that the right and privilege of said defendant to do business in this state be declared forfeited, and that plaintiff have and recover of said defendant the sum of thirty thousand dollars, and all her costs in this suit expended, together with all the expenses of the attorney general in prosecuting same, as provided in said act, and for all other and proper relief.'

"On the ground that the complaint was so vague that it was impossible to answer the same, the Hammond company moved that the state be directed to make the complaint more specific, so as to show when the alleged pool or trust was created, in what respect it constituted a violation of the statute, and where, in the vast area in which it was alleged the business of the company was carried on, the asserted unlawful agreement was to operate. The motion was denied.

"The complaint was demurred to on the ground that it did not allege the formation of any pool or trust in Arkansas, or that it was to affect prices within that state, and therefore, if the facts charged were within the prohibition of the statute, the act was wanting in due process of law, and was repugnant to the fourteenth amendment, because it was an attempt by the state to exercise authority beyond its jurisdiction. On the overruling of the demurrer, the first paragraph was answered by a general and specific denial of each and every allegation thereof. Moreover, it was specially asserted that the permit was a contract on the faith of which large sums of money had been expended in purchasing property and in making permanent improvements thereon within the state which would be destroyed by a revocation of the permit, and that the business of the company was largely interstate commerce. Various defenses under the constitution of the United States were specifically advanced, as follows: First, that to revoke the permit for the causes alleged would impair the obligations of the contract which had resulted from the issue of the permit; and, second, that to grant the relief prayed would violate the equal protection, due process, *ex post facto*, and interstate commerce clauses of the constitution of the United States.

"A request of the Hammond company that all depositions to be taken outside of the jurisdiction of the court be upon written interrogatories was denied.

"The attorney general, availing himself of section 8 of the act, moved for the appointment of a commissioner to take testimony in the city of Chicago, and for the production and examination before him of books and papers. The motion stated, first, that sixteen named persons resided in or near Chicago, and were either officers, agents, directors, or employes of the Hammond company; that it was the desire of the state to take their testimony on a day named; that all of said witnesses were hostile, and would not make fair answers to written interrogatories; that the facts as to the business methods of the corporation 'relevant to the issue in this case and within the knowledge of the said persons aforementioned are such that your relator can have no accurate knowledge of same until opportunity is given him to interrogate the aforesaid persons, who have peculiar and sole knowledge thereof; and that it is impossible for your relator to so frame written interrogatories to said persons as to elicit the facts within their knowledge relevant to the issues in this case.' As to the production of books and papers, it was stated that 'said persons have in their possession and under their control, and at the Chicago office of the defendant company, numerous books, papers, and documents bearing upon the issues in this cause and relevant to the claim of the plaintiff herein; that the precise description and nature of these is peculiarly within the knowledge of the aforesaid persons; and that it is impossible for your relator to so frame written interrogatories and demands as to require the production of such books, papers and documents as aforesaid as are relevant to the issues in this cause.' In response to this motion the Hammond company asked that the state be required to 'set out specifically what she expects to prove by each witness she desires produced, and also to set out specifically a particular description of any books she desires produced by any of said witnesses, together with the name of the witness who is to produce them, and that she be required to specifically state wherein any of said books so named are material to the issues in the case.' The attorney general thereupon filed an affidavit, reciting that he was 'at this time unable to designate and particularly point out the books, papers and documents which will be required in evidence on the execution of the commission that the contents and particular description of said books, papers and documents are matters peculiarly within the knowledge of the defendant and the witnesses whose examination is prayed at said time and place, and that it is impossible and impracticable for me at this time to designate particularly the matters as to which each witness whose testimony is sought to be taken can testify, or to frame interrogatories to such witnesses, or state at this time the substance of his evidence, for the reason that the matters as to which it is sought to examine said witnesses are matters touching the conduct and business of the defendant company

and as to which the defendant and said witnesses have peculiar and sole knowledge.' The motion to make the request more specific was overruled and an order was entered authorizing the designated commissioner to take the testimony of the witnesses named and to have produced before him by the Hammond company 'any books, papers, and documents in the possession or under the control of either of said persons, relating to the merits of said cause or to any defense therein,' accompanied with the proviso 'that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of the defendant's business.' The order contained specific directions commanding the Hammond company, through its officers or agents or attorney, to have the witnesses named present for examination, and to produce the books referred to in the order. To the entry of this order exception was duly reserved.

"The commissioner notified the Hammond company to produce the witnesses named and the books and papers referred to at his office in Chicago on a designated day. The Hammond company, through its attorneys, declined to comply, and stated, in writing, that it could not concede the power of the court to make the order which it had made, and that, 'on the contrary, it was of the opinion that the request calls upon it [the Hammond company] to surrender rights in which it is protected by the constitution of the United States and of the state of Arkansas that are too valuable to be surrendered.'

"Return, stating the refusal to produce, having been made to the court, the attorney general, under section 9 of the act of 1905, moved to strike out all 'answers, demurrers, motions, replies, or other pleadings filed by the defendant in this cause, and render in favor of the state of Arkansas a default judgment in this case for ten thousand dollars as penalties for the violations of the act of the General Assembly of the state of Arkansas, approved January 23, 1905, on the days and dates set forth in the complaint herein, and for all costs in this cause incurred.' The Hammond company, in response to the motion, set up the defense that to deny it the right to defend would be a condemnation without a hearing, and a consequent denial of due process of law, in conflict with the fourteenth amendment. The motion of the attorney general was granted, and a judgment for penalties amounting to ten thousand dollars was, as before stated, entered, which, on appeal, was affirmed by the supreme court: 81 Ark. 519, 100 S. W. 407, 1199.

"On the general question of the meaning of the act of 1905 the court adhered to the interpretation given the act in *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42, and also to the ruling in that case made concerning its validity, both as regards the constitution of the state and the United States. After holding that the proceeding was not criminal, but was 'purely a statutory action to recover the penalties of the statute for doing business in the state contrary to its terms,' the court came to consider the objections

urged to the validity of sections 8 and 9. Passing on the contention that the order made under section 8 for the production of books, papers and witnesses was so unlimited as to be repugnant to the state and federal constitutions, the subject was considered from a twofold aspect: First, the order for the production of the books and papers; and, second, that for the production of witnesses. As to the first, while conceding, for the sake of argument, that it might be that an order on a corporation, whether domestic or foreign, for the production of books and papers, could be framed in so unlimited a manner as to amount to a violation of a provision against unreasonable searches and seizures found in the state constitution, it was held that that question was irrelevant, and not necessary to be decided. This conclusion was reached because it was declared that, as the order called also for the production of witnesses, if there was a failure to comply with that portion of the order the judgment below was properly rendered. Considering the validity of the order for the production of the witnesses, and the contention that it was so arbitrary and unreasonable as to amount to a denial of due process of law, because it called upon the corporation to produce a number of witnesses simply upon the averment that they had some contract or fiduciary relation with the company, without at all considering its power to produce them, or affording to the corporation any compulsory process for requiring the witnesses to attend if they were unwilling to do so, the court, speaking of the statute, said:

"If these provisions mean that the corporation must be a policeman, and bring into court, on demand, its president, bookkeeper, or doorkeeper *vi et armis*, certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. These sections evidently mean this, and nothing more: that the corporation shall, on demand, request any given officer, agent or employé to be present at the time named for examination as a witness (and, in case of production of books and papers, that the given officer or agent produce the given books or papers), and, on a failure to comply with these requirements, that it be defaulted. Of course this necessarily contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with; when it is not, as in this case, where the defendant corporation refused to obey any part of the order, then the statute is not complied with, and that brings up the gravest question of the case.'

"In holding that the provisions of section 9, authorizing the striking out of the pleadings of the defendant and rendering judgment against him, as by default, were valid, the court held that the conferring of such a power by the statute, and its exercise as manifested in the case before it, was not repugnant to either the constitution of the state or that of the United States. In reaching this conclusion the court, in substance, held that the ruling of this court in *Hovey v. Elliott*, 167 U. S. 416, 17 Sup. Ct. Rep. 841, 42 L. ed. 220, must be limited to a case where a court, in virtue alone of its

asserted inherent power to punish for contempt, strikes an answer from the files and renders judgment as by default, and therefore did not embrace a case where such authority was exercised by a court in consequence of an express delegation by law of the power so to do. This limitation on the ruling in *Hovey v. Elliott* was deemed to be justified by a reference to, and an analysis of, the statutory law of the United States, which the court deemed conferred such power upon the courts of the United States, as well as many state statutes, including those of Arkansas and various state decisions, all of which it was deemed established the existence of the legislative power to authorize a court to punish a defendant by striking his answer from the files, and, over his objection, rendering a judgment against him.

"Condensing, though not changing, the substance of the assignments of error, in the light flowing from the review which we have made, we come to dispose of such assignments; not, however, following the precise order in which they are stated in the brief of counsel.

"Section 1 of the law of 1905 legislates concerning acts done beyond the limits of the state, and therefore takes property without due process of law, and deprives of the equal protection of the laws, contrary to the fourteenth amendment.

"But the premise upon which the proposition is based is imaginary, since it assumes that the statute does that which it has been conclusively determined by the court below it does not do. The interpretation which the court below gave to the statute was that it did not purport to forbid or affix penalties to acts done beyond the state, but that it simply forbade a corporation from continuing to do business within the state after it had done, either within or outside of the state, the enumerated acts. If the premise of the asserted proposition be that even although the statute addressed itself exclusively to the doing of business within the state under the circumstances stated, it nevertheless exerted an extraterritorial power, because it restrained the continuance of the business within the state by a corporation which had done the designated acts outside of the state, we think the proposition without merit. As the state possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that, if the state exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the state to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the state, unless, by the act of admission, some contract right in favor of the corporation arose, which we shall hereafter consider, it follows that the prohibition against continuing to do business in the state because of acts done beyond the state was none the less a valid exertion of power as to a subject within the jurisdiction of the state.

"In both the refusal to permit the coming into the state and the exclusion therefrom of a corporation previously admitted under the

circumstances stated, while it may be said that the acts done out of the state and their anticipated reflex result may have been the originating cause for the exertion of the lawful authority to refuse permission to come into the state, or to revoke such permission previously given, that fact is immaterial in a judicial inquiry as to the right either to refuse to give or to revoke a permit to do business within the state, since the power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action.

"Although it be conceded that the provisions of the statute cannot, consistently with constitutional limitations, be applied to individuals, such concession would not cause the act to amount to a denial of the equal protection of the laws. The difference between the extent of the power which the state may exert over the doing of business within the state by an individual and that which it can exercise as to corporations furnishes a distinction authorizing a classification between the two. It is apparent that the court below, both in the Hartford case (76 Ark. 303, 89 S. W. 42) and in this, by a construction which is here binding, treated the statute, in^d so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the act, that fact does not affect the validity of the law as to corporations.

"2. The act as construed by the court below is repugnant to section 10 of article 1 of the constitution of the United States, since the necessary effect of that construction is to impair the obligations of the contract which was created in virtue of the constitution and laws of Arkansas by the permit which was issued.

"By the constitution and laws of the state of Arkansas it is said foreign corporations, when lawfully admitted to do business in the state, were entitled to rights equal to those enjoyed by domestic corporations. Possessing this right of equality, it is argued that a permit to do business could not be revoked for causes not made applicable to domestic corporations without impairing the obligations of the contract which arose from the permit: *American Smelting etc. Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. Rep. 198, 51 L. ed. 393, 9 Am. & Eng. Ann. Cas. 978. With this proposition in hand—which is not denied by the state—the argument insists that, as the statute does not forbid a domestic corporation from continuing to do business under a charter granted by the state, because it has done the acts specified in the statute, therefore a discrimination results in favor of domestic corporations. But, again, the contention rests upon an erroneous assumption as to the operation of the statute. We say this because, on the face of the statute, its prohibitions are made applicable to domestic and foreign corporations. The insistence that the result of the decision in this case, as well as of that made in the Hartford case (76 Ark. 303, 89 S. W. 42), is to give the statute a controlling construction, operating to exempt domestic corporations from its provisions, is unfounded. True, that both in

the Hartford case (76 Ark. 303, 89 S. W. 42), as in this, the court below, in testing the question of power, considered solely the scope of the legislative authority over foreign corporations. But in so doing the court simply confined itself to the question before it, as in both cases the defendants were foreign corporations doing business under permit. Nothing in the general reasoning advanced by the court as to the power of the state over foreign corporations begets the thought that it was intended to decide that the express words of the statute concerning domestic corporations were meaningless or beyond the authority of the state to enact. While it is true that the reference made in the opinion in the Hartford case (76 Ark. 303, 89 S. W. 42) to the platform of the dominant political party, which it was assumed shed light upon the true meaning of the act, indicates that the impelling motive in adopting the act of 1905 was to reach foreign corporations, this does not justify the inference that the act was not intended to govern domestic corporations doing like acts, but, on the contrary, tends to establish the existence in the legislative mind of the purpose not to discriminate in favor of domestic corporations, since the latter were expressly embraced in the statute.

"The contention that to apply the law to domestic corporations would, as to such corporations, cause it to be repugnant to the contract clause of the constitution, is without merit. The chartered right to do a particular business did not operate to deprive the state of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the state, under its constitution, had a reserve power to repeal, alter and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied, in the absence of such reservation, the right to carry on the business in violation of a lawfully regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition. The claim of an irrevocable contract cannot be predicated upon a contract which is revocable: *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 19 Sup. Ct. Rep. 530, 43 L. ed. 840. And no support for the contrary view arises because the constitution of Arkansas exacted that the authority to repeal, alter and amend should be exercised 'in such manner, however, that no injustice be done to incorporators.' The determination whether the power to repeal, alter or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the constitution of the United States.

"3. The action of the trial court in making the order to produce, and, on failure to comply therewith, striking the pleadings of the Hammond company from the files, and rendering a judgment as by

default, was void because repugnant to the equal protection and due process clauses of the fourteenth amendment.

"As the conduct of the trial court on the subjects with which this proposition is concerned conformed to the authority conferred by sections 8 and 9 of the statute, it follows that the proposition is that those sections are repugnant to the fourteenth amendment. The grounds which are made the basis of this proposition are numerous, and are stated in various forms not separated one from the other. We shall disentangle them and treat them separately, and thus consider and dispose of them all.

"It is said, conceding that the power which section 8 confers could be exerted under just limitations, yet the order made, which was authorized by the statute, was so unlimited, so arbitrary and unjust, as to cause it to be wanting in due process. This rests upon the assumption that the order to produce the books and papers of the company and the witnesses was imperative, and did not consider the ability of the company to comply, furnished no compulsory process to compel obedience in case a named witness refused to appear at the request of the company, and therefore left the company helpless and subject to pains and penalties for a failure to do that which it may not have been in its power to do. But again, the proposition rests upon the assumption that the statute and the order which conformed to it did that which the court below decided it did not do. Conceding, for the sake of the argument, that the broad provisions of section 8 and the general language of the order to produce might, on their face, be amenable to the criticism which the proposition involves, the statement we have previously made demonstrates that the court below, by a construction which is binding here, expressly decided that neither the statute nor the order were subject to the interpretation which the argument attributes to them. Indeed, the court impliedly conceded that if the statute and the order meant that which the argument contends they did mean, both the statute and the order would have been void. But, in intimating to that effect, it was expressly held that all the statute required was a bona fide effort to comply with an order made pursuant to its provisions, and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order. As the Hammond company absolutely declined to obey the order, and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect. That is to say, we may not hold that the statute and order were arbitrary and unjust in the particulars asserted when it is conclusively determined that they do not have that effect.

"It is insisted that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure, and consequently was wanting in due process of law. But, conceding, for the sake of argument only, and not so deciding, that the due process

clause of the fourteenth amendment embraces in its generic terms a prohibition against unreasonable searches and seizures, a question hitherto reserved, under circumstances analogous to those here present, in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. Rep. 178, 52 L. ed. 327, we think the ruling made in that case establishes the unsoundness of the contention. We say this because it was in that case determined, in view of the visitatorial powers of a state over corporations doing business within its borders, and the right of the state to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the state to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the state had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents and other employes of the corporation for like and analogous purposes. It is true that the books and papers to which the order made in the cited case related were those of a foreign corporation doing business in Vermont, and which had been kept in the state, but had been taken therefrom. But we see no reason to hold that this case is not controlled by the principle applied in the Vermont case, because the books of the Hammond company, which were called for, may not have been at any time kept within the state of Arkansas.

"Nor do we think there is merit in the contention that the order to produce was wanting in due process because it was made in a pending suit, and sought to elicit proof not only as to the liability of the company, but also the proof in the possession of the company relevant to its defense to the claim which the state asserted. As these subjects were within the scope of the visitatorial power of the state, and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. Ct. Rep. 178, 52 L. ed. 327, the books and papers were required for an investigation before a grand jury concerning supposed misconduct of the corporation. The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater includes the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause: See *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. Rep. 370, 50 L. ed. 652. If, as was in that case decided, the power of visitation could be exercised, even although it might lead to the production of incriminating evidence, merely because the order to produce in this case called for evidence in the possession of the corporation relevant to its defense did not affect the validity of the order.

"The contention that because section 8 applies only to books and papers outside of the state, therefore it denies the equal protection of the laws, is not open, since it has been conclusively settled that, without denying the equal protection of the laws, regulations may be

based upon the fact that persons or property dealt with are not within the territorial jurisdiction of the regulating authority: *Central Loan & T. Co. v. Campbell Commission Co.*, 173 U. S. 84, 19 Sup. Ct. Rep. 346, 43 L. ed. 623. Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is confined to corporations and joint stock associations, and does not extend to individuals, that fact also furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted. The wider scope of the power which the state possesses over corporations and joint stock associations in and of itself affords a ground for the classification adopted.

"Lastly with much earnestness and elaboration, it is urged that the action of the court, authorized by section 9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, and the previous cases in this court which were there cited and applied. The ruling in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, was that, to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the fourteenth amendment. There the power to strike out and punish was exerted by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute, furnishes no ground for taking this case out of the ruling in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, if otherwise controlling. The fundamental guaranty of due process is absolute, and not merely relative. The inherent want of power in a court to do what was done in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the constitution is applicable. Indeed, in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, the impotency of the legislative department to endow the judicial with the capacity to disregard the constitution was emphasized. But, while this is true, the question yet remains, Is the doctrine of *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal

point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if, from doing so, it results that the authority exerted flows from a reservoir of unquestioned power, it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power, and not a mere incidental result, arising from its exertion, is the criterion by which its validity is to be measured. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the law-making power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.

"As pointed out by the court below, the law of the United States, as well as the laws of many of the states, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. United States Revised Statutes, section 724, which was drawn from section 15 of the judiciary act of 1789 (1 Stats. at Large, 82, c. 20, U. S. Comp. Stats. 1901, p. 583), after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery, expressly empowers

such courts, if a plaintiff fails to comply with the order, to render a judgment of nonsuit, and, if a defendant fails to comply, 'the court may, on motion, give judgment against him by default.' From the time of this enactment, practically coeval with the constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute. Its validity was taken for granted by the court, speaking through Mr. Chief Justice Taney, in *Thompson v. Selden*, 20 How. 194, 15 L. ed. 1001, and this was also assumed by the court, speaking through Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, 29 L. ed. 746, where the effect of the constitutional guaranties embodied in the fourth and fifth amendments was elaborately and lucidly expounded. It is unnecessary to cite the many cases in the lower federal courts which manifest the same result, as they will be found collected in Gould & Tucker's Notes on the Revised Statutes, under section 724, and in the notes to the same section, contained in volume 3, Federal Statutes Annotated.

"And, beyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed. While it may be true that, in some of the state statutes passed on the subject, and in decisions applying them, some confusion may appear to exist, resulting from confounding the extent of the authority to punish as for a contempt and the right to engender a presumption relative to proof arising from a failure to give or produce evidence, it is accurate to say that, when viewed comprehensively, the statutes and decisions in effect recognize the difference between the two, and therefore may be substantially considered as but an exertion by the states of a like power to that which was conferred upon the courts of the United States by the original judiciary act and by Revised Statutes, section 724.

"Without referring in detail to the various statutes, which will be found collected as of the year 1896 in 6 Encyclopedia of Pleading and Practice, note 3, page 812 et seq., we content ourselves with saying that the laws of Indiana, Iowa, Mississippi, Massachusetts, Missouri, New Hampshire, Texas, and Washington aptly portray the subject. As illustrative, we refer specially to the statute of Missouri, which directs that when a party refuses to produce evidence or fails to attend to testify on a proper order, besides being punished as for a contempt, the court may strike out the answer filed on behalf of the defendant, etc. This distinction is also marked in the Indiana and Washington statutes. Although the statute of Mississippi, which

authorizes, in the event of a failure to obey a proper order as to the production of evidence, the striking of an answer from the files and the entry of judgment by default, does not in terms refer the authority thus given to the legislative power to engender a presumption, the true source of the power was clearly pointed out in the concurring opinion of Whitfield, J. (now chief justice of the supreme court of Mississippi), in *Illinois C. R. Co. v. Sanford*, 75 Miss. 862, 23 South. 355, 942, and the distinction was made manifest between the power to create a presumption of fact and the want of authority as a mere punishment for contempt to deny a hearing, as ruled in *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. Rep. 841, 42 L. ed. 215. And the difference between the two is also elucidated in the opinion of the supreme court of the state of Washington in *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120, which interpreted and enforced a statute of the state of Washington, embraced in section 6013 and immediately antecedent sections of *Ballinger's Annotated Codes and Statutes*.

"As the power to strike an answer out and enter a default, conferred by section 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the law-making authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the constitution of the United States is without foundation. In so deciding our conclusion is, of course, based upon the legality and sufficiency of the order to produce made under section 8 of the act, and, as our decision on that subject rests upon the extent of the visitatorial power which the state had the right to exercise over a corporation subject to its control, our ruling as to the legality of the call under section 8 is confined to the case before us.

"Affirmed": *Hammond Packing Co. v. State* (U. S.), 29 Sup. Ct. Rep. 370.

MURRAY v. GALBRAITH.

[86 Ark. 50, 109 S. W. 1011.]

LIBEL PER SE.—To Publish that the Commissioners of a Graveling District have charged their neighbors and fellow property owners a sum greatly in excess of the cost of the material charged for is libel per se, and the charge is not privileged. (p. 1080.)

LIBEL.—The Republication of the Identical Libel is not another cause of action, but is an aggravation of a pre-existing cause, and competent evidence of malice. (p. 1081.)

LIBEL—Splitting Up Cause of Action.—Where there is a repetition of the libel before the commencement of an action, another and separate action will not lie for such repetition. (p. 1081.)

Action by R. M. Galbraith for libel against Murray, editor of "The Press Eagle," in publishing two alleged libels. The plaintiff was one of three commissioners of Graveling District No. 1, for paving Fifth avenue in Pine Bluff. The first article relied upon declared there could be no doubt of the fact that something was "rotten in Denmark," and that the commissioners charged their neighbors and fellow property owners \$10,477 for gravel for which the commissioners paid only \$3,431, and that if such was the case, it was reasonable to suppose the commissioners had also profited in the employment of labor and other expenses.

The second publication relied upon was as follows:

"The damage suit filed against the editor of 'The Press-Eagle' yesterday by two of the Commissioners of Graveling District No. 1 is not conclusive of anything except a determination on the part of the commissioners to shift responsibility for their own derelictions upon the shoulders of other and innocent parties. The imperfect and incomplete records kept by the commissioners show that the gravel of the district purchased from the St. Louis Southwestern Railway Company cost \$10,447.85, while the records of the general auditor of the railway company and of the city clerk of Pine Bluff show that the gravel purchased cost only \$3,434.80. Here is a manifest 'overcharge' of exceeding \$7,000, of which treasurer Galbraith of the commission, after a two weeks investigation, traced \$5,685.56 into the hands of local agent, J. W. Farley, of the Cotton Belt. This money is now said to have been remitted to the treasurer's office in St. Louis as receipts for freight, of which no itemized account was kept, which explains why the auditor had no record of it, so it is said. But the incontrovertible fact remains that, while the commissioners of Graveling District No. 1 purchased five hundred carloads of gravel at \$1.35 per yard, some six years later, the property owners of West Fifth avenue, who desired the graveling district extended, purchased one hundred carloads from the same railway company at about thirty per yard. This \$1.05 excess per yard, which the property owners of Fifth avenue of Graveling District No. 1, were required to pay on five hundred carloads of gravel, totals the \$7,000 overcharge of which they now complain, and which has not been explained to their satisfaction, although a majority of them, we are informed, have agreed to continue paying their tax assessments.

" 'The Press-Eagle's' information concerning this graveling district imbroglio was obtained from the chairman and

secretary of the committee of property owners appointed to get at the facts, and their information came direct from official sources, as shown in the statements of Auditor S. J. Johnson and City Clerk W. A. Lee, published last week. If the comments made upon the official statements were libelous, then the statements themselves were libelous, and we do not consider this paper or its editor in any way responsible for the peculiar condition of affairs revealed by these official statements.

"That there was an overcharge of something like \$7,000 for the gravel used on Graveling District No. 1, when compared with the charge for gravel used in extending that district, the records clearly show; and if the publication of this record, without attempting to prove who profited by this overcharge, is libelous and malicious, then we may plead guilty to the suit filed against us by Commissioners Galbraith and York, and settle their little damage bill, when properly discounted or rebated. Otherwise we consider ourselves from Joplin, Mo., and will have to be cited before we come across with that \$75,000 to assuage the lacerated feelings of our friends, the commissioners of Graveling District No. 1."

Verdict and judgment for the plaintiff for \$10,000, and the defendant appealed.

W. F. Coleman, for the appellant.

N. T. White and Benjamin J. Altheimer, for the appellee.

⁵⁰ HILL, C. J. Murray was editor and proprietor of "The Pine Bluff Press Eagle," a weekly newspaper published in Pine Bluff. Galbraith was one of the commissioners of Graveling District No. 1 of the city of Pine Bluff. Murray published in his newspaper articles in regard to affairs of the graveling district which caused this suit for libel to be brought by Galbraith against him. The complaint is in two counts. The first count is based upon an article published on the 19th of June, 1906. It is not necessary to discuss the first article, as it is clearly libelous per se, and not privileged.

The second count is based upon an article published on the 26th of June, after Galbraith and one other commissioner had brought a joint libel suit, which was subsequently dismissed. This suit was brought by the appellee upon the two publications. This publication will be set out in the reporter's statement of the case. Among other instructions, the court gave the following: "That the articles published by the defendant

and set out in the complaint are libelous per se, that they were not privileged, and that plaintiff is entitled to recover."

The facts in evidence are not sufficient to make this a privileged publication, and if the article in the second count was libelous per se, and made a distinct and separate cause of action, then his instruction was correct; otherwise, it is error.

An examination of the article set out in the second count, when disconnected from the previous publication, renders it difficult to determine exactly what charge is brought against Mr. Galbraith. Taken in connection with the previous article, it is in a sense a repetition of the libel, and in another sense an explanation and justification of why the first article was published, rather than a charge of actual wrongdoing or dishonesty. The law seems settled that a repetition of an identical libel is ⁵⁷ not a new cause of action, but an aggravation of the pre-existing cause, and is always competent evidence tending to prove malice. The supreme court of New York said: "When a libelous article is republished before the commencement of an action, a separate action cannot be maintained on such publication. The repetition of the publication may be pleaded and shown on the trial and bearing up the malice of the defendant and the extent of the injury and damage to the plaintiff": *Galligan v. Sun Ptg. & Pub. Co.*, 25 Misc. Rep. 355, 54 N. Y. Supp. 471.

The court of appeals of New York approved the following opinion of the supreme court of that state: "But the authorities are uniform that words proved as repetitions of the slander charged are not an independent ground of action in the case, and that no recovery can be had for uttering them. They reflect upon and strengthen the claim for damages on account of the words charged": *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123.

"Nor will a separate action lie on a republication by the same party of a libel, where the republication was made prior to the action on the original article": 25 Cyc. 431.

For the admissibility of such repeated libels, see a good discussion on the subject in *Gribble v. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. 710.

Both the article in the first count and the article in the second count were printed before the bringing of this suit; and the utmost that can be said of the article in the second count is that it repeated the libel contained in the first. It is doubtful that it amounts to libel per se. Even if it does, however, under the principles above announced, it would not be an independent cause of action. If not libelous per se, of course

the instruction is erroneous. Under either view, the judgment rendered under this instruction cannot be sustained. It is clearly admissible as evidence showing the animus of the prior publication, but cannot be sustained as an independent cause of action and libelous per se. The court so treated it, and therefore it erred. This error makes it necessary that the judgment be reversed, and renders it unnecessary to consider the other matters presented.

The cause is reversed and remanded

As to What Libelous Statements are Privileged, see the note to Holmes v. Clisby, 104 Am. St. Rep. 110. Justification in slander and libel is the subject of a note to Rutherford v. Paddock, 91 Am. St. Rep. 285.

To Impute Misconduct or Dishonesty in Office is libelous per se: Wofford v. Meeks, 129 Ala. 349, 87 Am. St. Rep. 66; Cotulla v. Kerr, 74 Tex. 89, 15 Am. St. Rep. 819.

JOHNSTON v. SCHNABAUM.

[86 Ark. 82, 109 S. W. 1163.]

NEGOTIABLE INSTRUMENTS.—A Guaranty of the Previous Indorsement of a Note amounts only to a guaranty of the genuineness of the signatures of the indorsers, and does not create a liability on the note. (p. 1084.)

NEGOTIABLE INSTRUMENTS—Indorsement—Parol Evidence to Vary Effect of.—An indorsement, though unrestricted in form, may by parol evidence be shown to have been for collection only, and one taking the note with notice of this purpose in the indorsement acquires no rights which such indorser for collection did not acquire. (p. 1084.)

NEGOTIABLE INSTRUMENTS—Notice of Purpose of Indorsement.—An indorsement on a note "pay to the order of any bank or banker," indicates that the indorsement is for collection only. (p. 1085.)

NEGOTIABLE INSTRUMENTS—Purchase of—What Amounts to.—The payment of a note by a stranger and its delivery to him will be held to be a purchase of it in the absence of evidence to the contrary. (p. 1085.)

Action against the Bank of Maynard, and the maker and sureties of a promissory note executed in favor of one Redwine, and by him indorsed and delivered to the Bank of Maynard. Judgment for the plaintiff. The defendants appealed.

J. B. McCaleb and Witt & Schoonover, for the appellee.

⁸³ McCULLOCH, J. J. L. Johnston and G. H. Counts, together with G. S. Johnston, now deceased, executed to one

Redwine, as guardian of an infant, their negotiable promissory note for the sum of one hundred and ninety-seven dollars, with interest from date, and at or before maturity of the note Redwine delivered it, bearing his blank indorsement, to the Bank of Maynard for collection and deposit of the proceeds to his credit. Appellants J. L. Johnston and Counts were sureties on the note for G. S. Johnston, the principal obligor. Subsequently, and after the maturity of the note, the Bank of Maynard, which was located at Biggers, Randolph county, Arkansas, received a verbal message from appellee, Schnabaum, requesting the bank to send the note to the Randolph County Bank at Pocahontas, and that he (Schnabaum) would "take it up."

⁸⁴ The Bank of Maynard made the following indorsement on the back of the note: "Previous indorsement guaranteed. Pay to the order of any bank or banker. (Signed) Bank of Maynard, by J. T. Talbert, cashier."

The note was then forwarded to the Bank of Randolph County for collection; appellee paid the full amount of the note and interest to the bank, and the note was delivered to him without further indorsement thereon, and the amount so paid was sent by the collection bank to the Bank of Maynard, and the latter in turn paid it over to Redwine.

Appellee held the note a year or longer, and then instituted this action on the note against the appellants, J. L. Johnston and Counts, as makers, and the Bank of Maynard as indorser. Redwine was also sued, but the action was dismissed as to him.

Appellee testified that he instructed Robinson, the person by whom he sent the message to the Bank of Maynard, to request the bank to send the note to the Bank of Randolph County, but not to mark it paid, and that he would "take it up as received and would carry it until Johnston could pay it off." His testimony shows further that he did not, in making the payment, intended to discharge the debt, but intended to purchase the note and hold it for payment by the makers.

Robinson, in his testimony, denied that appellee instructed him to request the Bank of Maynard not to mark the note paid, or that he expected to hold the note as secured. He testified that appellee only told him to request the bank to send the note to the Bank of Randolph County, and that he would "take it up." This, the evidence shows, was the only message ever delivered to the bank, and that the note was forwarded in response to this message.

The court instructed the jury that if the Bank of Maynard made the indorsement in question, and the note had not been

paid to appellee, the bank was liable. This was equivalent to a peremptory direction to the jury.

We think that, according to the undisputed evidence, the bank was not liable.

So far as the guaranty of the previous indorsement of Redwine is concerned, that amounted only to a guaranty of the genuineness of the indorsement, and did not render the ⁸⁵ bank liable on the note. The other part of the indorsement was unrestricted, and, unless explained, would render the indorser liable. But it is shown by undisputed evidence that the note was sent to the Bank of Randolph County for collection, and that the indorsement was made only for that purpose.

The question arises, then, whether parol evidence is admissible to explain or qualify an unrestricted indorsement. The authorities seem to uniformly sustain the view that under such circumstances parol testimony would be admissible for that purpose. Mr. Daniel, in discussing the various circumstances under which parol testimony is admissible for such purpose, says: "Secondly, it might be shown that the indorsement was upon trust for special purpose, as from a principal to an agent, to enable him to use the instrument or the money in a particular way, or for collection": 2 Daniel on Negotiable Instruments, sec. 720. See, also, to the same effect, Joyce on Defenses to Commercial Paper, sec. 255; Doolittle v. Ferry, 20 Kan. 230, 27 Am. Rep. 166; Lovejoy v. Citizens' Bank, 23 Kan. 331; Patten v. Pearson, 57 Me. 428; McDonough v. Goule, 8 La. 472; Lawrence v. Stonington Bank, 6 Conn. 521; Dale v. Grear, 38 Conn. 15, 9 Am. Rep. 353; Ricketts v. Pendleton, 14 Md. 320. In Lovejoy v. Citizens' Bank, 23 Kan. 331, a note was made payable to the president of the bank, individually, and was by him indorsed in blank to the bank. The court held that, notwithstanding the unrestricted indorsement, he could prove by parol evidence that the note represented a debt of the maker to the bank, and that he (the nominal payee) made the indorsement merely for the purpose of passing title to the bank.

No rule of evidence is, we think, violated by admitting such explanation. While the law implies, from an unrestricted indorsement, a contract to guarantee payment of negotiable paper, still the fact may be shown that the purpose of the assignment was merely for collection, and not for a sale of the instrument; and when this is shown, no liability as guarantor of payment is implied.

The appellee in this case knew that the note was forwarded by the bank only for collection, and could therefore claim no greater rights under the indorsement than his immediate transferee could have claimed. Indeed, the form of the ⁸⁶ indorsement itself may be said to show on its face that it passed the title for collection only. It reads "to any bank or banker," which would indicate that it was for collection.

The other two appellants stand in a different attitude. They appeared on the face of the note as joint makers, but were in fact merely sureties for G. S. Johnston. They were primarily liable to any holder of the note for the amount thereof, notwithstanding any irregularity in the indorsement.

Appellee was a stranger to the contract represented by the note, and a payment by him of the amount and delivery to him of the note will be held to be a purchase until an intention to the contrary is shown: 7 Cyc. 1025. These two appellants did not, in their answer, make any denial of the transfer of the note to appellee as alleged in the complaint, but rested their defense entirely upon the plea of payment. There was some evidence tending to show that the note was paid to appellee by Johnston, the principal debtor, but there was a conflict in the testimony, and the jury settled that issue in favor of appellee.

The judgment against the Bank of Maynard is reversed, and the cause is dismissed, but the judgment against the other two appellants is affirmed.

Parol Evidence to Explain an Indorsement of a Negotiable Instrument has been held admissible in some cases: United States Nat. Bank v. Ewing, 131 N. Y. 506, 27 Am. St. Rep. 615; Witherow v. Slayback, 158 N. Y. 649, 70 Am. St. Rep. 507. In Holmes v. First Nat. Bank, 38 Neb. 326, 41 Am. St. Rep. 733, it is held that as between the parties to a negotiable instrument, a blank indorsement may be modified by parol evidence, and the entire transaction may be thus shown, although resting partly in writing and partly in parol. This does not affect a third party who is a holder without notice before due, and for a valuable consideration. But in Lloyd v. Matthews, 223 Ill. 477, 114 Am. St. Rep. 346, it is decided that the holder of a note indorsed in blank by the payee is not authorized to write out a special guaranty over the signature of the indorser and rely upon parol proof to establish that such was the agreement and understanding at the time of the indorsement. If a note of a corporation, payable to the order of its president, is indorsed by him twice, the first signature having the word "president" attached to it, and the second one not having it, parol evidence is inadmissible to vary the contract of indorsement, as shown by the first signature, or to prove that the indorser, by his second signature, intended and agreed to guarantee the payment of the note: Hatley v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304.

JACOBS v. BENTLEY.

[86 Ark. 186, 111 S. W. 594.]

APPEAL AND ERROR.—Instruments not Set Out in the Abstract or Brief do not present matters for review. (p. 1087.)

EXECUTORS AND ADMINISTRATORS—Collateral Attack upon Letters of.—The proceedings of the court granting letters of administration of the estate of a deceased person can be collaterally attacked on the ground that the person appointed administrator was a nonresident of the state when the application was made and the letters granted. (p. 1087.)

STOPPAGE IN TRANSITU—Right of When Defeated by Death of Purchaser and the Appointment of Administrator.—If, while goods are in transit, the consignee dies and his administrator is appointed, to whom the goods are delivered, the right of stoppage in transitu terminates. (p. 1088.)

Manning & Emerson, for the appellants.

Thomas & Lee, for the appellee.

187 HILL, C. J. John Seay was a liquor dealer at Indian Bay, Monroe county, where he died on the night of the 31st of August, 1903, intestate, leaving personal property at that place. On the 20th of August he had bought a bill of liquors of the appellants, Jacobs & Garrett, liquor merchants of Memphis, Tennessee, and they shipped the goods in due course of business, routed to Clarendon, Arkansas, where they were delivered by the agent of the railroad company, who had authority for that purpose ¹⁸⁸ from Seay, to a steamer plying on White river, and were carried by the steamer to Indian Bay. They were delivered to the steamer on August 31st, about 9 o'clock in the morning, and reached Indian Bay on the morning of the 1st of September. The steamboat captain then learned of the death of Seay and put the goods on the wharf at the usual landing-place, except one barrel of whisky, which he kept for his freight charges. After keeping this for some two weeks, he delivered it at Seay's late place of business.

The railroad agent at Clarendon wired to Jacobs & Garrett of the death of Seay, and they wired back to stop the goods in transit, but before their telegram was received the goods had been delivered to the boat and gone to Indian Bay, and no message reached the carrier to stop delivery. Garrett came to Indian Bay shortly afterward to investigate, and found the goods in the possession of one Renfro, who was acting for one Atkins, who had been appointed administrator of Seay's estate by the probate clerk in vacation on the 3d of September, which appointment was later confirmed by the

probate court in term. Garrett returned without taking any action in regard to the goods, and brought replevin on the 16th of October against the parties alleged to be in possession of them, including the administrator. He lost in the lower court, and brings the case here. There was testimony tending to establish the right of stoppage in transitu, if the right had been seasonably exercised.

Appellants criticise several of the instructions, but they do not set out the instructions in their abstract or brief, but proceed upon the theory that the court is familiar with the record, instead of making the court familiar with the record through their abstract. Under the well-settled practice of the court, such criticisms of the instructions do not present matters for review.

The principal attack is made upon the administration letters granted to Atkins. The proceedings were regular upon their face, and showed compliance with the statute in such matters. It was attempted to be shown that at the time of his appointment Atkins was out of the state of Arkansas, and was a nonresident of the state, and that Renfro made the application and bond and affidavit for him. The proceedings and record of the ¹⁸⁹ probate court cannot thus be impeached in a collateral proceeding: *Hare v. Shaw*, 84 Ark. 32, 120 Am. St. Rep. 17, 104 S. W. 931, and authorities there collated.

"The right of the unpaid vendor to stop goods in transitu upon the bankruptcy or insolvency of the vendee is not defeated by the mere arrival of the goods at their destination. The transitus is not at an end until they have come to the vendee's actual possession, or his constructive possession by a delivery to his agent" (citing many cases): *Mason v. Wilson*, 43 Ark. 172; 2 Mechem on Sales, secs. 1508, 1509.

"The transit, ex hypothesi, continues, and the right of stoppage may be exercised, until the goods have arrived at their destination, and have come into the actual or constructive possession of the buyer": 2 Mechem on Sales, sec. 1573.

When a man dies, "the probate court becomes vested 'with at least potential jurisdiction over his entire estate, which is put in actual exercise, if not before, at least upon the granting of letters testamentary or of administration.' Upon the granting of such letters, all his property, although the purchase money for the same may be unpaid, passes into the custody of the law, and becomes assets, a trust fund in the hands of his executioner or administrator for the payment of his debts, subject to any liens or charges thereon or interests

therein acquired by any other person in his lifetime": *Blass v. Hood*, 57 Ark. 13, 20 S. W. 544.

"As the successor of the vendee's rights upon his death, his administrator or executor may take possession, thereby terminating the transit and putting an end to the right of stoppage": 2 *Mechem on Sales*, sec. 1594.

The goods in question went into the hands of the administrator of the estate, and that administration, being prima facie regular, is impervious to collateral attack. The goods being in the hands of said administrator before the right of stoppage was attempted to be exercised, the title of the estate to them cannot be defeated in this action.

The case was tried upon this theory in the lower court, and it was right.

Judgment affirmed.

The Right of a Nonresident to Act as an Executor or Administrator is the subject of a note to *Breen v. Kehoe*, 113 Am. St. Rep. 562.

As to When the Appointment of an Administrator may be Collaterally Attacked, see the note to *Dobler v. Strobel*, 81 Am. St. Rep. 535.

EUREKA STONE COMPANY v. FIRST CHRISTIAN CHURCH.

[86 Ark. 212, 110 S. W. 1042.]

MECHANIC'S LIEN—Who may not Claim to Enforce.—A Surety of a Contractor cannot claim a lien for material furnished at the request of such contractor. (p. 1091.)

MECHANIC'S LIEN—Sureties, When not Released.—A Change in the Plans and Specifications does not release the sureties of the contractor when such change is authorized by the terms of his contract, or is not material. (p. 1091.)

MECHANIC'S LIEN—Sureties, When not Released by an Extension of Time.—An extension of time for the completion of a building does not affect the obligation of a bond with sureties when such extension is without consideration, and not granted until after the expiration of the time when completion was required by such contract. (p. 1092.)

MECHANIC'S LIEN—Owner's Rights, When not Affected by His not Reserving a Sum Prescribed by the Contract.—If the contractor for a building abandons his contract before completion so that the owner is required to finish it, his right to recover against the sureties for a sum expended in completing the building in excess of the contract price is not defeated by his failure to reserve ten per cent of such price as required by contract. (p. 1092.)

MECHANIC'S LIEN cannot be Asserted Against a Church Building. (p. 1092.)

MECHANIC'S LIEN—Sureties of Contractor, When not Liable to a Materialman.—Under a bond with sureties for the construction of a building by the principal contractor, conditioned that the latter will perform his work and pay all materialmen, there can be no recovery against the sureties by one not a party to the bond or contract where the purpose apparently for them is to protect the obligee named therein. (p. 1094.)

Youmans & Youmans, for the appellant.

Ira D. Oglesby, for the appellee.

212 HART, J. This was a suit by the Eureka Stone Company against the First Christian Church of Fort Smith, Arkansas, to fix a lien upon the property of the church for materials furnished the contractor, E. D. Heilman, and used by him in the construction of the church building under the contract between him and the trustees of the church, made on the fourth day of March, 1903. **213** August Reichert, Mechanics' Planing Mill, Atkinson-Williams Hardware Company and Will Schulte, who claim to have furnished to said contractor materials used in the construction of the building, were also made parties defendant to the suit.

The church filed its answer, in which it denies that plaintiff has, or is entitled to enforce, a lien upon the lot and building described in the complaint for and on account of any material furnished by it in the construction of said building.

Defendant also alleges that said contractor, when said contract was entered into, was required to and did execute his bond to the said defendant Christian Church, conditioned that he would fully perform and carry out this contract, and build and complete the church according to the plans and specifications which were made a part of the said contract, and would protect the said defendant from all liens of any kind whatever for labor or materials furnished in building the church.

Defendant says that the plaintiff and S. F. Stahl were the sureties upon this bond, and asks that they be made parties to this action.

The defendants, August Reichart, Mechanics' Planing Mill and Atkinson-Williams Hardware Company, each filed a separate answer and cross-complaint, in which they assert a lien against the lot and building of the church for materials furnished, and ask a judgment for the amount of their respective claims against the Eureka Stone Company and S. F. Stahl as sureties on the contractor's bond.

The Eureka Stone Company answered these several cross-

complaints as applied to it. It denies that the terms of the bond executed by E. D. Heilman with it as one of the sureties provided that the bondsmen on said bond should pay all claims for labor and materials used in the construction of the church, and denies that it is liable on said bond for any amount whatever. The Eureka Stone Company also filed its answer to the cross-complaint of the church. It admits that it became a surety on the bond of E. D. Heilman for the construction of the church building, but alleges that it is not liable on said bond because the church committed certain breaches of said contract, which are set out in its answer, and which will appear in the discussion of this branch of the case in the opinion.

214 In his answer to the cross-complaint of the lien claimants, Heilman admits that he is indebted to them in the amounts set out therein. He denies that he is indebted to the church, but alleges that the church is indebted to him for extra work in the sum of five hundred and sixty-three dollars. He also pleads that he is insolvent, and has been adjudicated a bankrupt.

Will Schulte filed a complaint to enforce a mechanic's lien, but did not ask a judgment against the plaintiff as surety on the contractor's bond.

The chancellor made the following findings: That the Atkinson-Williams Hardware Company did not serve notice of their intention to file their lien upon the property of the church, as required by law, and were therefore not entitled to a lien. That part of the claim of Will Schulte was for payment of freight for stone that he hauled. That he was not entitled to a lien for the payment of freight, but was entitled to a lien for that part of his account charged for hauling. That the Mechanics' Planing Mill Company and August Reichert were entitled to a lien for the respective amounts claimed by them. That the last three named lien claimants were entitled to recover against the Eureka Stone Company, a surety on the bond of the contractor, for the amount of their respective claims. That the Eureka Stone Company was not entitled to a lien on said building for the amount of its claim. That the church had expended three hundred and seventy-six dollars and twenty-five cents above the contract price in completion of the building, and was entitled to judgment for that amount against the Eureka Stone Company as surety.

A decree was entered in accordance with the findings of the chancellor, except that the judgment against the Eureka

Stone Company for the amount of the liens asserted was in the name of the church for the benefit of the claimants.

An appeal was taken by the Eureka Stone Company, and cross-appeals were taken by the defendants.

²¹⁶ For the reason here given and the additional reason hereafter given, the chancellor was correct in holding that the Eureka Stone Company was not entitled to assert a lien upon the building. It was the surety upon the bond of the principal contractor conditioned for the performance of the contract and the delivery of the building free from liens. "One who is a surety for the contractor cannot claim a lien for material furnished by him at the request of the contractor. That would enable a man to exact payment for what he had promised should be paid for by another": Phillips on Mechanics' Liens, sec. 43a; Boisot on Mechanics' Liens, sec. 753.

The chancellor also found that the church paid out the sum of three hundred and seventy-six dollars and twenty-five cents in order to complete the building, and judgment was rendered for this amount against the Eureka Stone Company, the surety on the bond of the contractor.

The specific claims relied upon by the Eureka Stone Company to release it from liability on the bond are as follows:

1. Change of lintels.
2. Metal ceilings.
3. Delay in payments.
4. Change in making estimates.
5. Extension of time for completion of building.
6. Payment before completion of the building.

The lintels provided for in the original plans and specifications were changed by direction of the architect, and such change was authorized by the terms of the contract. Besides, we do not regard the change as a material one.

The contention of appellant that the failure of the church to have the metal ceiling on hand discharged the bond is not well taken. The testimony clearly shows that the contractor was not ready for the metal ceiling until June, 1904, three ²¹⁷ months after the time for the completion of the church had expired; and it is further shown that no delay was caused on account of the ceiling. The chancellor found in favor of the church on the facts on both the question of delay in payments and change in the estimates, and, according to the settled rule of this court, his findings of fact will not be disturbed unless against the clear weight of the evidence. A care-

ful consideration of the testimony does not justify a reversal of his findings in that regard.

The extension of time for the completion of the building, granted by the church, was done after the expiration of the time in which the building should have been completed, was a mere voluntary act without any consideration to support it. Therefore, it neither added to nor took away any obligations of the bond.

Appellant seeks to avoid its liability on the bond because ten per cent of the contract price was not reserved until completion of the building. This provision is based upon the performance of the terms of the contract by the contractor. In the present case the contractor abandoned his contract long before the building had been completed. Moreover, the building was not completed until June, 1905, more than one year after expiration of the time of its completion as fixed by the terms of the contract. We are of the opinion that the church was entitled to recover the three hundred and seventy-six dollars and twenty-five cents, the amount expended by it above the contract price for the completion of the building after the contractor had abandoned the work.

A majority of the court is of the opinion that a mechanic's lien cannot be asserted against a church building.

Counsel for the lien claimants contend that the general rule is that a church is subject to a mechanic's lien under a statute giving such a lien on buildings, unless churches are expressly exempted from the operation of the statute, and that this doctrine is not in conflict with that announced in the case of *Grissom v. Hill*, 17 Ark. 483. They maintain that the decision in that case was based upon a clause contained in the deed conditioned against alienation, but a contrary interpretation has been placed upon it by this court.

In the case of *Fordyce v. Woman's Christian National Lib. Assn.*, 79 Ark. 550, 96 S. W. 155, 7 L. R. A., N. S., 485, in discussing the case of *Grissom v. Hill*, 17 Ark. 483, the court said: "The clause in the deed above mentioned cut no figure in the case whatever; and what was said in the opinion as to the effect of the deed was pure surplusage, because the trustees acquiesced in the decree rendered in the court below, and did not appeal."

True, the subject under discussion in the *Fordyce* case was whether the property of a public charity could be sold under execution, but the principle announced is the same; for our statutes do not make any exception in favor of the property of public charities in regard to execution liens, and it was held

in the case of *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432, and reaffirmed in the case of *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952, that a church is a public charity. So, whatever may be the rule elsewhere, it may be considered as settled in this state that a church building is not subject to a mechanic's lien.

Cross-appellants, who are lien claimants, ask for judgment against the Eureka Stone Company, the surety on the bond of the principal contractor, for the amount of their debt. In the case of *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218, it was held that where a promise is made to one upon a sufficient consideration for the benefit of another, the beneficiary may sue the promisor for a breach of his promise. Hence the right of the lien claimants to recover on the bond depends upon the terms of the contract in connection with the conditions of the bond. The church is the only obligee named in the bond, and the only condition contained therein is that the principal contractor shall perform his contract and fulfill the stipulations thereof. The contract, so far as material to determine the liability of the bond for materials furnished, is as follows: "In determining the liability of the sureties on the bond to the materialmen, sentences or parts of sentences must not be considered apart from what follows and what precedes them." The intention of the parties is to be gathered from the whole instrument. If the intention was to secure the payment of materials furnished to the contractor, then the materialmen should recover. If, on the other hand, the fund only secured the church against claims and liens, then it becomes a bond of indemnity to the church, and materialmen are not entitled to recover. The materialmen ²¹⁹ base their right to recover upon that clause of the contract which provides that the contractor shall pay all materialmen, but it will be observed that the subject in contemplation of the parties was the protection of the church against liens that might be asserted against the building; for that which immediately precedes as well as that which follows the clause in question manifestly shows that the object in view was to protect the church from the filing of liens, and to provide for their payment in case they were asserted.

Article 15 of the contract, in which the expression in question occurs, is wholly taken up with the subject of liens. It provides that if, from any cause, a lien shall be filed, the amount of such lien may be withheld from the contractor until the claim is satisfied. A subsequent clause provides that the trustees of the church may settle with such claimants ac-

ording to their judgment, pay the same without litigation, and that the whole cost of the adjustment shall be borne and paid by the contractor and his bondsmen out of any sums due or to become due the contractor. The expression, "and that the contractor shall pay all artisans, materialmen, etc.," in connection with what immediately precedes and follows it, cannot be construed to mean an express covenant to pay for materials used in the construction of the building.

A majority of the court, from a consideration of the provisions of the bond, in connection with the contract it was given to secure, is of the opinion that the bond was taken to indemnify the church from claims that might be asserted against its building, and that it was not made for the benefit of those who might furnish material to be used in the construction of the building. The case of *Smith v. Bowman*, 32 Utah, 33, 88 Pac. 687, 9 L. R. A., N. S., 889, contains a clear and instructive discussion of this subject, with a full and complete review of all the authorities. Hence, we are of the opinion that neither the materialmen nor the church for their benefit were entitled to recover against the surety on the contractor's bond.

The chancellor erred in holding that a church is subject to a mechanic's lien, and that part of the decree of the court fixing a lien on the church building and the property on which it is situated in favor of lien claimants is reversed.

220 The chancellor also erred in rendering judgment in favor of the church for the benefit of the lien claimants against the Eureka Stone Company, a surety on the principal contractor's bond, and the decree of the chancery court in that respect is reversed. In all other respects the decree is affirmed.

Chief Justice Hill is of the opinion that the bond secures the payment of material furnished to the contractors, and that the materialmen are entitled to recover on said bond because it was made for their benefit as well as to indemnify the church, and therefore dissents from that part of the opinion which holds that the surety on the bond of the contractor is not liable to the lien claimants for the amount of materials furnished by them to the contractor and used in the construction of the building, and concurs in the remainder of the opinion.

Mr. Justice Wood and Mr. Justice McCulloch dissent from that part of the opinion which holds that a church is not

subject to mechanic's lien, and concur in the rest of the opinion.

HILL, C. J., Dissenting. As indicated in the opinion of Mr. Justice Hart, I disagree with one conclusion reached by the majority of the court, and that is, that the bond is only one of indemnity against liens. Article 15 says: "That there shall be no liens filed on said building or work, either for labor done thereon or for materials furnished in its construction, and that the contractor shall pay all artisans, materialmen and laborers doing work on or about said building or other work; and if, for any cause, such lien shall be filed by any person, then and in such case the contractor shall pay and satisfy the amount that may be due and owing," etc.

As seen, this contains various covenants, among others the direct covenant that the contractor shall pay all artisans, materialmen and laborers doing work on or about said building or other work, and I think it unwarranted to qualify that positive agreement by limiting it to pay for liens only. The payment or indemnity against liens is abundantly provided for, and I think also the payment of all debts incurred to artisans, materialmen and laborers is equally provided for, and that the obligation is as much an obligation to pay as it is an obligation of indemnity.

The result of these views is, I reach the same conclusion which the majority reach, so far as the Eureka Stone Company ²²¹ is concerned, as it occupied the dual relation of debtor and surety; but as to the other debtors I dissent from the refusal to give them judgment on the bond. I concur in all other parts of the opinion and the judgment.

A Mechanic's Lien cannot be Enforced against public buildings: Pittsburg Testing Laboratory v. Milwaukee Electric Ry. etc. Co., 110 Wis. 633, 84 Am. St. Rep. 948; Noonan v. Hastings, 101 Ky. 312, 72 Am. St. Rep. 419. A public library building erected by a town for free public use is not subject to a mechanic's lien: Young v. Inhabitants of Falmouth, 183 Mass. 80, 97 Am. St. Rep. 418. Neither is a public schoolhouse: Mayhofer v. Board of Education of San Diego, 89 Cal. 110, 23 Am. St. Rep. 451; Charnock v. District Township of Colfax, 51 Iowa, 70, 33 Am. Rep. 116; or a courthouse: Whiting v. Story County, 54 Iowa, 81, 37 Am. Rep. 189; Board of Commissioners v. O'Conner, 86 Ind. 531, 44 Am. Rep. 338.

BIGHAM v. DOVER.

[86 Ark. 323, 110 S. W. 217.]

A JOINT EXECUTION upon Two Separate Judgments in Favor of Two Plaintiffs is Void, and so also is the sale made thereunder. The result cannot be avoided by amending the writ. (p. 1097.)

Shaver & Pipkin, for the appellant.

323 WOOD, J. Appellee bought a saddle for twelve dollars at a sale under the following execution:

“County of Pope,
Town of White.

“The State of Arkansas to any constable of Polk County: You are hereby commanded that of the goods and chattels of E. T. Bigham you cause to be made the sum of nine dollars (\$9) which W. W. Cranford late before me, a justice of the peace for said county, recovered against him for his costs in a replevin suit and also costs in a suit wherein S. S. Crockett was plaintiff and W. W. Cranford and F. T. Bigham were defendants, and that you have said sum of money within thirty days to render to said W. W. Cranford for his costs aforesaid.

“Witness my hand as such justice this the 16th day of September, 1906. B. F. McMILLAN, J. P.”

The sale was regular.

The execution was based on two judgments against appellant in the justice court, aggregating the sum of nine dollars for costs. The judgments were in favor of different parties. The judgments were valid. Appellants, claiming that the execution was **324** void, and that the sale thereunder was void, brought replevin against appellee for the saddle. The cause was tried by the court sitting as a jury, and the above appear as the undisputed facts.

The court found that the sale was valid, and that the title to the saddle was in appellee, but that appellant was entitled to the difference between twelve dollars, the amount for which the saddle was sold, and five dollars and fifty cents, the amount of the Cranford judgment, and rendered judgment accordingly. The appellant duly prosecutes this appeal.

Our statute provides that: “An execution may issue upon any final judgment, order or decree of a court of record for a liquidated sum of money, and for interest and costs, or for costs alone”; Kirby’s Digest, sec. 3203.

There is no law or rule of practice that authorizes a single execution for the amounts of two separate and distinct judgments: 17 Cyc. 932. A joint execution upon two separate judgments is not voidable merely, but void: *Merchie v. Gaines*, 5 B. Mon. (Ky.) 126; *Doe v. Rue*, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368. Such an execution is defective, not in form merely, but also in substance, and is therefore not susceptible of amendment: See *Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780; *Hightower v. Handlin*, 27 Ark. 20; *Hall v. Doyle*, 35 Ark. 445; *Jett v. Shinn*, 47 Ark. 373, 18 S. W. 693; and *Downs v. Dennis*, 83 Ark. 71, 119 Am. St. Rep. 120, 102 S. W. 699, as to executions that may or may not be amended. An execution based on a valid judgment, but which contains an excessive amount only, may, according to some decisions, be amended: *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 793; *Otis v. Nash*, 26 Wash. 39, 66 Pac. 111. But this not that case. The ruling of the court eliminating the amount of one of the judgments did not cure the error of taking and selling appellant's property under process that was absolutely void. Such error was prejudicial, and could not be cured by amendment. Appellee acquired no title by his purchase at a sale under the void execution.

The judgment is therefore reversed, and the cause is remanded for new trial.

Hill, C. J., and McCulloch, J., dissent.

As to What Defective Executions may be cured by amendment, see the note to Kipp v. Burton, 101 Am. St. Rep. 550. Where a fieri facias against two defendants is levied on land "as the property of the defendant," the court may, after the sale, allow the officer, who is still in office and present in court, to amend his entry of levy by naming which of the two defendants' property was levied upon: *Dorminey v. De Lang*, 130 Ga. 618, 124 Am. St. Rep. 193. On the amendment of writs of scire facias, see the note to *Bank of Eau Claire v. Reed*, 122 Am. St. Rep. 96.

CHEROKEE CONSTRUCTION COMPANY v. BISHOP.

[86 Ark. 489, 112 S. W. 189.]

FORFEITURES—Enforcement of in Equity.—Though equity will not ordinarily enforce a forfeiture, it will do so where the forfeiture works equity and protects the rights of the parties. (p. 1104.)

LEASES—Forfeiture of in Equity.—Where a lease provides that all machinery placed on the property by the lessee shall remain thereon until the royalties reserved are paid, and that the leased property shall be operated for mining purposes with due diligence, and if it remains idle for more than thirty consecutive days the lease shall be forfeited, the forfeiture arising from the removal of such machinery and the failure to prosecute such work will be enforced in equity. (p. 1108.)

MINING FIXTURES, When Remain the Property of the Lessee.—If a lease of a mine provides that the machinery placed thereon may be removed after the royalty reserved is paid, such machinery becomes a removable fixture, and remains the property of the lessee. The only interest which the lessor has therein is a lien for unpaid royalty. (p. 1110.)

Winchester & Martin, for the appellant.

Sam R. Chew, for the appellee.

⁴⁹¹ **BATTLE, J.** On the twenty-sixth day of February, 1901, Araminta D. Bishop and others leased certain lands to Jerry M. Cravens for a period of thirty years. The lease is as follows:

“This contract and agreement, made and entered into this 26th day of February, A. D. 1901, by and between Araminta D. Bishop, widow of R. A. Bishop, deceased, Titula W. Hocott and Thomas Hocott, her husband, Lee S. Bishop and wife, Hay Bishop, Almira T. Shelton and her husband, John H. Shelton, Ben Bishop and wife, Minnie Bishop, of Sebastian County, Arkansas, parties of the first part, and Jerry M. Cravens of Sebastian County, Arkansas, party of the second part.

“Witnesseth: That the parties of the first part, for themselves, their heirs, executors, administrators and assigns, in consideration ⁴⁹² of the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration and covenants hereinafter mentioned, have leased and do hereby lease and let to the party of the second part, his heirs, executors and assigns, the following described lands for the purpose hereinafter named situated in the Greenwood District of Sebastian County, State of Arkansas, to wit: the northeast quarter section thirteen and north half of northwest quarter and north half of the southeast quarter of northwest quarter, sec-

tion thirteen, township five, range thirty-two, northeast quarter section thirteen and north half of northwest quarter and north half of southeast quarter of northwest quarter of section thirteen, township five, north, range thirty-two west, except one acre of said land in square form upon which the said parties of the first part's dwelling and adjoining buildings are now situated, which is strictly understood is reserved from the operation of this lease, and no coal is to be mined or taken therefrom.

"With the sole and exclusive privilege of mining for coal and operating coal mines thereon and taking and selling coal therefrom for the term and period of thirty years from this date, hereby giving to the party of the second part the exclusive right to mine coal on said premises and to remove and sell the same for the term aforesaid, hereby giving the party of the second part, for the consideration aforesaid, the privilege of taking sufficient coal out of said premises for stationary machinery necessary for conducting said mining operations free of charge, and said party of the second part shall have the right free of charge to take from the premises all such timber and stone as may be necessary to be used to conduct said mining business, that is to say, all of such material as may be necessary to be used in constructing and maintaining said mine or mines, but not to include such timber as is used in building houses, tipples, railroad bridges and railroad ties, and all timber so used for said purpose shall be paid for at the price of two dollars per thousand feet, standard measure.

"And the said party of the second part shall also, for the consideration aforesaid, have the right to erect on said premises all necessary buildings for the purpose of carrying on said coal ⁴⁹³ mining business, including dwellings for miners and other employees of said second party, and said party of the second part, his successors or assigns, shall have the right to build and maintain roads and railways to and from all shafts, slopes or strip pits now on said premises or that may hereafter be put thereon for the use of said mine or mines, and said party of the second part, his agents, successors or assigns, shall fence all the aforesaid railroad tracks and build and maintain suitable stock gaps thereon, and it is further understood and agreed that said party of the second part, or his legal representative, shall build and maintain gates on all dirt roads made by them as aforesaid when said roads enter upon any of the enclosure of said party of the first part.

"It is further agreed and understood that the party of the second part is to pay all taxes on improvements placed on said premises by the party of the second part, and the taxes on the realty are to be paid by the party of the first part.

"It is further understood and agreed that the party of the second part shall enter upon said land within ninety days from date hereof and begin sinking slope or shaft, and in event it is not commenced in the time specified then the party of the second part forfeits this lease and all privileges thereunder and all improvements made thereon to the parties of the first part.

"The party of the second part agrees and binds himself, his successors or assigns, that, should he elect to sink shaft or slope upon the line running east and west between the southeast quarter and the northeast quarter of said section thirteen, township five north, range thirty-two west, he will have, on or before the first day of July, 1902, in place upon said premises, for the operation of said slope or shaft, not less than two boilers of 60-horse power each and hoisting engine of not less than 100-horse power and all other necessary appliances for the successful operation of said mine or mines.

"It is further understood and agreed that said party of the second part, his successors or assigns, shall pay to the party of the first part the following royalty, to-wit: For mine run coal the sum of five cents per ton, 2,000 pounds to constitute a ton (bulletin weights to govern settlement). The minimum royalty to be \$500.00 per year during the period of this lease, or until ⁴⁹⁴ the coal shall be worked out, and, should all of the said coal be mined from said land before the expiration of the lease, then said minimum royalty shall cease, and, in case the royalty on coal mined shall exceed in any one year the said sum of \$500.00, then the excess of royalty of previous years shall be applied to the deficiency. The royalty as aforesaid to be paid on the 20th day of each month for the coal mined the previous month, i. e., coal mined in March, 1901, the royalty on same would be due and payable April 20 of same year, and, in the event that said royalty is not paid as aforesaid within ninety days from the date it becomes due, then said party of the second part, his successors or assigns, shall forfeit this lease and all privileges thereunder, and in no case shall any machinery or other improvements be removed from the premises or disposed of by the party of the second part, his successors or assigns, until said royalty is fully paid. And it is expressly understood and

agreed that said parties of the first part, or their legal representatives, shall have a first lien upon all of said improvements and machinery that are now upon said leased premises or may hereafter be put thereon by the party of the second part, his successors or assigns, until royalties herein provided for are fully paid.

“Said party of the second part, his successors or assigns, shall furnish the parties of the first part, or their legal representatives, a statement on the 15th day of each month for all coal mined the previous month, said statement to be made from bulletin weights, and the parties of the first part or their legal representatives shall at all reasonable hours have access to the weigh books, bulletin sheets and other records of the coal mined and kept in his office.

“It is further understood and agreed by the parties hereto that said mines or mine shall be operated by the party of the second part, his successors or assigns, with due diligence, and at no time during the period of this lease shall said mine or mines be idle for more than thirty consecutive days in any one year, unless same is caused by strikes, labor troubles, shortage in cars, floods, explosions, fires, shortage in orders, or other unavoidable circumstances not within the power of the party of the second part to prevent.

“It is further understood and agreed by the parties hereto ⁴⁹⁵ that the party of the second part, his successors or assigns, may, at such times as he or they may deem best, move or cause to be moved any buildings, machinery, railroad tracks or materials which he or they have put upon said premises without force or process of law; provided, however, that the royalty has been paid as aforesaid and work commenced within ninety days as aforesaid.

“It is understood and agreed by the parties hereto that the party of the second part, his successors or assigns, shall have the right to sublet said premises for the purposes of mining coal as aforesaid, subject to all the conditions of this lease.

“It is hereby agreed by the parties of the first part, or their legal representatives, that said party of the second part, his successors or assigns, shall have the sole and exclusive right to locate, own or conduct a mercantile business on said premises for the period of this lease.

“It is further understood and agreed that said parties of the first part, or their legal representatives, shall at all times during reasonable hours have the right to enter said mine or mines for the purpose of investigation.

"In witness whereof, we have hereunto set our hands and seals, in duplicate, on this the day and date first above written.

ARAMINTA D. BISHOP. (Seal)

"TAHILAH W. HOCOTT. (Seal)

"MAY BISHOP. (Seal)

"JOHN H. SHELTON. (Seal)

"MINNIE BISHOP. (Seal)

"THOMAS HOCOTT. (Seal)

"LEE S. BISHOP. (Seal)

"ALMIRA SHELTON. (Seal)

"BEN B. BISHOP. (Seal)

"JERRY M. CRAVENS. (Seal)"

Cravens assigned the lease to the Montreal Coal Company, and it assigned the same to the Cherokee Construction Company. A mine was opened on the leased land, and machinery of the description stated in the lease was placed therein for the purpose of operating it. On the third day of July, 1905, the lessors brought a suit in the Sebastian chancery court, for the Greenwood district, in Sebastian county, against Cravens and ⁴⁹⁶ Cherokee Construction Company to cancel the lease and for other relief. After setting out the terms of the lease, the plaintiffs alleged in their complaint as follows: "That the lessees have failed and refused to pay to the lessors the minimum royalty provided by the terms of the lease for a period of time much longer than provided in the lease contract, and plaintiffs further charge that the lessees have moved away from the premises the machinery placed thereon for the purpose of mining coal, and have thus destroyed security out of which the lessors had the right, according to the terms of the lease, to secure the payment of the minimum royalty aforesaid. The plaintiffs further charge that the defendants have failed to furnish to the lessors on the fifteenth day of each month a statement of all the coal mined during the previous month according to the terms of the contract. The plaintiffs further charge that the lessees have violated their contract, in that they have failed to operate the mine with due diligence, and have permitted the same to stand idle for more than thirty consecutive days in one year. Plaintiffs further charge that all the acts, conducts, failures and forfeitures hereinbefore complained of have destroyed the rights of the lessees with respect to the contract and to remain in possession of the premises. And plaintiffs, further complaining of the defendant, the Cherokee Construction Company, allege that they have been, by the wrongful acts and conduct of the

defendant, its agents and employés, in violation of the terms and conditions of the lease, damaged in the sum of fifteen thousand dollars; as follows:

“For destroying and cutting timber upon the leased premises in the sum of fifteen hundred dollars, for removing tippie, machinery and all other equipment for the operation of the mine, and for pulling the pillars and destroying the underground work of the mine, in the sum of thirteen thousand five hundred dollars.”

And asked as follows: “Wherefore, the premises considered, these plaintiffs pray that the lease herein set out shall be by the court canceled; that the defendants and their agents or assigns shall be forever enjoined from setting up any claims to said premises or from going upon the same for the purpose of mining coal or for other purposes, and shall be perpetually enjoined from setting up any claim or right of title to said premises under the aforesaid lease, and that they have judgment ⁴⁹⁷ against the Cherokee Construction Company for damages as aforesaid in the sum of twenty-five thousand dollars, and for all other and further relief to which in equity and good conscience they are entitled.”

And the defendants, admitting the execution of the lease and the terms thereof so far as stated in the complaint, answered as follows:

“Defendants deny that the lessees have failed to pay lessors the minimum royalties provided by said lease contract for a period of time much longer than provided in said lease; and they also deny that the lessees have moved away from said premises the machinery placed thereon for the purpose of mining coal, and have thus destroyed security out of which the lessor had a right, according to the terms of said lease, to secure payment of said royalties.

“Defendants also deny that they have failed to furnish the lessors a statement of all coal mined during the previous month, on the fifteenth day of each month, according to the terms of said lease contract, and also deny that the lessees have violated their contract by failing to operate said mine with due diligence, and that they have permitted the same to stand idle for more than thirty days of any one year, when within their power to prevent; and further deny that, by reason of anything alleged in the complaint, defendants have in any manner forfeited or destroyed their rights under said lease, or their right to remain in possession of said premises and further operate said mine.

"Further answering, defendants say that at expense of large sums of money, to wit, fifty thousand dollars, said lessees have opened up a coal mine upon the premises described in the complaint, and have developed said mine and operated the same with due diligence down to this day, and have not allowed same to remain idle for more than thirty consecutive days in one year, except when such idleness was enforced by labor troubles, shortage in cars, floods, shortage in orders, and other circumstances unavoidable and not within the power of defendants to prevent, and that most of the time during which said mine has remained idle, has been caused by shortage of orders, shortage in cars, and shortage in orders for coal produced from said time, more especially the latter cause."

⁴⁹⁸ And denied the other allegations of the complaint so far as stated in this opinion.

The machinery in the mine was moved out by the Cherokee Construction Company on the second day of February, 1904. After its removal the pillars of the mine were pulled down, and the mine was virtually abandoned. All this was caused by the discovery of a fault of the depth of eighteen feet and four inches, which made the operation of the mine impracticable. It (mine) was idle from January 16, 1904, until October of the same year, and was idle three or four months before the bringing of this suit. There was no evidence that any effort was made to open a mine on other parts of the land.

The court canceled the lease, and rendered judgment against the Cherokee Construction Company for three thousand one hundred and sixty-seven dollars, for the value of the machinery, and it appealed.

As a rule, equity will not enforce a forfeiture. But there are exceptions to this rule. In cases where the forfeiture works equity and protects the rights of parties, equity will in effect enforce it. Courts of equity will not reject it when it becomes a means of enforcing equitable rights.

Pomeroy's Equity Jurisprudence says: "It is well settled that where the agreement secured is simply one for the payment of money, a forfeiture either of land, chattels, securities or money, incurred by its nonperformance, will be set aside on behalf of the defaulting party, or relieved against in any other manner made necessary by the circumstances of the case, on payment of the debt, interest and costs, if any have accrued, unless by his inequitable conduct he has debarred himself from the remedial right, or unless the remedy

is prohibited, under the special circumstances of the case, by some other controlling doctrine of equity. Where the stipulation, however, is intended to secure the performance or non-performance of some act in pais, it is impossible to lay down any such general rule with which all the classes of decisions shall harmonize. It is certain that if the act is of such a nature that its value cannot be pecuniarily measured, if the compensation for a default cannot be ascertained and fixed with reasonable precision, relief against the forfeiture incurred by its nonperformance will not, under ordinary circumstances, be given. The affirmative of this proposition ⁴⁹⁹ cannot be stated as a rule with the same generality. It has, indeed, been said that equity would relieve against forfeitures in all cases where compensation can be made; but this is clearly incorrect. It is well settled that a court of equity will not, under ordinary circumstances, set aside forfeitures incurred on the breach of many covenants contained in leases, or of stipulations in other agreements, although the compensation for the resulting injury could be ascertained without difficulty": 1 Pomeroy's Equity Jurisprudence, 3d ed., sec. 450.

Again he says: "It is a well settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture. The few apparent exceptions to this doctrine are not real exceptions, since they all depend upon other rules and principles. The reasons of the doctrine are to be found in the universal principle that a court of equity refuses to aid any party who, by the remedy which he seeks to obtain against his adversary, is not himself doing equity, or who does not come before the court 'with clean hands'—the same principle upon which the court acts when it refuses to specifically enforce a contract which is unequal, unjust, or has any inequitable features and incidents": 1 Pomeroy's Equity Jurisprudence, 3d ed., secs. 459, 460, and notes. From this we (this court) understand the author to mean that a court of equity will enforce a forfeiture where its enforcement involves equitable rights and principles, and in that case it would not be the enforcement of the forfeiture as such but of the equitable rights and principles.

The law of insurance affords examples of the necessity of forfeitures, the enforcement of which would be consonant with

equity. In *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789, Mr. Justice Bradley, delivering the opinion of the court, said: "Promptness of payment is essential in the business of life insurance. . . . Delinquency cannot be tolerated nor redeemed, except at the option of the company. . . . Time is material and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract. . . . Courts cannot, with safety, ⁵⁰⁰ vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

In *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. ed. 662, it was said: "If the assured can neglect payment at maturity, and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on the failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract."

Brown v. Vandergrift, 80 Pa. 142, is a case wherein equity enforced a forfeiture based upon the same reason and principle as the forfeiture of a policy of insurance. The syllabus in that case is as follows:

"1. Brady leased to Lambing a lot of land, to have the sole right to bore for oil, etc., for twenty years, Lambing to commence operations in sixty days and continue with due diligence; if he should cease operations twenty days at any one time, Brady might resume possession. There were other covenants in the lease, and it was then stipulated that a failure of Lambing to comply with any one of the conditions should work a forfeiture, and Brady might enter and dispose of the premises as if the lease had not been made. It was further agreed that, if Lambing did not commence operations at the time specified, he should pay Brady thirty dollars per month until he should commence. Held, that the covenant of forfeiture was modified, not abrogated, by the clause for payment of rent.

"2. Lambing did not commence operations; he paid four months' rent; he omitted payment for eleven months and then tendered the amount for that time. Held, that the lessor might refuse the tender and insist on the forfeiture.

501 "3. In such case time is of the essence of the contract, and equity follows the law, and will enforce the covenant of forfeiture as essential to do justice.

"4. Equity abhors a forfeiture when it works a loss that is contrary to equity, not when it works equity and protects the lessor against the laches of the lessee."

Chief Justice Agnew, speaking for the court, said: "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results, when attended with success, while these results led to great speculations by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the land owner, as well as public interest, by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases, incompatible with the right of alienation and the use of the land. . . . Hence covenants became necessary to regulate the boring of wells, their number and time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance and put an end to the lease in case of injurious delay or a want of success. These leases were not valuable, except by means of development, unlike the ordinary terms for the cultivation of the soil, or for the removal of fixed minerals. A forfeiture for nondevelopment or delay, therefore, cut off no valuable rights of property while it was essential for the protection of private and public interest in relation to the use and alienation of property. . . . That time may be made of the essence of the contract by the express agreement of the parties has been so often decided that no citation of authority is necessary. In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true, as a general statement, that equity abhors a forfeiture, but this is when it works a loss that is contrary to equity; not when it works equity and protects the land owner against the indifference and laches

of the lessee ⁵⁰² and prevents a great mischief, as in the case of such leases.”

It is said that it is common for leases of land for the purpose of sinking wells for oil to contain covenants for diligent operation and for forfeiture in case of suspension, and such forfeitures are sometimes enforced in equity because the oil is a fluid likely to flow a considerable distance through the crevices and loose sand where it is found, and, if not removed, may be wholly lost to the owner of the land by reason of wells on land adjoining, and because its enforcement is essential to the protection of the rights of the owner, and because the lease yields nothing when idle, and is an encumbrance on the lands of the owner, tying his hands against selling or leasing to others: *Munroe v. Armstrong*, 96 Pa. 307.

In *Harper v. Tidholm*, 155 Ill. 370, 40 N. E. 575, Tidholm entered into a written contract with Harper, by which he bound himself, in consideration of a certain sum paid as earnest to bind the contract and of a certain other sum to be paid as purchase money, to convey certain lands to Harper when the stipulated price was paid; and provided that, if Harper failed to pay the purchase money at the time and in the manner specified in the contract, the money paid as earnest should, at the option of the vendor, be forfeited as liquidated damages, and the contract should be null and void. The contract was recorded. The purchase money not being paid at maturity upon demand, the vendor, upon tender of a deed for the land to the purchaser and his refusal to pay, declared the contract void and the earnest forfeited, and filed his bill in equity to cancel and remove the agreement and record as a cloud upon his title. The court, finding that the contract was null and void, and, being recorded, was a cloud upon the title of the vendor, decreed that it be canceled and removed, and that the earnest be forfeited.

In this case it was stipulated in the lease that the lessee, his successors and assigns, shall operate the mine or mines opened upon the land with due diligence, and that, at no time during the term of the lease, shall it or they remain idle for more than thirty consecutive days in any one year, unless the same was caused by strikes, etc. The only mine upon the land remained idle about ten consecutive months in the year 1904 and three or four months in 1905. The lease thereby became ⁵⁰³ forfeitable at the option of the lessors (*Barringer & Adams on the Laws of Mines and Mining*, p. 148; 20 *Am. & Eng. Ency. of Law*, 2d ed., pp. 778-780, par. 7 b, and cases cited), and they have so elected; and the enforcement of the

forfeiture thereby created is necessary to protect them against unnecessary and injurious delays, and to protect them against an unprofitable lease being perpetuated by laches and kept hanging over their property like clouds upon titles, and to relieve their land of a burden.

"The findings of the court in favor of the plaintiffs for the value of the machinery is based on the theory that it was a fixture, became and was a part of the realty, and, defendant having removed the same, plaintiff could recover its value." This is error. Whether it was a fixture is determined by the intention of the parties expressed in clear and unambiguous language: Choate v. Kimball, 56 Ark. 55, 19 S. W. 108; Ozark v. Adams, 73 Ark. 227, 83 S. W. 920.

The lease clearly shows that the machinery was to remain the property of the lessees. After stipulating that the lessees should have the right to make certain improvements, it then provides: "It is further agreed and understood that the party of the second part is to pay all taxes on improvements placed on the said premises by said party of the second part, and the taxes on the realty are to be paid by the party of the first part."

After stipulating that royalty shall be paid, and that the lease shall be forfeited if it is not paid in ninety days after it is due, it then provides: "And in no case shall any machinery or other improvement be removed from the premises or disposed of by the party of the second part, his successors or assigns, until said royalty is fully paid. And it is expressly understood and agreed that said parties of the first part, or their legal representatives, shall have a first lien upon all of said improvements and machinery that are now upon said leased premises or may hereafter be put thereon by the party of the second part, his successors or assigns, until royalties herein provided for are fully paid."

And then this stipulation follows: "It is further understood and agreed that the party of the second part, his successors or assigns, may at such times as he ⁵⁰⁴ or they may deem best move or cause to be moved any buildings, machinery, railroad tracks or materials which he or they have put upon said premises without force or process of law, provided, however, that the royalty has been paid as aforesaid and work commenced within ninety days as aforesaid. It is understood and agreed by the parties hereto that the party of the second part, his successors or assigns, shall have the right to sublet said premises for the purpose of mining coal as aforesaid, subject to all the conditions of the lease."

The only interest the lessors were to have in the machinery was a lien for unpaid royalty.

The decree as to the cancellation of the lease is affirmed; and the judgment for three thousand one hundred and sixty-seven dollars is reversed.

Forfeitures will be Enforced, either by a court of law or of equity, when it is clear that the parties have agreed to one: *Equitable Loan etc. Co. v. Waring*, 117 Ga. 599, 97 Am. St. Rep. 177.

Relief in Equity from Forfeitures is the subject of a note to *South Penn. Oil Co. v. Edgeli*, 86 Am. St. Rep. 48.

The Forfeitures of Leases is the subject of a note to *Guffy v. Hukill*, 26 Am. St. Rep. 910; and the waiver of such forfeitures is the subject of a note to *Moses v. Loomis*, 47 Am. St. Rep. 197.

When and Against Whom Fixtures may, by agreement, retain the character of personal property, is the subject of a note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 877.

HARRIS v. GRAHAM.

[86 Ark. 570, 111 S. W. 984.]

APPEAL AND ERROR.—The Court will not Review Instructions not Set Out in the Abstract. (p. 1113.)

MECHANIC'S LIEN Against the Property of a Married Woman—**Estoppel.**—A wife by silently acquiescing in a contract made and signed by her husband only may estop herself from denying his authority or his ownership of the property. (p. 1113.)

MECHANIC'S LIEN—Estoppel Against Married Woman.—If a husband contracts for improvements on his wife's property with one who believes him to be the owner, and she, knowing this fact, permits the work to be done without disclosing her title, she is estopped from setting up such title in defense of an action brought to enforce a mechanic's lien. (p. 1113.)

MECHANIC'S LIEN.—Where There has been a Lack of Substantial Performance of the Contract by Contractor, he cannot establish a lien on the property. (p. 1114.)

MECHANIC'S LIEN—Building, When does not Become the Property of the Land Owner.—Where a contractor agrees to build and deliver a house on the land of another, such house does not become the property of the land owner until it is finished in substantial conformity with the contract, or is accepted by him. (p. 1115.)

JURY TRIAL—Condition of Verdict—When Should be Entered.—If, in an action to enforce a mechanic's lien, the jury returns a verdict for the defendant in a suit to enforce a mechanic's lien, but states to the court that it is intended that the plaintiff should be permitted to remove the building, and the defendant asks for a judgment on the verdict, and to have the records show that the plaintiff be permitted to remove such building, the court errs in refusing to enter judgment on the verdict. (p. 1115.)

Manning & Emerson, for the appellants.

Thomas & Lee, for the appellees.

571 HILL, C. J. This was a suit by Graham & Bordley, as contractors, to obtain judgment and enforce a lien for erecting a dwelling-house for H. C. Harris and his wife, Lillie R. Harris. The contract price of the house was two thousand seven hundred and fifty-five dollars, and was to have been built by Sample & Hoaglan, whose performance of the contract was guaranteed by Graham & Bordley; and, Sample & Hoaglan failing to proceed with the work, it was assumed by Graham & Bordley.

The contractors claimed a balance of two thousand six hundred and five dollars due them for the work of each of the said contractors, Sample & Hoaglan, and themselves. They filed a lien in substantial conformity with the statute, and brought suit for the said amount and to enforce said lien.

The defendants denied that the house had been built pursuant to the plans and specifications, setting forth with much detail various and divers defects, which they alleged occurred, justifying them in rejecting the house as one built pursuant to their contract. The defendants further alleged that Mrs. Harris owned the property upon which the building was to be erected **572** in her own right, and denied that she had entered into any contract with the plaintiffs or with Sample & Hoaglan, or either of them, and denied that she was indebted to them, or that the property was subject to lien.

The contract was signed by H. C. Harris, and not by Mrs. Harris. The title to the lot stood in the name of Mrs. Harris. There was evidence adduced tending to prove that the contract was substantially complied with, and evidence tending to prove that it was not substantially complied with. There was also evidence that Harris notified the contractors before the completion of the work that it was not satisfactory, and he would not accept it, and for them to remove their material from his ground. There was sufficient evidence to have sustained a verdict either way on the issue of substantial compliance.

The record discloses the following facts: After the case was submitted to the jury, and the argument of counsel closed, the jury returned into court and announced the following verdict: "We, the jury, find for the defendant," and, upon being asked if that was their verdict, one of the jurors stated that it was, but it was intended by the jury that the plaintiffs should be permitted to remove the building from the lot

of the defendant, whereupon the court, of its own motion, and over the objections of the defendants, announced to the jury that it would not receive that verdict, and over the objections of the defendants ordered the jury dispersed for the night, but to return to the courtroom the following morning for further consideration of their verdict. Thereupon the defendants announced to the court that the defendants desired a judgment on the verdict of the jury, and to have the records show that the plaintiff should be permitted to remove the building from said lot of the defendants, but the court overruled the motion of the defendants, and refused to receive the verdict of the jury in behalf of the defendants, to which ruling of the court defendants saved their exceptions. Upon the following morning, the twelfth day of December, 1906, the defendants renewed their motion for a judgment upon the verdict of the jury, and to have the judgment recite that the plaintiffs should have permission to remove buildings from the lot of the defendants, but the court overruled the motion of the defendants and refused to receive a verdict of the jury in behalf of the defendants, to which they saved their exceptions.

573 The record of the proceedings of the next day reads as follows: "Instruction No. 3, given by the court of its own motion, over the objections of the defendants, and given after argument of counsel had been made to the jury, and after the jury had received instructions on part of the plaintiff and the defendant, and the cause had closed, and after the jury had returned into court and announced a conditional verdict in favor of the defendants, which verdict was not received by the court, and which instruction was given by the court of its own motion over the objections of the defendant, to which the defendants at the time excepted, and asked that their exceptions be noted of record, which was done; said instruction being as follows: 'If you believe from the evidence that the house had been completed substantially according to contract, but has slight defects in its construction, either in material or workmanship, and you further find that said house is on the land of defendants, and said building inures necessarily to the benefit of the said defendants, then you should find for the plaintiffs for the contract price, less whatever amount the evidence shows the defendants are damaged on account of said defects.' "

Thereafter the jury returned the following verdict: "We the jury, find for the plaintiffs fifteen hundred and thirty-

seven dollars and fifty cents." Judgment was entered thereon, and Harris and his wife appealed therefrom.

⁵⁷⁵ Appellants criticise the instructions, and allege various errors therein; but they have not set out the instructions in their abstract. They argue the instructions as if there were five transcripts here, and each judge had a transcript before him when he was reading their criticisms of the instructions. The rule that the abstract is to acquaint the judges with the material parts of the record seems to be overlooked. The court has so often said that it will not review instructions thus presented that it is unnecessary to cite the cases.

The property stood in the name of Mrs. Harris, and the contract was made by Mr. Harris, and it is insisted that there can be no recovery against her upon the terms thereof, and that a lien cannot be enforced upon her property without the contract having been signed by her or her agent.

In *Hoffman v. McFadden*, 56 Ark. 217, 35 Am. St. Rep. 101, 19 S. W. 753, the court said: "A married woman may, by silently acquiescing in the contract of one who to her knowledge assumes to act as her agent, be estopped to deny the agency. And where the husband contracts for the improvement of his wife's property with one who believes him to be the owner, and the wife, knowing this fact, permits the work to be done without disclosing her right, it has been held that she will be estopped to set up her title in defense of an action to enforce the contractor's lien."

The evidence here is sufficient to justify the jury in finding against Mrs. Harris upon either of these propositions.

The principal question in the case is as to the verdict rendered by the jury in favor of the defendants and the refusal of the court to accept it when one of the jurors announced that the jury intended by that verdict for the plaintiffs to have the building, and that they be permitted to remove it. Under sections 6203, 6204 of Kirby's Digest, if any juror dissents from the verdict as delivered by the foreman, the jury must be sent out for further deliberation. But this is not a case falling within the statute. The juror's announcement was not a dissent, but an explanation of the intended effect of the verdict for the defendants. ⁵⁷⁶ As shown in the statement of facts, there was a sharp conflict as to whether there were material variations from the contract, or whether there had been a substantial performance of it. The verdict of the jury for the defendants necessarily found that there were substantial and material deviations from the contract which justified the defendant in not accepting the building,

and the statement of the juror showed that the jury intended in so finding that the house which had been erected by the contractors should belong to them, and that they should be entitled to remove it. If this was the effect of the verdict, then the statement of the intention of the jury neither added to it or took from it; if it was not the effect of the verdict, then they should have been remanded for further deliberation. Where there has been a lack of substantial performance of a contract by a contractor, he cannot establish a lien upon the property: Phillips on Mechanics' Liens, sec. 134; 20 Am. & Eng. Ency. of Law, 367; Dermott v. Jones, 2 Wall. 1, 17 L. ed. 762; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Fox v. Davidson, 36 N. Y. App. 159, 55 N. Y. Supp. 524; Ark-Mo Zinc Co. v. Patterson, 79 Ark. 506, 96 S. W. 170.

In New York the rule is rigidly adhered to that the contractor can recover nothing where he has failed to substantially comply, and although this may inflict upon him a heavy pecuniary punishment by giving the other party what the contractor has done without paying for it, still it is said that this consideration is unimportant, weighed against the healthy and beneficial effect of the rule denying recovery unless there is substantial compliance with the contract: Phillips on Mechanics' Liens, sec. 134.

In some jurisdictions it is held that while the contractor cannot recover upon his contract where he has failed to substantially comply, yet he may recover upon a quantum meruit for labor done and quantum valebat for material furnished: Phillips on Mechanics' Liens, sec. 134.

Thus in Massachusetts it was said: "We think the weight of modern authority is in favor of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed, and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take ⁵⁷⁷ the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented—there having been no prohibition to proceed in the work after a deviation from the contract has taken place—no absolute rejection of the building, with notice to remove it from the ground; it would be a hard case indeed

if the builder could recover nothing": *Hayward v. Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 261.

Under neither rule can the action of the court in refusing to render judgment upon this verdict be sustained. The owner had given notice before the completion of the building several times that he would not accept the building, and that the material belonging to the contractor should be removed.

Immediately upon the juror saying that the jury intended that the contractor be permitted to remove the building, the owner offered to consent thereto. This consent, if not theretofore given, certainly then removed any objection to refusing recovery to the contractor, where there had not been substantial compliance, irrespective of whether the strict New York or the liberal Massachusetts rule is adopted.

When a contractor agrees to build and deliver a certain house on the land of another, the building does not become that of the land owner until it is finished in substantial conformity with the contract or accepted by him: *Phillips on Mechanics' Liens*, 135; *Dermott v. Jones*, 2 Wall. 1, 17 L. ed. 762.

In some instances, as in the Massachusetts case, *supra*, and others may be found in 20 American and English Encyclopedia of Law, 367, where a contractor in good faith has performed services and delivered material, he may have compensation for their value, notwithstanding he cannot recover on the contract. But those all seem to be cases where the building has become the land owner's, and grave injustice would be done the contractor unless he was allowed some compensation for what he had imperfectly done, and recovery is allowed to the extent that he had improved the land owner's property. None of these instances are in point here.

The second verdict, rendered after the court refused to accept the first one and gave instruction No. 3, was, in round numbers, for eleven hundred dollars less than the contract price. In other words, the jury said in this verdict that the contractors lacked by eleven hundred dollars ⁵⁷⁸ having fulfilled a two thousand seven hundred and fifty-five dollar contract. This was a second finding that there was a substantial and material deviation from the contract, and was but a confirmation in another form of the finding in the first verdict. This finding is supported by ample evidence, and, accepting it as true, then the jury's verdict for the defendants entitled the contractors to remove the house from the land owner's lots. This the land owner had requested, and again offered to consent to.

The court erred in not entering judgment upon this verdict. Reversed and remanded, with directions to enter judgment upon the first verdict.

The Question Whether the Estate of a Married Woman can be subjected to a mechanic's lien under a contract made by her husband alone, where she has knowledge of the improvements and makes no objection thereto, is discussed in the note to Rust-Owen Lumber Co. v. Holt, 83 Am. St. Rep. 520-524. It has recently been held that a mechanic's lien cannot be created against real estate held by husband and wife as tenants by the entireties, under a building contract signed by him alone: Bauer v. Long, 147 Mich. 351, 118 Am. St. Rep. 552.

INDEX TO THE NOTES.

Abstracts of Title, limitation of actions to recover damages for defects in, 949.

Attorney at Law, adverse party need not question right of to appear, 33.

authority of to appear, adverse party, whether may require proof of, 35.

authority of to appear, affidavit questioning, when sufficient, 45.

authority of to appear, burden of proof respecting, 41-43.

authority of to appear cannot be questioned on appeal, 45, 46.

authority of to appear, collateral attack upon, 43.

authority of to appear, court, when authorized to require proof of, 34, 35.

authority of to appear, denial, when must be under oath, 44.

authority of to appear, burden of, proof respecting, 41-43.

authority of to appear, evidence sufficient to overcome, 40.

authority of to appear, evidence of, what sufficient, 36, 37.

authority of to appear, how may be questioned, 43.

authority of to appear may be questioned, 34.

authority of to appear, motion questioning, affidavit for, 45.

authority of to appear, prima facie evidence of, 39-41.

authority of to appear, questioning by motion, 43, 44.

authority of to appear, questioning collaterally, 43.

authority of to appear, stranger to the record cannot question, 35.

authority of to appear, waiver of right to question, 36.

authority of to appear, when a question for the jury, 38, 39.

authority of to appear, when does not exist, 41.

authority of to appear, when will not be questioned, 34.

negligence of, limitations of actions for, 900.

presumption of authority of, 33, 37, 39, 40.

waiver of right to question authority of, what amounts to, 36.

Bigamy, absence of former spouse as a defense, 208, 209.

after separation of the parties to the first marriage by mutual consent, 218.

American statutory provisions respecting, 204.

belief that first marriage was void or had been annulled, 205-208.

cohabitation after second marriage not essential to crime of, 214.

committed in one state when punishable in another, 205.

constitutes one continuous crime, and hence will not support two convictions, 220.

crime of, when becomes complete, 214.

- Bigamy**, death of first spouse, belief in as a defense, 217, 218.
 definitions of, 201, 202.
 divorce, belief in, whether constitutes a defense, 206, 207.
 divorce in another state as a defense, 210, 211.
 divorce, invalid, as a defense, 209-214.
 divorce, marriage contracted within prohibited time after, 212, 213.
 divorce prohibiting marriage, remarriage after, 213.
 elements of the offense of, 202.
 former marriage must have been valid in law, 202.
 intent as an element of the offense of, 205.
 marriage, what sufficient to sustain conviction for, 203.
 marriage without a license, whether supports a conviction after, 219.
 mistake of fact as a defense, 206, 207.
 prior marriage is essential to crime of, 202.
 religious belief is no defense, 205, 206.
 sexual intercourse after marriage not essential to crime of, 215, 219.
 statutes relating to crime of, 201.
 under the Edmunds anti-polygamy law, 219.
 voidable first marriage will sustain an indictment for, 216.
 voidable second marriage will sustain an indictment for, 216.
 was not a common-law offense, 201.
 when the former marriage was voidable, 202.
- Children**, adulterine, are regarded more unfavorably than children of an unmarried person, 261.
 adulterine defined, 261.
 legitimacy of, burden of proof respecting if born during wedlock, 264.
 legitimacy of, doubt of not sufficient, 265.
 legitimacy of, evidence of mother, admissibility of to disprove, 266.
 legitimacy of, evidence to overcome presumption of, sufficiency of, 264-266, 270-273.
 legitimacy of, husband or wife, testimony of to disprove, 266-270.
 legitimacy of, nonaccess, evidence of to rebut presumption of, 266, 270.
 legitimacy of, presumption of from birth during wedlock, rebuttability of, 263.
 legitimacy of, presumption of, how disproved, 261.
 legitimacy of, presumption of, is not weakened by antenuptial conception, 272, 273.
 legitimacy of, presumption of, reasons for, 262.
 legitimacy of, presumption of, what sufficient to overcome, 264.
 legitimacy of, presumption of where a child is begotten before marriage, 272, 273.

Children, legitimacy of, presumption of where the mother was married to another at the time of the conception, 273.

presumption of legitimacy of when born of a married woman, 261, 262.

Community Property, animals, increase of, 113.

borrowed money and its proceeds, 107, 108.

business, profits resulting from, 113, 114.

charge against for property purchased with separate estate, 105.

colonization laws, property acquired under, 118.

constructive notice of to purchaser, 124, 125.

conveyance of by husband to wife, 106.

conveyance, recitals in of evidence respecting, 124.

conveyance to husband and wife, 122.

doctrine of and its source, 100.

doctrine of, in what states prevails, 100.

earnings of husband or wife, 114-116.

earnings of wife after separation, 115.

earnings of wife, agreements respecting, 115.

equitable title existing before marriage and legal title acquired afterward, 101.

evidence to overcome presumption in favor of, 122-124.

gifts or donations from the government, 116.

government, property acquired from, 116.

homestead acquired under the laws of the United States, 117.

interest on funds belonging to the separate estate, 113.

intermingling of separate property with, 100, 107.

life insurance policies, proceeds of, 119.

lottery tickets, prizes drawn on, 113, 114.

mining laws, property acquired under, 118.

pension moneys, 111, 112.

personal injuries, damages recovered for, 119, 120.

presumption on a joint conveyance to husband and wife, 122.

presumption respecting, evidence to overcome, 122, 123.

presumption respecting on a conveyance to either spouse, 103, 120.

presumption where a spouse has a separate estate, 121.

presumptions for and against, 120.

proceeds of sale or exchange of separate property, 113, 114.

profits arising from investment of wife's separate funds in commercial business, 113.

property acquired after marriage by exchange, 104.

property acquired after marriage by the industry of either spouse, 102.

property acquired after marriage partly out of community and partly out of separate funds, 104.

property acquired after marriage, presumptions respecting, 103, 120.

property acquired after marriage out of separate property or out of its proceeds, 105.

Community Property, property acquired before marriage, 101.

property acquired by adverse possession, 111.

property acquired by devise or descent, 110.

property acquired by gift other than testamentary, 110.

property acquired by mortgage of or on the credit of the separate estate, 107.

property acquired by prescription, 102.

property acquired on the credit of the separate estate, 108.

property acquired partly with borrowed money and partly with separate estate, 109.

property acquired under the colonization laws, 118.

property acquired under the homestead laws of the United States, 117.

property acquired under the government as timber lands, 118.

property acquired under the mining laws, 118.

property acquired with the rents, issues and profits of separate estate, 112, 113.

property conveyed to wife at the direction of her husband, 106 107.

property purchased with separate estate of wife but conveyance taken in name of her husband, 106.

property title to which was perfected after marriage, but which was held by adverse possession before, 102.

purpose of doctrine of, 100.

rents, issues and profits of separate estate, 112, 113.

test for determining what is, 100.

title initiated before marriage and completed after, 116, 117.

title initiated during community and completed after, 117, 118.

wife, interest of in, extent and nature of, 100.

Covenants against indemnity or of seisin, limitation of actions upon, 946-948.

grantees, liability of upon. See Grantees.

Equity, multiplicity of suits, bills of peace, when maintainable to prevent, 992.

multiplicity of suits, common source of title, whether supports jurisdiction, 995.

multiplicity of suits, community of interest or of title, whether essential to sustain jurisdiction, 993, 994.

multiplicity of suits, jurisdiction of to prevent, 992.

multiplicity of suits, parties holding separate tracts of land, 994.

separate claims to different parcels of land, whether court may maintain an action to determine to prevent multiplicity of suits, decisions affirming, 998-1002.

separate claims to different parcels of land, whether court may maintain an action to determine to prevent multiplicity of suits, decisions denying, 994-998.

title, establishing in one suit against persons holding different tracts in severalty, 998.

Evidence, to prove illegitimacy. See Children.

Frauds, Statute of, administrators, promise of to pay debts of their intestate, 494.

assignee for the benefit of creditors, promise of to answer for the debt of his assignor, 498.

collateral and original promises, benefit to the promisor as a test of, 494.

collateral and original promises, intent of the parties as determining, 492.

collateral and original promises, tests of, 492-494.

consideration as supporting a promise to answer for the debt of another, 497-504.

contract between three persons that the first is to pay debt due to the third from the second, 509, 510.

indemnity, contracts of, whether and when within, 512-516.

new consideration, effect of on the promise to pay the debt of another, 497.

original and collateral undertakings, illustrations of, 516-535.

promise to answer for the debt of another, acceptance of order, when is not a, 517.

promise to answer for the debt of another, accommodation indorsements, 516.

promise to answer for the debt of another, agreement to repurchase stock, 489, 490.

promise to answer for the debt of another and promise to see it paid, difference between, 502.

promise to answer for the debt of another based on a new consideration, 497.

promise to answer for the debt of another, collateral promises, when do not fall within, 495-497.

promise to answer for the debt of another, consideration for, 497, 498.

promise to answer for the debt of another, consideration to support and to make an original undertaking, 497-504.

promise to answer for the debt of another, contracts of indemnity, 512-516.

promise to answer for the debt of another, credit, to whom given as a test to determine whether the promise was original or collateral, 492.

promise to answer for the debt of another, discharge of the original debtor, when necessary to validate, 505-509.

promise to answer for the debt of another, employer's promise to pay debt of his employé, 496.

promise to answer for the debt of another, form of is not conclusive, 498.

promise to answer for the debt of another, illustrations of, 516-535.

Frauds, Statute of, promise to answer for the debt of another, includes all collateral undertakings, 487, 488.

promise to answer for the debt of another, independent liability must exist, 489, 490.

promise to answer for the debt of another, original undertaking, when amounts to a, 497-500.

promise to answer for the debt of another presupposes the existence of an enforceable obligation, 489, 490.

promise to answer for the debt of another, promise of another to pay subcontractor, 494.

promise to answer for the debt of another, purchaser's promise to pay mortgage given by vendor, 497.

promise to answer for the debt of another where the original debtor remains liable and there is a new consideration, 497-504.

promise to answer for the debt of another where the promisor effects the payment of his own debt, 496.

promise to answer for the debt of another where the promisor obtains an advantage to himself, 500.

promise to answer for the debt of another where there is a liability on the part of the promisor independent of his promise, 510, 512.

promise to pay debt due to an attorney from another, 494.

subcontractor, promise of the owner of a building to pay claim of, 499.

Grantees, action against them upon deeds not signed by them, nature of, 349-358.

action of covenant against where they have not signed, 350-359.
are not liable for acts of their lessees, 370.

devisees of, liability of on covenants of, 376.

excuses for nonperformance of covenants by, 377.

heirs of, liability of on covenants of, 376.

ignorance will not relieve for nonperformance of covenants, 377.

jurisdiction of actions against for breaches of covenants or conditions, 379.

liability of assignees of on personal covenants, 373.

liability of for acts of third persons, 371.

liability of for breaches of covenant by subsequent grantees, 370, 372.

liability of for breaches of covenants they have not signed, 370-372.

liability of husband on wife's covenants in deeds, 371.

liability of is not that of a covenantee, 350.

liability of lessees who have not signed the lease, 373.

liability of on covenants, conflict of authorities concerning, 349.

liability of on covenants goes to the form of the remedy, 349.

liability of on covenants, remedial and substantive law respecting, 349-354.

Grantees, liability of on personal covenants, 372.

- liability of, rule of in Connecticut, 355-357.
- liability of, rule of in Georgia, 360.
- liability of, rule of in Indiana, 361.
- liability of, rule of in Kansas, 362.
- liability of, rule of in Massachusetts, 354, 355.
- liability of, rule of in Minnesota, 362.
- liability of, rule of in New Hampshire, 363.
- liability of, rule of in New Jersey, 363.
- liability of, rule of in New York, 363.
- liability of, rule of in North Carolina, 365.
- liability of, rule of in Ohio, 366.
- liability of, rule of in Pennsylvania, 367.
- liability of, rule of in the United States courts, 350-354.
- liability of under covenants against nuisances, 371.
- liability of under covenants respecting the use of buildings, 370.
- liability of under covenants respecting the use of property, 370.
- liability of wife on husband's covenants in deeds, 371.
- performance of covenants by, what sufficient, 378.
- privity of estate or of contract, necessity of by, 350, 373-376.
- remedies against for breaches of covenants in deeds, 378.
- signature of, absence of from deeds, 349.
- statutes abolishing distinction between sealed and unsealed instruments, effect of upon liability of, 369.
- under covenants running with and restricting the use of land, 369.

Heirs, covenants of ancestors, liability of upon, 376.

Husband and Wife. See Community Property.

- covenants, liability of husband on wife's, 371.

Indemnity Contracts, frauds, whether and when within the statute of, 512-516.

- limitation of actions upon, 946.

Judgments against corporations after their dissolution, 632.

- collateral attack upon by proving the death of a party before the commencement of the action, 632, 633.

Judgments for or Against Deceased Persons are erroneous, 626, 628.

- are voidable, 627.
- assailing by writ of error coram nobis or coram vobis, 630, 631.
- attack on, how may be made, 630.
- by confession, 628.
- by default, 628, 629.
- collateral attack upon, 626.
- correction of, when must be by writ of error, 625.
- difference in effect between those for and those against deceased persons, 624, 627.
- effect of at the common law, 623.

Judgments for or Against Deceased Persons, English statute validating, 623, 624.

- English statute validating was not in force in America, 624, 625.
- in partition proceedings, 630.
- nunc pro tunc entry of, 631.
- on service of summons by publication, 628.
- rendered on appeal, 626.
- states in which are held void, 627, 629.
- when forbidden by statute are void, 630.
- where one of several parties dies before the entry, 638.
- where the court obtained jurisdiction in the lifetime of the decedent, 625.
- where the decedent was a nominal party merely, 637.
- where the fact of death appears by the record, effect of on appeal, 637.
- where the party died on the same day the judgment was rendered, 636.
- where the party dying was served by publication, 635, 637.
- where the party was dead before the commencement of the action, 631-635.

Leases, tenant's liability of on covenants, when he does not sign, 373.**Legitimacy. See Children.****Limitation of Actions, damages, accrual of substantial after accrual of nominal does not extend, 944-954.**

- in actions against public officers, 949, 950.
- in actions against recorders for false searches of title, 949.
- in actions for continuous or repeated injuries, 953.
- in actions for interference with lateral support, 954.
- in actions for interfering with the flow of water, 954.
- in actions for malpractice of physicians, 951.
- in actions for negligence and other torts, 952.
- in actions for nuisances, 953.
- in actions for the negligence of attorneys, 950.
- in actions on misrepresentation as to encumbrances, 948.
- on agreements to furnish abstracts of title, 949.
- on covenants against indemnity, 946-948.
- on covenants of seisin, 947.
- on indemnity contracts, 946.
- on the breach of a contract to carry and delivery goods, 946.
- on the breach of a contract to insure property or to cancel insurance, 945.
- on the breach of a warranty of quality on the sale of personal property, 946.
- on the breach of a warranty of title on the sale of personal property, 945.
- time when cause of action is deemed to accrue if on a contract, 944.
- where the damages are nominal at the breach and substantial damages afterward develop, 944.

Multiplicity of Suits. See Equity; Quieting Title.

Navigable Waters, are in England synonymous with tide waters, 710, 711.

are natural highways, 719.

artificial means, employment of, whether creates, 728, 730.

at the common law, modification of as applied in the United States, 711.

at the common law, what constitutes, 711.

bayous, when are, 733.

capacity essential to, 720.

capacity of for boating, fishing and the like, 723.

civil-law law, doctrine of and its effect in the United States, 715-717.

civil law, doctrine of, difference between and the common law, 716, 717.

classification of, 711.

continuous capacity not essential to, 729, 730.

courses, whether essential to, 723-725.

definitions of, 710.

depth, whether a test of, 724, 731.

duration as a test of, 730.

drainage ditches, when are not, 733.

extent of actual use is not the test of, 722.

floatage and navigability, difference between, 725.

floatage, capacity for, when sufficient, 726-728.

illustrations of, 724.

improvement, capacity of for and its effect, 730, 731.

lakes and bays, when are, 732, 733.

marshes, when are, 732.

meanders by government as affecting the question of, 732.

obstructions as affecting the question of, 731.

rivers, what are, 720.

statutory declaration is not necessary to, 717.

terminals as a test, 731.

tests of in America, 717-722.

tidal test, rejection of in America, 711-715, 718.

vessels, capacity for, whether essential to, 725, 726.

what are is a question of fact, 718.

Negligence, limitation of actions for when nominal damages have been succeeded by substantial, 952.

Nuisances, limitation of actions upon, 953, 954.

Physicians, limitation of actions against for damages, 951.

Presumption of legitimacy of one born of a married woman, 261, 262, 264, 272.

of the authority of an attorney at law to appear, 33, 37, 39, 40.

of the authority of an attorney at law to appear, evidence sufficient to overcome, 40.

Public Officers, limitations of actions against, 949, 950.

Quieting Title, against persons claiming separate tracts on the ground of preventing multiplicity of suits, 992-1002.

INDEX.

Note.

Abstracts of Title, limitation of actions to recover damages for defects in, 949.

ADMINISTRATORS.

See Executors and Administrators.

ADOPTED CHILD.

See Death.

ADVERSE POSSESSION.

In General.

1. **ADVERSE POSSESSION—What Constitutes.**—To constitute an adverse possession, there must be an actual occupancy, clear, definite, positive and notorious, and it must be continued, adverse, and exclusive during the whole period prescribed by the statute, with an intention to claim title to the land occupied. (Ala.) *McDaniel v. Sloss-Sheffield Steel etc. Co.*, 48.

2. **ADVERSE POSSESSION—Defective Right or Title.**—Possession of land, to be adverse, must be under claim of right or title if the occupant knows his title to be defective. (Ala.) *McDaniel v. Sloss-Sheffield Steel etc. Co.*, 48.

3. **ADVERSE POSSESSION—Character of.**—If one enters upon land, with knowledge that he has no title thereto, but thinking that it belongs to the United States government, he does not hold adversely to the true owner though he cuts timber on the land at various places and times, and cultivates a field for an indefinite time. (Ala.) *McDaniel v. Sloss-Sheffield Steel etc. Co.*, 48.

Color of Title.

4. **LIMITATIONS OF ACTIONS—Color of Title—Void Judicial Sale.**—A void deed, although made under and as a result of a judgment or decree absolutely void, constitutes color of title. (Wash.) *Hamilton v. Witner*, 921.

5. **LIMITATIONS OF ACTIONS—Void Guardian's Sale.**—Under a statute declaring that every person in the actual, open and notorious possession of land under claim and color of title made in good faith, who shall have seven consecutive years continued in possession and paid all the taxes, shall be held to be the legal owner of such land to the extent and according to the purport of his paper title, one taking and holding possession under a void guardian's sale has color of title and may become the owner of the property if his possession is sufficiently long continued and he pays the taxes as required by the statute. (Wash.) *Hamilton v. Witner*, 921.

ALIBI.

See Criminal Law, 3-5.

ALIMONY.

See Divorce, 6-9.

ANIMALS.

See Game; Health Regulations; Municipal Corporations, 20-23.

ANNULMENT OF MARRIAGE.

See Marriage.

ANTI-TRUST STATUTE.

See Constitutional Law, 9-13.

APPEAL AND ERROR.*Law of Case.*

1. **LAW OF THE CASE**, Effect of on a Second Appeal.—A decision in favor of the appellant on the ground that there was no finding on the plea of the statute of limitations nor of facts from which such finding might be inferred is not conclusive in his favor on a subsequent appeal, where there was a finding of facts from which the inference must be drawn that such statute has not operated in his favor. (Cal.) *Hibernia Savings etc. Soc. v. Farnham*, 129.

Specification and Assignment of Error.

2. **APPEAL AND ERROR**—Duty of Counsel to Specify Where Errors may be Found.—It is the duty of counsel to specify where the alleged errors on which they rely may be found in the transcript, and if they do not see fit to do so, the court will not assume that burden. (Cal.) *Dauphiny v. Buhne*, 136.

3. **APPEAL**.—An Assignment of Error in Permitting Cross-examination on matters not testified to on direct examination is unavailing, if the bill of exceptions does not contain all the testimony of the witness on direct examination. (Or.) *First Nat. Bank v. McCullough*, 758.

Questions Reviewable.

4. **APPEAL**.—The Grant or Denial of a Motion for a New Trial is not a final order from which an appeal lies. (Or.) *First Nat. Bank v. McCullough*, 758.

5. **APPEAL AND ERROR**—Questions not Raised on the Original Brief.—Points made for the first time in the closing or reply brief of the appellant will not be considered if no good reason appears for their omission from the original brief and it does not appear that the appellant would be unjustly affected by the refusal to consider them. (Cal.) *Hibernia Savings etc. Soc. v. Farnham*, 129.

6. **APPEAL**.—No Determination of a Trial Court can be Reviewed on appeal unless the question has been distinctly presented to that tribunal for its action. (Or.) *First Nat. Bank v. McCullough*, 758.

7. **APPEAL AND ERROR**.—The findings of a jury, under proper instructions from the court, are final and cannot be reviewed on appeal, where there is sufficient evidence to warrant the submission of a question of fact to them. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

8. **APPEAL AND ERROR**.—The Findings of the Judge Who Tried the Cause without a jury must stand, if there was any evidence to support it. (Mass.) *Supple v. Suffolk Savings Bank*, 451.

9. **APPEAL AND ERROR**.—The Court will not Review Instructions not Set Out in the Abstract. (Ark.) *Harris v. Graham*, 1110.

10. **APPEAL AND ERROR**.—Instruments not Set Out in the Abstract or Brief do not present matters for review. (Ark.) *Jacobs v. Bentley*, 1086.

Reversal and Remanding of Cause.

11. **APPEAL—Reversal Because of Wrong Reason.**—The ordinary rule that the conclusion of the trial court on questions of fact should not be overruled unless clearly wrong does not apply where the conclusion was reached by applying a wrong rule of law. (Wis.) Chase v. Woodruff, 972.

12. **APPEAL AND ERROR—Verdict of the Jury, When will not be Set Aside on Appeal.**—Though the judges of the appellate court, upon a consideration of the established facts, would have reached a conclusion different from that of the trial jury, yet their verdict will not be set aside if reasonable men, on consideration of the facts and circumstances, might arrive at different conclusions. (Utah) Brown v. Salt Lake City, 828.

13. **APPEAL—Disposition and Remanding of Cause.**—Where it appears from the record on appeal in a foreclosure case that the defendant has a prior mortgage which the plaintiff admits but claims has been paid, though there is no proof of payment, and the trial court has held the foreclosure by the defendant valid, which on appeal is held void, an issue is left undisposed of, and if the answer of the defendant is such that the appellate court cannot give him the relief to which he is entitled, it will not render a final decree but will remand the cause with leave to amend the answer. (Or.) Knapp v. Wallace, 742.

ARTESIAN WELLS.

See Waters and Watercourses.

ASSAULT AND BATTERY.

1. **ASSAULT AND BATTERY Justifiable Against an Employer, When Justifiable Against His Employé.**—A person in taking possession of his own real property is justified in using the same force against an employé of a trespasser thereon as he would be justified in using against the employing trespasser. (Cal.) Walker v. Chanslor, 61.

2. **TITLE, Burden of in an Action for Assault and Battery.**—In an action to recover for personal injuries inflicted by the defendants, evidence on their behalf is admissible to show the title to the property where the injury was inflicted, and that the defendants had such title and right to the possession, and in what they did employed no more force than was necessary to expel an intruder, and the effect of the evidence is not to be restricted to the question of exemplary damages. (Cal.) Walker v. Chanslor, 61.

3. **JURY TRIAL—Question for the Jury.**—Malice in fact is always a question for the jury. (Cal.) Walker v. Chanslor, 61.

ASSIGNMENT.

1. **ASSIGNMENT OF CONTRACT Providing for a Personal Obligation.**—Notwithstanding a contract contains general provisions recognizing its assignability, they are not controlling on that subject, if, from its entire terms and tenor, the contract calls for the performance of a demand purely personal in its nature, and it cannot be assigned without the consent of the party benefited. (Cal.) Montgomery v. De Picot, 84.

2. **ASSIGNMENT OF CONTRACT to Sell Real Property Where Payment is to be Secured by Mortgage Thereon.**—If a contract for the sale of real property provides for certain cash payments and the payment of the residue in the promissory notes of the vendee, secured by a mortgage on the same property, such contract is assignable, and

specific performance may be enforced at the suit of the assignee of the vendee on his tender of notes secured by a mortgage on such property. (Cal.) *Montgomery v. De Picot*, 84.

See Landlord and Tenant, 1; Mortgage, 2-4; Trademark.

ATTACHMENT.

In General.

1. **ATTACHMENT, Alteration of Affidavit for—When Immaterial.** When a complaint alleges that the amount claimed does not exceed \$2,000, and an affidavit in the action for an attachment states that the claim was for a sum "not exceeding 200 dollars," though the affidavit shows on its face that the claim is for \$414.18, an alteration so that the affidavit reads "20 hundred" instead of "200 dollars" is not sufficient ground for striking the affidavit and bond from the files, there being no proof that the alteration occurred after the affidavit was sworn to, and the alteration being of an unnecessary, immaterial statement. (Colo.) *Hill v. Fruita Mercantile Co.*, 172.

2. **ATTACHMENT—Vessels on Great Lakes.**—The Wisconsin statute giving a lien upon vessels for certain demands against the owners, and providing for the enforcement or foreclosure thereof by a special form of attachment, does not provide an exclusive remedy, nor preclude the seizure of such property under the general attachment laws. (Wis.) *Phillips v. Eggert*, 963.

3. **ATTACHMENT.—Vessels on Great Lakes are Subject to attachment under the laws of Wisconsin.** Such a seizure is not an invasion of the exclusive jurisdiction of the United States admiralty courts, because the vessel itself is not proceeded against; it is simply the reaching of property rights in the vessel by attachment in a personal action against the owner, which is a common-law remedy preserved by the admiralty law itself. (Wis.) *Phillips v. Eggert*, 963.

Action on Sheriff's Bond.

4. **ATTACHMENT—Action on Sheriff's Bond—Recitals in Return as Evidence.**—In an action against a sheriff and his sureties for permitting an attached vessel to be taken from his custody, his return upon the writ of attachment positively stating that the vessel was the property of the defendants named in the writ is an admission of a fact against his interest, made in the course of his official business, and is prima facie evidence of such fact, both against him and his sureties. (Wis.) *Phillips v. Eggert*, 963.

5. **ATTACHMENT—Action on Sheriff's Bond.**—In an action against a sheriff and his sureties for permitting an attached vessel to be taken from his custody, recitals in the judgment in the main action that personal service of the summons had been made on the defendants are prima facie evidence of that fact. (Wis.) *Phillips v. Eggert*, 963.

ATTORNEY AND CLIENT.

1. **ATTORNEY AND CLIENT—Authority to Appear—Presumption.**—An attorney who is regularly admitted and licensed to practice law is presumed to have authority to appear for the party whom he professes to represent. (Ala.) *Doe v. Abbott*, 30.

2. **ATTORNEY AND CLIENT—Authority to Appear—Presumption—Burden of Proof.**—The appearance in a suit by an attorney of the proper court is presumed to be authorized, and the burden of proof is upon the party denying the authority to show the want thereof. (Ala.) *Doe v. Abbott*, 30.

3. **ATTORNEY AND CLIENT—Authority to Appear—When must be Challenged.**—The right to require an attorney to establish his

authority to appear for the party whom he assumes to represent must be exercised at the first term after service and before pleading, and cannot be exercised after the trial has been entered upon by the selection of a jury. (Ala.) *Doe v. Abbott*, 30.

4. ATTORNEY AND CLIENT—Authority of Attorney to Appear. Mere Denial of the authority of an attorney to appear for the party whom he assumes to represent is insufficient to challenge his authority and require him to produce it. (Ala.) *Doe v. Abbott*, 30.

5. ATTORNEY AND CLIENT—Authority of Attorney to Appear—Challenge of Waiver.—The right to challenge the authority of an attorney to appear for the person whom he assumes to represent may be waived. (Ala.) *Doe v. Abbott*, 30.

See Witnesses, 1-4.

Note.

Attorney at Law, adverse party need not question right of to appear, 33.

authority of to appear, adverse party, whether may require proof of, 35.

authority of to appear, affidavit questioning, when sufficient, 45.

authority of to appear, burden of proof respecting, 41-43.

authority of to appear cannot be questioned on appeal, 45, 46.

authority of to appear, collateral attack upon, 43.

authority of to appear, court, when authorized to require proof of, 34, 35.

authority of to appear, denial, when must be under oath, 44.

authority of to appear, burden of, proof respecting, 41-43.

authority of to appear, evidence sufficient to overcome, 40.

authority of to appear, evidence of, what sufficient, 36, 37.

authority of to appear, how may be questioned, 43.

authority of to appear may be questioned, 34.

authority of to appear, motion questioning, affidavit for, 45.

authority of to appear, prima facie evidence of, 39-41.

authority of to appear, questioning by motion, 43, 44.

authority of to appear, questioning collaterally, 43.

authority of to appear, stranger to the record cannot question, 35.

authority of to appear, waiver of right to question, 36.

authority of to appear, when a question for the jury, 38, 39.

authority of to appear, when does not exist, 41.

authority of to appear, when will not be questioned, 34.

negligence of, limitations of actions for, 900.

presumption of authority of, 33, 37, 39, 40.

waiver of right to question authority of, what amounts to, 36.

BANKRUPTCY.

BANKRUPTCY—Creditors' Suits—Defenses—Jurisdiction.—A fraudulent grantee cannot plead the subsequent discharge in bankruptcy of his grantor as a defense in a creditor's suit brought more than four months prior to the institution of the bankruptcy proceedings, if the property involved has never been brought within the jurisdiction of the bankruptcy court. (Neb.) *Flint v. Chaloupka*, 639.

BANKS AND BANKING.

Deposits.

1. DEPOSIT IN BANK, Trust, When not Established by.—A deposit in a savings bank in the name of a depositor "in trust for F.," but without delivering the passbook to him, does not establish a trust in his favor, where there is no further evidence of a completed or executed intention to establish a trust, nor any communication

of such intention to him or to anyone acting for him or for his benefit. (Mass.) *Supple v. Suffolk Savings Bank*, 451.

2. DEPOSIT IN TRUST, Proof of by Admissions.—If a deposit is made in a savings bank in the name of a depositor "in trust for F.," admissions by the depositor that there had been a completed trust or an executed gift are admissible against her or her representatives, and may support a finding against her executors and in favor of F. or of the bank claiming that a gift had been made to or a trust created in his favor. (Mass.) *Supple v. Suffolk Savings Bank*, 451.

Collections on Forged Bills of Lading.

3. BANKS AND BANKING—Collections on Forged Bills of Lading.—If a bank, without notice or knowledge of any wrongdoing, receives a draft from the drawer for collection and collects it from the drawee, and in good faith pays the proceeds to the person engaged by it, it is not liable to the payor in case the latter makes payment without consideration in reliance upon a forged bill of lading which the drawee attaches to and causes to be forwarded with the draft. (Neb.) *Nebraska Hay etc. Co. v. First Nat. Bank*, 602.

Payment of Checks.

4. BANKING.—The Burden of Proving Payment by a Valid Check or other voucher is on the bank, as between it and its depositor. (Mich.) *Harmon v. Old Detroit Nat. Bank*, 467.

5. BANKING—Duty of Inquiry Respecting Payee of Paper Coming Through Another Bank.—The fact that a check or draft on a bank is presented to it through another bank does not exonerate the former from inquiry respecting the identity of the payee named in such check, and it is liable if payment is not made to such payee. (Mich.) *Harmon v. Old Detroit Nat. Bank*, 467.

6. BANKING—Check Payable to Fictitious Person, When not Payable to Bearer.—If a check is drawn in favor of one whom the drawer supposes to be a real person, but, as a matter of fact, no such person exists, the case does not fall within the statute relating to checks drawn in favor of fictitious persons. This statute applies only when the payee is known to be fictitious. (Mich.) *Harmon v. Old Detroit Nat. Bank*, 467.

7. BANKING—Payment of a Check Changed so as to be a Forged Instrument.—If a check or warrant for the payment of money is so changed after its issuance as to make it a forged instrument, the bank is not justified in paying it. (Mich.) *Harmon v. Old Detroit Nat. Bank*, 467.

8. BANKING.—The Duty of the Drawee to Use Diligence in Identifying the Payee of a check or warrant is not changed by the time or place of the forgery. (Mich.) *Harmon v. Old Detroit Nat. Bank*, 467.

9. BANKING—Liability for Paying Check Where the Name of the Payee is Forged.—If a railway corporation intends to issue its warrant or check in favor of A, but, through the fraud of one of its employés, the paper is issued in favor of B, probably a fictitious person, and, being paid by a bank in a distant city, is by it forwarded to the bank on which it is drawn, which makes payment without taking steps to ascertain the identity of the payee, it is answerable to the railroad company for the payment so made. (Mich.) *Harmon v. Old Detroit Nat. Bank*, 467.

BASTARDS.

1. LEGITIMACY OF CHILD.—The Presumption in Favor of the legitimacy of a child born in wedlock obtains, even though the birth

occurs so soon after marriage that it is certainly the result of coition prior thereto. (Iowa) *Wallace v. Wallace*, 253.

2. **LEGITIMACY OF CHILD.**—The Testimony of the Wife, in an action against her for divorce on the ground of her antenuptial pregnancy by a man other than the one she married, is not admissible to show access or nonaccess by the latter during the time of the conception. (Iowa) *Wallace v. Wallace*, 253.

BASTARDY PROCEEDING.

See Pardons.

BENEFIT ASSOCIATIONS.

1. **BENEFIT ASSOCIATION**—Mother, When not Entitled to be Regarded as a Beneficiary.—If a benefit certificate issues payable to the mother of a member, providing she is at the time of his death his lawful beneficiary under the charter, constitution and laws of the order of Knights of Columbus, and the member marries and afterward dies, leaving a wife and children, the mother, not being a member of his family, is not entitled to the payment of the sum designated in the certificate. (Mich.) *Knights of Columbus v. McInerney*, 541.

2. **BENEFIT ASSOCIATIONS**—Conflict of Laws.—If a state wherein a benefit association organizes interprets the charter or law governing the association, such interpretation should be accepted and followed by the courts of another state in which the same question is raised. (Mich.) *Knights of Columbus v. McInerney*, 541.

3. **BENEFIT ASSOCIATIONS**—Payment of Dues Under a Mistake of Fact.—That the sister of a member of a benefit association pays the assessments accruing against him in the belief that their mother was the beneficiary does not affect the right of his widow and heirs to the amount called for in the certificate in the event of the death of such member. (Mich.) *Knights of Columbus v. McInerney*, 541.

4. **BENEFIT ASSOCIATION, Power of to Change Beneficiary, When does not Exist.**—Though a benefit association has power, "for special reasons," to accept the designation of a beneficiary out of the order, yet if the member dies and his widow and children are in law the persons entitled to the benefit, the association has no power to change their rights by any action taken in favor of another. (Mich.) *Knights of Columbus v. McInerney*, 541.

5. **BENEFIT ASSOCIATIONS**—Release by a Widow, She Being the True Beneficiary.—The fact that the widow of a deceased member of a benefit association, without consideration, executed a release of all claim to the fund under the belief that the mother of the deceased was the legal beneficiary, does not entitle such mother to the sum specified in the certificate, nor prevent such widow from asserting a claim to the amount of the certificate, when she is the person who, under the laws of the order, is entitled to the fund. (Mich.) *Knights of Columbus v. McInerney*, 541.

BIGAMY.

1. **BIGAMY**—Belief that Prior Marriage has been Dissolved.—Proof that the second marriage was entered into in good faith, under an honest but mistaken belief that the first marriage has been dissolved by divorce, constitutes no defense to a charge of bigamy. (Ill.) *People v. Spoor*, 197.

2. **BIGAMY**—Proof of Dissolution of Prior Marriage.—One accused of bigamy who relies upon the dissolution of his former marriage

by divorce must not only prove the divorce, but also that it was granted by lawful authority. (Ill.) *People v. Spoor*, 197.

Note.

Bigamy, absence of former spouse as a defense, 208, 209.

after separation of the parties to the first marriage by mutual consent, 218.

American statutory provisions respecting, 204.

belief that first marriage was void or had been annulled, 205-208.

cohabitation after second marriage not essential to crime of, 214.

committed in one state when punishable in another, 205.

constitutes one continuous crime, and hence will not support two convictions, 220.

crime of, when becomes complete, 214.

death of first spouse, belief in as a defense, 217, 218.

definitions of, 201, 202.

divorce, belief in, whether constitutes a defense, 206, 207.

divorce in another state as a defense, 210, 211.

divorce, invalid, as a defense, 209-214.

divorce, marriage contracted within prohibited time after, 212, 213.

divorce prohibiting marriage, remarriage after, 213.

elements of the offense of, 202.

former marriage must have been valid in law, 202.

intent as an element of the offense of, 205.

marriage, what sufficient to sustain conviction for, 203.

marriage without a license, whether supports a conviction after, 219.

mistake of fact as a defense, 206, 207.

prior marriage is essential to crime of, 202.

religious belief is no defense, 205, 206.

sexual intercourse after marriage not essential to crime of, 215, 219.

statutes relating to crime of, 201.

under the Edmunds anti-polygamy law, 219.

voidable first marriage will sustain an indictment for, 216.

voidable second marriage will sustain an indictment for, 216.

was not a common-law offense, 201.

when the former marriage was voidable, 202.

BILLS AND NOTES.

Parol to Vary Interest.

1. **BILLS AND NOTES**—*Parol to Vary Rate of Interest.*—In an action to recover on a promissory note, parol evidence is not admissible to show that the rate of interest expressed in the instrument is not the one actually agreed upon. (Iowa) *Cochran v. Zachery*, 307.

Transfer and Indorsement.

2. **NEGOTIABLE INSTRUMENTS.**—*A Guaranty of the Previous Indorsement of a Note* amounts only to a guaranty of the genuineness of the signatures of the indorsers, and does not create a liability on the note. (Ark.) *Johnston v. Schnabaum*, 1082.

3. **NEGOTIABLE INSTRUMENTS**—*Indorsement*—*Parol Evidence to Vary Effect of.*—An indorsement, though unrestricted in form, may by parol evidence be shown to have been for collection only, and one taking the note with notice of this purpose in the indorsement acquires no rights which such indorser for collection did not acquire. (Ark.) *Johnston v. Schnabaum*, 1082.

4. NEGOTIABLE INSTRUMENTS—Notice of Purpose of Indorsement.—An indorsement on a note "pay to the order of any bank or banker," indicates that the indorsement is for collection only. (Ark.) *Johnston v. Schnabaum*, 1082.

5. NEGOTIABLE INSTRUMENTS—Purchase of—What Amounts to.—The payment of a note by a stranger and its delivery to him will be held to be a purchase of it in the absence of evidence to the contrary. (Ark.) *Johnston v. Schnabaum*, 1082.

6. BILLS AND NOTES—Indorsement to Cashier.—Parol Evidence is not admissible to show that the indorsement of a note to a person who is the cashier of a bank, but is not so designated, was such a transfer as vests legal title in the bank and precludes defenses good against the payees. (Or.) *First Nat. Bank v. McCullough*, 758.

Transfer without Indorsement.

7. BILLS AND NOTES—Transfer Without Indorsement—Defense. The transfer of a note without indorsement does not cut off the equities of antecedent parties. Hence, when a note is indorsed to the cashier of a bank and he delivers it to the bank without indorsement, the bank holds the paper subject to all the equities existing in favor of the maker. (Or.) *First Nat. Bank v. McCullough*, 758.

8. BILLS AND NOTES—Transfer Without Indorsement—Parties. The transfer without indorsement of a promissory note, payable to order, carries under the law-merchant only an equitable right which can be enforced in the name of the payee only; but under a statute providing that every action shall be prosecuted in the name of the real party in interest, a bank may maintain an action in its own name on a note transferred to it without indorsement. (Or.) *First Nat. Bank v. McCullough*, 758.

Indorsers of Non-negotiable Paper.

9. BILLS AND NOTES—Indorsers of Non-negotiable Paper—Liability.—The indorser of a non-negotiable note is liable to the indorsee to the same extent as the indorser of a negotiable instrument. (Ala.) *Bank of Luverne v. Sharp*, 58.

10. BILLS AND NOTES—Liability of Indorser of Non-negotiable Paper.—Under the Alabama statute an indorsee of a non-negotiable note, to charge an indorser, is bound to exercise the diligence required to first recover of the maker, unless there is a waiver by the indorser or proof of an excuse for not showing such diligence. (Ala.) *Bank of Luverne v. Sharp*, 58.

11. BILLS AND NOTES—Liability of Indorser of Non-negotiable Instrument.—The indorser of a non-negotiable note is liable to an indorsee who acquires the paper before maturity, though the maker cannot be held liable on account of a failure of consideration. (Ala.) *Bank of Luverne v. Sharp*, 58.

BLIND MAN.

See Municipal Corporations, 14.

BRIDGES.

See Navigable Waters, 9-19.

BUILDING REGULATIONS.

See Municipal Corporations, 3.

BULK SALES STATUTE.

See Sales, 1.

CANAL COMPANY.

CANAL COMPANY—Ultra Vires Contract.—A contract by a canal company to construct a basin along the canal on land purchased by it as a part of the consideration is not ultra vires. (Md.) *Dawson v. Western Maryland R. R. Co.*, 337.

CARRIER.*Transportation of Goods.*

1. **CARRIERS, Liability of as Such, When has not Terminated.**—If goods shipped over a railway reach their destination, but the consignee, on applying for them, is informed that the waybills are not made out and will not be made out on that day, this is equivalent to notifying him that the goods cannot then be delivered, and the railway company remains liable as a carrier for the subsequent loss of the property by fire without negligence. (Wash.) *Fisher v. Northern Pac. Ry. Co.*, 867.

Statutory Regulation of Sleeping-cars.

2. **CONSTITUTIONAL LAW**—Sleeping-car Regulations.—A law giving to the occupant of a lower berth in a sleeping-car absolute control, at his option, of the upper berth if it is not occupied is not a legitimate exercise of the police power, and is unconstitutional as an arbitrary appropriation of the property of one for the benefit of another. (Wis.) *State v. Redmon*, 1003.

Discrimination Against Hackmen.

3. **RAILROADS**—Discrimination Against Hackmen.—A railroad or depot company owning a passenger station for the accommodation of railway travelers may lawfully exclude hackmen or carriers of baggage from entering thereon to ply their vocation, while it gives to others permission so to do. (Colo.) *Union Depot and Ry. Co. v. Meeking*, 145.

Protection of Passengers.

4. **CARRIERS**—Protections of Passengers.—A carrier owes to its passenger the duty of protecting him from the violence and insults of other passengers, so far as this can be done by the exercise of a high degree of care, and will be held responsible for its own or its servants' negligence in this particular, when, by the exercise of proper care, the act of violence might have been foreseen and prevented. (Ala.) *Montgomery Traction Co. v. Whatley*, 17.

5. **CARRIERS**—Protection of Passengers.—Negligence of Conductor.—The conductor of a street-car in permitting a drunken passenger to attempt to walk up and down the aisle of the car while it is in motion, instead of requiring him to be seated, or, in the event of his refusal, ejecting him from the car, is negligent in the discharge of the duty which he owes to the other passengers, and the company is liable. (Ala.) *Montgomery Traction Co. v. Whatley*, 17.

6. **CARRIERS**—Drunken Passengers.—Negligence of Conductor.—Question of Fact.—That a conductor on a street-car has knowledge of the drunken condition of a disorderly passenger, and of his inability to stand, makes it a question for the determination of the jury whether such conductor, in the exercise of that degree of care exacted of him and of his company, ought to have foreseen that such passenger might do injury to some other passenger upon the car. (Ala.) *Montgomery Traction Co. v. Whatley*, 17.

7. **CARRIERS**—Protection of Passengers—Liability for Negligence of Conductor.—If an injury to a passenger on a street-car could have been avoided by requiring a drunken passenger to be and

remain seated, the carrier cannot avoid liability to a passenger injured by the failure of the conductor on the car to do his duty in that respect, and it is not necessary that the conduct of the passenger be such that the conductor should have ejected him from the car before the injury occurred. (Ala.) *Montgomery Traction Co. v. Whatley*, 17.

8. CARRIERS—Injury Through Negligence of Fellow-passenger.—Where a passenger in a street railway carried a hoe so that its handle caught under the hood of the forward car as it rocked up and down, and broke, throwing a piece back into the car and striking another passenger, the question whether the failure of the conductor to require the passenger to carry his hoe in some other position was negligence is for the jury. (Colo.) *Farrier v. Colorado Springs etc. Ry. Co.*, 158.

9. CARRIERS—Protection from Fellow-passenger.—A common carrier is under the same strict obligation to protect a passenger from the negligence or willful conduct of fellow-passengers that it is to carry him safely. (Colo.) *Farrier v. Colorado Springs etc. Ry. Co.*, 158.

10. CARRIERS—Injury Caused by Negligence of Fellow-passenger. Where a passenger on a street railway carried a hoe so that its handle caught under the hood of the forward car as it rocked up and down, and broke, throwing a piece back into the car against another passenger, the test of the negligence of the carrier, in view of the condition of the roadbed, the position of the trucks, the rocking of the cars and all the surrounding conditions, is, ought the conductor, as a reasonable man, to have anticipated or foreseen, as a natural and probable result of the way in which the passenger held his hoe, that this or a similar accident would likely happen? (Colo.) *Farrier v. Colorado Springs etc. Ry. Co.*, 158.

CHATTEL MORTGAGES.

1. MORTGAGES—Bills of Sale Intended as Security, When must Comply with Statute Respecting.—Under a statute declaring that a mortgage of personal property is void as against creditors unless accompanied by an affidavit that it is made in good faith and without any design to hinder, delay or defraud creditors, and acknowledged and recorded in the manner required by law for a conveyance of real property, a bill of sale given as security must be acknowledged and accompanied by the affidavits required by the statute. (Wash.) *Hicks v. National Surety Co.*, 883.

2. A CHATTEL MORTGAGE or a Bill of Sale is Valid as Between the Parties, though not acknowledged nor accompanied by an affidavit of good faith as required by the statute. (Wash.) *Hicks v. National Surety Co.*, 883.

3. ENCUMBRANCER IN GOOD FAITH, Who is not.—One who Takes an Encumbrance as Security for a Pre-existing Debt cannot be deemed an encumbrancer for value and in good faith. (Wash.) *Hicks v. National Surety Co.*, 883.

4. MORTGAGE of Sheep Held Under a Lease.—One holding sheep under a lease requiring their return, with ten per cent of the increase and a specified amount of wool, cannot give a binding mortgage on such sheep without the consent of the lessor. (Utah) *Manti City Savings Bank v. Peterson*, 817.

5. MORTGAGE of Leased Sheep, When does not Give the Mortgagee a Right of Possession.—If sheep are leased, to be returned with ten per cent increase yearly and a specified amount of the wool for each sheep, and the lessee executes a mortgage thereof to a person hav-

ing no knowledge that the sheep did not belong to the mortgagor, the mortgagee does not acquire any right to the possession of the sheep, for the reason that the leasing is personal to the mortgagor, and the lessee cannot assign his right without the consent of the owners or lessors. (Utah) Manti City Savings Bank v. Peterson, 817.

6. MORTGAGE of Flock of Sheep of Which the Mortgagor is a Tenant in Common Only.—If a mortgage is made of a flock consisting partly of sheep of the mortgagor and partly of sheep leased by him of others, which he has mingled with his own so as to be no longer capable of identification and segregation, and because of this fact the lessee and the lessor must be deemed tenants in common, the interest of the mortgagor passes to his mortgagee. (Utah) Manti City Savings Bank v. Peterson, 817.

CHECKS.

See Banks and Banking, 4-9; Payment.

Note.

Children, adulterine, are regarded more unfavorably than children of an unmarried person, 261.

adulterine defined, 261.

legitimacy of, burden of proof respecting if born during wedlock, 264.

legitimacy of, doubt of not sufficient, 265.

legitimacy of, evidence of mother, admissibility of to disprove, 266.

legitimacy of, evidence to overcome presumption of, sufficiency of, 264-266, 270-273.

legitimacy of, husband or wife, testimony of to disprove, 266-270.

legitimacy of, nonaccess, evidence of to rebut presumption of, 266, 270.

legitimacy of, presumption of from birth during wedlock, rebuttability of, 263.

legitimacy of, presumption of, how disproved, 261.

legitimacy of, presumption of, is not weakened by antenuptial conception, 272, 273.

legitimacy of, presumption of, reasons for, 262.

legitimacy of, presumption of, what sufficient to overcome, 264.

legitimacy of, presumption of where a child is begotten before marriage, 272, 273.

legitimacy of, presumption of where the mother was married to another at the time of the conception, 273.

presumption of legitimacy of when born of a married woman, 261, 262.

CHURCH.

See Estates, 1; Mechanics' Liens.

COAL SCREENING.

See Constitutional Law, 24, 25.

COLOR OF TITLE.

See Adverse Possession, 4, 5.

COMMERCE.

INTERSTATE COMMERCE.—An Ordinance Limiting the Speed of Trains on an interstate railway which carries United States mail to ten miles an hour within the city limits is not invalid as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail. (Neb.) Peterson v. State, 651.

Note.**Community Property, animals, increase of, 113.**

- borrowed money and its proceeds, 107, 108.
- business, profits resulting from, 113, 114.
- charge against for property purchased with separate estate, 105.
- colonization laws, property acquired under, 118.
- constructive notice of to purchaser, 124, 125.
- conveyance of by husband to wife, 106.
- conveyance, recitals in of evidence respecting, 124.
- conveyance to husband and wife, 122.
- doctrine of and its source, 100.
- doctrine of, in what states prevails, 100.
- earnings of husband or wife, 114-116.
- earnings of wife after separation, 115.
- earnings of wife, agreements respecting, 115.
- equitable title existing before marriage and legal title acquired afterward, 101.
- evidence to overcome presumption in favor of, 122-124.
- gifts or donations from the government, 116.
- government, property acquired from, 116.
- homestead acquired under the laws of the United States, 117.
- interest on funds belonging to the separate estate, 113.
- intermingling of separate property with, 100, 107.
- life insurance policies, proceeds of, 119.
- lottery tickets, prizes drawn on, 113, 114.
- mining laws, property acquired under, 118.
- pension moneys, 111, 112.
- personal injuries, damages recovered for, 119, 120.
- presumption on a joint conveyance to husband and wife, 122.
- presumption respecting, evidence to overcome, 122, 123.
- presumption respecting on a conveyance to either spouse, 103, 120.
- presumption where a spouse has a separate estate, 121.
- presumptions for and against, 120.
- proceeds of sale or exchange of separate property, 113, 114.
- profits arising from investment of wife's separate funds in commercial business, 113.
- property acquired after marriage by exchange, 104.
- property acquired after marriage by the industry of either spouse, 102.
- property acquired after marriage partly out of community and partly out of separate funds, 104.
- property acquired after marriage, presumptions respecting, 103, 120.
- property acquired after marriage out of separate property or out of its proceeds, 105.
- property acquired before marriage, 101.
- property acquired by adverse possession, 111.
- property acquired by devise or descent, 110.
- property acquired by gift other than testamentary, 110.
- property acquired by mortgage of or on the credit of the separate estate, 107.
- property acquired by prescription, 102.
- property acquired on the credit of the separate estate, 108.
- property acquired partly with borrowed money and partly with separate estate, 109.
- property acquired under the colonization laws, 118.
- property acquired under the homestead laws of the United States, 117.
- property acquired under the government as timber lands, 118.
- property acquired under the mining laws, 118.

Community Property, property acquired with the rents, issues and profits of separate estate, 112, 113.
 property conveyed to wife at the direction of her husband, 106, 107.
 property purchased with separate estate of wife but conveyance taken in name of her husband, 106.
 property title to which was perfected after marriage, but which was held by adverse possession before, 102.
 purpose of doctrine of, 100.
 rents, issues and profits of separate estate, 112, 113.
 test for determining what is, 100.
 title initiated before marriage and completed after, 116, 117.
 title initiated during community and completed after, 117, 118.
 wife, interest of in, extent and nature of, 100.

COMPROMISE.

See Evidence, 2.

CONFUSION OF GOODS.

See Tenants in Common, 1.

CONSTITUTIONAL LAW.

Liberty of Speech and Press.

1. **LIBERTY OF SPEECH and of the Press.**—The constitutional liberty of speech and of the press grants the right to freely utter and publish whatever the citizen may desire, and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious or scandalous in character, so that they become an offense against the public, and by their malice and falsehood injuriously affect the character, reputation or pecuniary interests of individuals. (Mo.) Ex parte Harrison, 557.

2. **LIBERTY OF SPEECH and of the Press, Limitations upon the Power of the Legislature to Restrict.**—If a publication is neither blasphemous, obscene, seditious nor defamatory, no court has the right to restrain it, nor any legislature the power to provide for its punishment, if the constitution of the state declares that no law shall be passed impairing the freedom of speech, and that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty. (Mo.) Ex parte Harrison, 557.

3. **LIBERTY OF SPEECH and of the Press—Statute Making Criminal the Publication of the Reports of a Civil League.**—A statute prohibiting the publication of the reports of a civil league and making such publication criminal unless it states in full the facts on which the report is based, and gives the name and address of the person furnishing the information concerning candidates or nominees, and states in full the information furnished by such person, is in conflict with the provision of the state constitution declaring that no law shall be passed impairing the freedom of speech, and that every person shall be free to write, say or publish whatever he will on any subject, being responsible for all abuse of that liberty, and is therefore void. (Mo.) Ex parte Harrison, 557.

4. **CONSTITUTIONAL LAW—Impairing of a Right, What Amounts to.**—Anything which makes the exercise of a right more exclusive or less convenient, more difficult or less effective, impairs that right. (Mo.) Ex parte Harrison, 557.

Curative Statutes.

5. **CURATIVE STATUTE—Interference with Vested Rights.**—A curative statute which interferes with rights vested before its passage is unconstitutional. (Iowa) *Swartz v. Andrews*, 285.

6. **CURATIVE STATUTE—Correction of Irregularities in Conveyance.**—If a legalizing act simply makes effectual as against the parties a conveyance otherwise ineffectual on account of some irregularity or omission not involving substantial right, the parties affected are not in a situation to complain, nor can those who claim under them by virtue of transactions taking place after the passage of the act assert any rights which the parties themselves could not have asserted. (Iowa) *Swartz v. Andrews*, 285.

Class Legislation.

7. **CONSTITUTIONAL LAW—Class Legislation.**—The legislature has power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation. (Ill.) *Off & Co. v. Morehead*, 184.

8. **CONSTITUTIONAL LAW—Class Legislation.**—The classification of occupations as a basis for police regulation is a matter wholly within the discretion of the legislature, and whether there is room for the classification made in any given case is primarily a legislative question, and can never become a judicial one except for the purpose of examining, in any given situation, whether legislative action passed the boundaries of reason, reasonable doubts to be resolved in the negative. (Wis.) *Servonitz v. State*, 955.

Anti-trust Statute.

9. **CONSTITUTIONAL LAW—Criminal Proceeding—What is not.** A proceeding to recover the penalty given by the anti-trust act of 1905 is not a criminal proceeding within the meaning of section 8 of article 2 of the constitution, declaring that no person shall be held to answer a criminal charge unless on presentment or indictment of the grand jury. (Ark.) *Hammond Packing Co. v. State*, 1014.

10. **CONSTITUTION of the United States—When not Applicable to State Legislation.**—The first ten amendments to the constitution of the United States operate on the national government only, and cannot be invoked against state legislation. (Ark.) *Hammond Packing Co. v. State*, 1014.

11. **CONSTITUTIONAL LAW—Construction of the Supreme Court of the United States, When Controls the State Courts.**—If the provisions of the national and of the state constitution on any subject are identical, the state courts are controlled by the decisions of the national courts interpreting and applying such provisions. (Ark.) *Hammond Packing Co. v. State*, 1014.

12. **CONSTITUTIONAL LAW—Anti-trust Statute Respecting the Production of Testimony—Interpretation of.**—Sections 8 and 9 of the anti-trust statute, providing that the prosecuting attorneys may, in proceedings under the act, apply for an order to take the testimony of persons, and that the defendant's attorneys and officers may be notified to request the officers, agents or employés of the defendant to appear and testify, and authorizing the striking out of the defendant's answer for refusal to so appear, do not require more of the defendant than that it shall make an honest effort to produce the testimony called for. (Ark.) *Hammond Packing Co. v. State*, 1014.

13. **CONSTITUTIONAL LAW**—Statute Authorizing the Striking Out of an Answer, and the Taking of a Judgment as by Default.—The operation of the anti-trust act authorizing the striking out of the answer and the taking of judgment, on the refusal of the defendant to produce books and papers when ordered by the court to do so, relates to matters of procedure, and is not unconstitutional as denying due process of law. (Ark.) *Hammond Packing Co. v. State*, 1014.

Police Power.

14. **CONSTITUTIONAL LAW**—Exercise of Police Power.—A police regulation is no more legitimate and valid than a law in any other field, if it in fact violates any principle entrenched in the constitution. (Wis.) *State v. Redmon*, 1003.

15. **CONSTITUTIONAL LAW**—The Police Power is the power to make all laws which, in the contemplation of the constitution, promote the public welfare. (Wis.) *State v. Redmon*, 1003.

16. **CONSTITUTIONAL LAW**—Legitimate Exercise of Police Power.—It is a legislative function primarily to determine the manner of dealing with a subject involving the exercise of the police power, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitations, express or implied. (Wis.) *State v. Redmon*, 1003.

17. **CONSTITUTIONAL LAW**—Exercise of Police Power.—The police power extends to legislation reasonably regulating matters appertaining to the lives, limbs, health, comfort, good morals, peace and safety of society. (Wis.) *State v. Redmon*, 1003.

18. **CONSTITUTIONAL LAW**—Police Power.—A Law is not Necessarily One to Promote the Public Health, Welfare and Comfort of the people generally, or of a legitimate class thereof, merely because such is its declared purpose. (Wis.) *State v. Redmon*, 1003.

19. **CONSTITUTIONAL LAW**—Exercise of Police Power—Judicial Functions.—It is a judicial function to define the proper subjects for the exercise of the police power, and the court has the right to decide as to any enactment, whether it really relates to a subject legitimately within the exercise of the police power, or whether, under the guise of doing so, it violates rights of persons or property. (Wis.) *State v. Redmon*, 1003.

20. **CONSTITUTIONAL LAW**—Exercise of Police Power.—It is not every enactment which will to some extent promote the public health, comfort, or convenience, that is a legitimate exercise of the police power. (Wis.) *State v. Redmon*, 1003.

21. **CONSTITUTIONAL LAW**—Exercise of Police Power.—Exigency Required.—To constitute a legitimate exercise of the police power, the exigency to be met must so concern the public welfare and be sufficiently vital thereto as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment. (Wis.) *State v. Redmon*, 1003.

22. **CONSTITUTIONAL LAW**—Police Power.—Legislative Interference with Property or Other Private Rights for the ostensible purpose of promoting public health and comfort, or both, to be valid must be adapted to that end, and not merely to make effective mere individual dictation. (Wis.) *State v. Redmon*, 1003.

23. **POLICE POWER**—All Police Regulations must bear the judicial test of reasonableness under all of the circumstances. (Wis.) *State v. Redmon*, 1003.

Regulation of Coal Screening.

24. CONSTITUTIONAL LAW—Meaning of Statute Restricting the Right to Screen Coal Before Weighing.—A statute making it unlawful for any mine owner, when more than ten men are employed to mine coal by the bushel or ton, to pass the output of coal over any screen or other device that shall take any part from the value thereof before weighing and crediting the employes, and depriving the latter of all right to waive the benefits of the statute, is within the scope of the police power and not unconstitutional, where the statute gives the owner the right to accept or reject the coal at the surface. (Ark.) *McLean v. State*, 1037.

25. CONSTITUTIONAL LAW—Classification by the Number of Employes, When not Forbidden.—For the purpose of protecting miners from fraud or imposition, a broad latitude is given the legislature in the matter of the classification of mines and miners, and it may therefore enact a statute applicable only in mines where more than ten men are employed. (Ark.) *McLean v. State*, 1037.

See Carriers, 1; Commerce; Corporations, 2-5; Sales, 1; Searches and Seizures.

CONTRACTS.

1. CONTRACT—Recovery for Gratuitous Services.—Where one renders services under an express assurance that he will make no charge, he cannot recover therefor on the ground that he would have made a charge had he not believed that another agreement between the parties would have been carried out. (Iowa) *Cochran v. Zachery*, 307.

2. CONTRACTS FOR LABOR—Implied—Right to Recover.—If a municipal ordinance provides that a fireman shall be assigned to attend all performances given at any theater, he to be paid by the manager of such theater, the fireman so assigned and attending is entitled to bring an action in his own name against such manager to recover the reasonable value of the services rendered. (Ala.) *Tannebaum v. Rehm*, 52.

3. CONTRACT, When Indivisible, and Void in Whole Because Void in Part.—A contract by a corporation to purchase certain real property and also certain shares of its capital stock for a sum specified, without stating what part is for the stock and what for the property, and void as to the stock because of the incapacity of the corporation to deal in or to acquire shares of its own stock, is indivisible, and therefore void as a whole, and no action can be sustained thereon. (Wash.) *Brechlin v. Night Hawk Min. Co.*, 863.

4. JURY TRIAL—Effect of Contract, When Should not be Left to the Jury.—Where the testimony tends to show that several parties leased sheep to a person now deceased, to be returned with a specified percentage of the increase, and of the wool, the court should not submit to the jury the question of determining whether the contract constituted a sale or a bailment. (Utah) *Manti City Savings Bank v. Peterson*, 817.

5. CONTRACT, Meaning of, When a Question for the Court.—If the terms of a contract, whether oral or written, are established by proper evidence, it is for the court to declare the effect of such contract, and not to submit that question to the jury. (Utah) *Manti City Savings Bank v. Peterson*, 817.

CONVERSION.

See Trover and Conversion.

CORPORATIONS.*Creation of Corporation.*

1. **CORPORATIONS.**—The Laws of a Sister State in reference to the creation of a corporation are presumed the same as those of this state. (Neb.) *Bannard v. Duncan*, 661.

Repeal of Charter.

2. **CONSTITUTIONAL LAW**—Right to Repeal the Charter of a Corporation or the Law Under Which It was Organized.—If a corporation is organized under a statute incorporating it for the purpose of supplying water to a municipality, with no limits upon the life of the corporation, except that implied from the declaration that the legislature may at any time amend or repeal the act, a statute repealing such act reserving the right to the corporation to present a claim against such municipality for the value of its tangible property, such repealing statute is not unconstitutional on the ground that it impairs the obligation of a contract, deprives the corporation of its property without due process of law, or takes private property for a public use without compensation. (Mich.) *People v. Calder*, 550.

3. **CONSTITUTIONAL LAW**—Repealing Statute, Effect of upon Rights of Bondholders of a Corporation.—The fact that a repealing statute destroys the right of a corporation to continue in existence under the statute repealed does not make such repealing statute unconstitutional even as against bondholders of the corporation. The execution of the mortgage and the issuing of bonds secured by the property of the corporation do not affect the right of the legislature to repeal the statute. (Mich.) *People v. Calder*, 550.

4. **ESTOPPEL** Against Enforcement of a Repealing Statute.—If a statute organizing a corporation is repealed, no estoppel against the right to enforce the repealing statute exists on the ground of certain wrongful conduct of officials of a municipality, where the repeal was for the benefit of the entire inhabitants of a great city who were guilty of no wrong. (Mich.) *People v. Calder*, 550.

5. **CONSTITUTIONAL LAW**—Statute Giving a Corporation the Right to Present a Claim for the Value of Its Tangible Property.—Where the charter of a corporation is repealed, with a provision that it may present against a municipality a claim for its tangible property, such provision will not be held unconstitutional on the ground that it permits property to be taken for a public use without determining the necessity for such taking, or that the compensation provided is inadequate. The provision is not compulsory, and has no force unless the corporation chooses to accept it. (Mich.) *People v. Calder*, 550.

Stock and Stockholders.

6. **CORPORATION.**—The Husband of a Stockholder is not presumed to have authority to represent his wife in her absence. (Colo.) *Steel v. Gold Fissure Gold Min. Co.*, 177.

7. **CORPORATE STOCK**—Rescission of Contract to Buy.—A purchaser of corporate stock may rescind his contract and recover the purchase money paid if the seller refuses to deliver the certificate, irrespective of whether title passed without such delivery. (Ill.) *Kinsler v. Cowie*, 221.

Transfers of Stock.

8. **CORPORATIONS**—Stock Transfers—By-laws.—The regulation of stock transfers may be accomplished in the form of by-laws to enable the corporation to know who are stockholders, to whom dividends are to be paid, who are entitled to vote, and, where the company has a lien on the stock for debts due to it from the stockholders,

to enable it to prevent a transfer in derogation of its own rights, but such by-laws will not be enforced beyond what is necessary to serve those purposes, where their enforcement would operate as an infringement on the property rights of others, or an unreasonable restraint upon the disposition of property in the stock of the corporation. (Neb.) *Miller v. Farmers' Milling etc. Co.*, 606.

9. CORPORATIONS—Transfers of Stock—By-laws.—The right of transfer is incidental to the ownership of shares of stock of joint stock companies and corporations, formed in pursuance of legislative authority, and a by-law which unreasonably interferes with the free exercise of this right is void as being in restraint of trade. (Neb.) *Miller v. Farmers' Milling etc. Co.*, 606.

10. CORPORATIONS—Transfer of Stock—By-laws.—A by-law of a corporation organized under the laws of the state which limits the number of shares of its stock a person may hold at one time, or prevents a transfer by a stockholder to a nonstockholder without the consent of the directors of the corporation, is void, as an unreasonable restriction upon the transfer of property or stock. (Neb.) *Miller v. Farmers' Milling etc. Co.*, 606.

11. CORPORATIONS—Transfers of Stock—Interpretation of Statute.—A statute purporting to give a corporation the power "to render the interest of the stockholders transferable" is not intended to make the transferability of stock dependent on some affirmative act of the corporation, but to impress the stock with that quality as a consequence of the act of incorporation. (Neb.) *Miller v. Farmers' Milling etc. Co.*, 606.

Directors and Other Officers.

12. CORPORATION—Officer Voting Himself Salary.—A director of a corporation who has been elected president is disqualified from voting upon a resolution fixing his salary. (Colo.) *Steele v. Gold Fissure Gold Min. Co.*, 177.

13. CORPORATION—Quorum of Disinterested Directors.—It is essential that a majority of the quorum of a board of directors be disinterested with respect to the matter voted upon in order to render the vote valid and binding upon the corporation. (Colo.) *Steele v. Gold Fissure Gold Min. Co.*, 177.

14. CORPORATION—Officers Voting Themselves Salaries.—Directors who have been elected president and secretary of a corporation cannot be counted in making a quorum to pass a single resolution which fixes their salaries. (Colo.) *Steele v. Gold Fissure Gold Min. Co.*, 177.

15. CORPORATION—Right of Director to Compensation.—The directors of a corporation are not entitled to compensation for discharging their ordinary duties unless it is legally provided for. (Colo.) *Steele v. Gold Fissure Gold Min. Co.*, 177.

16. CORPORATION—Right of President to Compensation.—The president of a corporation is not entitled to compensation for discharging the ordinary duties of his office, in the absence of an antecedent valid agreement by the corporation to pay him. (Colo.) *Steele v. Gold Fissure Gold Min. Co.*, 177.

Foreign Companies—Process and Actions.

17. FOREIGN CORPORATIONS Doing Business Within the State under laws permitting them to do so are subject to the same control as domestic corporations. (Ark.) *Hammond Packing Co. v. State*, 1014.

18. CONSTITUTIONAL LAW.—A Corporation, Though Formed Under the Laws of Another State, is a person within the meaning of

the fourteenth amendment to the constitution of the United States, providing that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws. (Cal.) *American De Forest Wireless Tel. Co. v. Superior Court*, 125.

19. CORPORATIONS, Foreign, Right to Defend Actions.—The general comity existing between the states permits a foreign corporation which has entered a state and done business therein to maintain and defend actions arising out of such business, in the absence of any statute to the contrary. (Cal.) *American De Forest Wireless Tel. Co. v. Superior Court*, 125.

20. CORPORATIONS, Foreign, When not Denied the Right to Maintain Actions.—A statute requiring foreign corporations to file in the office of the Secretary of State and in that of the county clerk or county recorder where its principal place of business is conducted and where it owns property a certified copy of its articles of incorporation, and declaring that no corporation failing to do so can maintain any suit or action in the courts of the state, does not prohibit it from defending actions brought against it. (Cal.) *American De Forest Wireless Tel. Co. v. Superior Court*, 125.

21. FOREIGN CORPORATION.—Before Service of Process on the President of a foreign corporation will confer jurisdiction, it must be made to appear that the corporation is doing business in this state, or is otherwise within its jurisdiction. If the company is doing business in this state, or has an office therein in connection with its business, then the presence of an officer in connection therewith is the presence of the corporation. (Or.) *Knapp v. Wallace*, 742.

22. FOREIGN CORPORATION—Presumption of Service of Process.—So long as a foreign corporation confines its operations to the state within which it was created, no presumption can arise that service of process on its president within this state is service on the corporation. (Or.) *Knapp v. Wallace*, 742.

23. FOREIGN CORPORATION—Recital in Judgment of Service of Process.—A decree against a foreign corporation is open to collateral attack, where the record discloses that there was no service upon it, notwithstanding the decree recites: "And now having fully examined the return made in the cause, wherefore it is thereby and otherwise made to appear to the satisfaction of the court that the defendant, Althouse Mining Co., has been duly served with summons with the State of Oregon, default is entered." (Or.) *Knapp v. Wallace*, 742.

24. FOREIGN CORPORATION—Affidavit for Publication of Summons.—An affidavit for publication which shows that the defendant is a foreign corporation with its principal place of business in another state; that theretofore it has been engaged in mining in this state, but has ceased such operations; and that it has no officer or agent in this state on whom service can be made, but that its officers reside and are now in another state, is sufficient to show that service cannot be made in this state as prescribed by the statute. (Or.) *Knapp v. Wallace*, 742.

See Pledge.

COSTS.

1. COSTS OF SUIT—When not Avoided by Stipulation as to the Facts.—Though before the trial commences a stipulation is made as to the facts, this does not impair the right of a party to recover for costs incurred by him in obtaining certified copies of deeds and other records to be used in evidence, and the use of which is subsequently

rendered unnecessary by such stipulation (Wash.) *Hamilton v. Witner*, 921.

2. **APPEAL AND ERROR—Costs—Judgment for, When Reviewable on Appeal.**—The appellate court may review a judgment for costs, although the amount of costs involved is less than the sum fixed for the jurisdiction of the court, where the provision limiting or fixing such jurisdiction purports to apply to actions for the recovery of money or personal property. (Wash.) *Hamilton v. Witner*, 921.

COTENANCY.

See Tenants in Common.

COURTS.

JURISDICTION—Absence of Party from Trial.—If complete jurisdiction of both the subject matter and the parties has been acquired, the absence of one of the parties from the trial cannot deprive the court of jurisdiction to proceed, although it may affect the nature of the judgment which should be properly rendered, but if the court renders a wrong judgment, such action is erroneous merely and not void. (Wis.) *Comstock v. Boyle*, 1033.

COVENANTS.

1. **COVENANTS—Whether Bind Grantee.**—Covenants in a deed which is neither signed nor sealed by the grantee do not, by reason of his accepting it, bind him as a covenantor. (Md.) *Dawson v. Western Maryland R. R. Co.*, 337.

2. **COVENANTS—Whether Run with Land.**—When a deed to a canal company provides as part of the consideration and as a condition that the grantee, who neither signs nor seals the deed, shall construct a basin on the land, this stipulation is not a covenant running with the land. (Md.) *Dawson v. Western Maryland R. R. Co.*, 337.

3. **COVENANTS—Enforcement in Equity Against Assigns of Covenantee.**—When a deed to a canal company provides as part of the consideration and as a condition that the grantee shall construct a basin on the land, this provision may be enforced in equity by the grantor against the grantee's assigns with notice, notwithstanding it does not constitute a covenant running with the land. (Md.) *Dawson v. Western Maryland R. R. Co.*, 337.

4. **COVENANTS—Enforcement Against Assigns of Grantor.**—The assigns of one who grants land to a canal company in consideration and on the condition that the grantee shall erect a basin connected with the canal on the land can compel the assigns of the grantee to restore the basin after it has been filled in. (Md.) *Dawson v. Western Maryland R. R. Co.*, 337.

5. **COVENANT AGAINST ENCUMBRANCES—When Breach Occurs.**—There is a technical breach of a covenant against encumbrances, in case of an outstanding mortgage, as soon as the deed is delivered, but it gives rise only to an action for nominal damages; no action for substantial damages lies in advance of an eviction or of a payment of the encumbrance. (Wis.) *In re Estate of Hanlin*, 938.

6. **COVENANT AGAINST ENCUMBRANCES.**—The Statute of Limitations does not run against a breach of a covenant against encumbrances in advance of eviction or extinction of the encumbrance, for, although a technical breach occurs immediately on the delivery of the deed, it gives rise only to an action for nominal damages, and

substantial damages are not suffered until eviction or payment. (Wis.) In re Estate of Hanlin, 938.

7. COVENANT AGAINST ENCUMBRANCES—Whether Runs with Land.—A covenant against encumbrances is one of indemnity, and, as to substantial damages for its breach, runs with the land, the action therefor not accruing until the damages are suffered; but there is also an action for mere nominal damages accruing at the instant of the delivery of the deed and becoming a mere chose in action, enforceable by the covenantee or his assignee. (Wis.) In re Estate of Hanlin, 938.

8. COVENANT AGAINST ENCUMBRANCES—Enforcement Against Estate of Decedent.—A cause of action for the breach of a covenant against encumbrances, made by a person since deceased, does not arise so as to be enforceable against his estate until the person entitled to the benefit of the covenant has suffered actual damages. (Wis.) In re Estate of Hanlin, 938.

Note.

Covenants against indemnity or of seisin, limitation of actions upon, 946-948.

grantees, liability of upon. See Grantees.

CREDITORS' BILL.

See Fraudulent Conveyances.

CRIMINAL LAW.

In General.

1. CRIMINAL STATUTES, Deficiencies in Which will not be Supplied by the Courts.—Though a statute should not be held invalid on the ground of uncertainty if susceptible of any reasonable construction which will support it, still if no judicial certainty can be settled upon as to the meaning of the statute, or if it omits, in defining a criminal offense, certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or to undertake to make the statute definite and certain. (Mo.) State v. Excelsior Springs Light etc. Co., 563.

2. CRIMINAL LAW—Statute Attempting to Make Criminal the Suffering or Permitting of an Act.—A statute declaring guilty of a misdemeanor any person who shall suffer or permit any poisonous or deleterious substance to be thrown, run or drained into the waters of the state in quantities sufficient to injure, stupefy or kill fish, without providing that the suffering or permitting shall be on the premises or under the control of the accused, does not so define any act which the legislature has power to declare criminal as to sustain a conviction. (Mo.) State v. Excelsior Springs Light etc. Co., 563.

Alibi.

3. ALIBI—Sufficiency of a General Instruction.—The Defense of alibi is sufficiently embraced in a general charge to the effect that the defendant is presumed innocent until his guilt is established by competent evidence beyond a reasonable doubt, where no additional instruction is requested more explicitly amplifying the law. (Tex. Cr.) Jones v. State, 776.

4. ALIBI—Necessity for Particular Instructions.—A conviction should not be reversed for the failure of the court particularly to charge on alibi, unless the action of the court was excepted to at the time, and a full and more particular submission of the issue of alibi sought. (Tex. Cr.) Jones v. State, 776.

5. ALIBI—Absence of Special Charge.—A Case will not be Reversed for the mere failure of the court to charge on the subject of alibi, unless a special charge submitting this issue is requested or an exception reserved at the time. (Tex. Cr.) *Jones v. State*, 776.

Trial and Sentence.

6. CRIMINAL TRIAL—Misconduct of Judge.—Any language, gestures, remarks, facial expressions or tones of voice which might seem even to hint at what the court thinks of the merits of a case should always be avoided at a trial of issues before a jury. (Or.) *State v. Bartlett*, 751.

7. CRIMINAL TRIAL—Instructions as to Testimony of Accused. An instruction in a criminal trial where the defendant has testified in his own behalf: "You are not bound to consider the testimony of the defendants as absolutely true, nor any part of it as absolutely true, nor as equal to the testimony of disinterested witnesses. You are to bear in mind that the defendants speak in their own behalf to discharge themselves of a criminal accusation, and you are to consider the great temptation which one so situated is under, so to speak, as to procure his acquittal," is erroneous as seeming to leave an implication that it is incumbent upon the jurors to consider the defendant's testimony as false, and for that reason to reject it. (Or.) *State v. Bartlett*, 751.

8. CRIMINAL LAW—Reversal for Technical Errors.—Article 723 of the Code of Criminal Procedure of Texas is a remedial statute, designed to prevent reversals for mere technical errors. (Tex. Cr.) *Jones v. State*, 776.

9. CRIMINAL LAW—Power to Impose a Legal After Imposing an Illegal Sentence.—Where the trial court has imposed an illegal sentence, it has power to substitute for it a legal sentence, notwithstanding the illegal sentence has been partly executed. (Mich.) *In re Vitali*, 535.

Former Jeopardy.

10. FORMER JEOPARDY.—The Judgment of a Court Having No Jurisdiction of the offense charged constitutes no bar to a second prosecution of the same charge. (Neb.) *Peterson v. State*, 651.

CROPS.

See Landlord and Tenant, 1-4.

CURATIVE STATUTES.

See Constitutional Law, 5, 6.

CUSTOMS AND USAGES.

EVIDENCE—Admissibility.—In an action to recover for lumber sold and delivered, evidence as to "what was the custom in this district as to where lumber was to be measured by wholesale dealers," is not admissible when it is not shown that the district inquired about embraced the place where the lumber was sold and delivered. (Ala.) *Alabama Lumber Co. v. Cross*, 55.

DAMAGES.

1. EVIDENCE—Title to Land, When Admissible in Reduction of Exemplary Damages.—In an action to recover for personal injuries sustained by the plaintiff in a contest over the possession of land from which the defendants sought to dispossess him, evidence of their

title is admissible on the question of exemplary damages. (Cal.) *Walker v. Chanslor*, 61.

2. **DAMAGES—Evidence of Earnings or Wages.**—In an action for personal injuries evidence of what the plaintiff's services prior to the injury were reasonably worth is admissible when only general damages are claimed. (Ill.) *Barnes v. Danville Street Ry. etc. Co.*, 237.

3. **DAMAGES—Testimony of an Osteopath.**—In an action for personal injuries an osteopath, who is also a graduate of a medical college, who treated the plaintiff for his alleged injuries, may give in evidence subjective symptoms of the plaintiff, given at the time of the treatment. (Ill.) *Barnes v. Danville Street Ry. etc. Co.*, 237.

See *Death*.

DEATH.

NEGLIGENCE—Death by Wrongful Act—Adopted Child.—A right granted by statute to a surviving father or mother to recover damages for the death of their child caused by wrongful act is a right granted to the actual father or mother of such child, and not a right granted to an adopting parent. (La.) *Mount v. Tremont Lumber Co.*, 312.

DEEDS.

Delivery.

1. **DEEDS—Presumption of Delivery.**—The Possession of a Deed by a person at the time of his death raises a presumption that it was delivered, to take effect according to its import, at the time of its execution; and if it appears that the instrument was not delivered until some years after its date, this raises a presumption that it was intended to take effect when so delivered. (Wis.) *Chase v. Woodruff*, 972.

2. **DEEDS—Evidence of Delivery.**—The Declaration of the Grantor in a deed that he delivered it to the grantee for safekeeping is self-serving, and not provable to defeat the deed which years before had passed into the grantee's possession. (Wis.) *Chase v. Woodruff*, 972.

3. **DEEDS—Rebuttal of Presumption of Delivery from Possession.** Evidence to rebut the presumption that a deed in the possession of the grantee at the time of her death was delivered to take effect according to its tenor should be pretty clear and satisfactory, but something quite short of establishing absolute nondelivery beyond all reasonable controversy is sufficient to raise a jury question. (Wis.) *Chase v. Woodruff*, 972.

Escrow.

4. **ESCROW, Deed Delivered in, Without Any Agreement in Writing.**—If a conveyance is executed and deposited as an escrow, to be delivered upon conditions orally agreed upon, the grantors are bound and cannot avoid the escrow on the ground that the agreement was not expressed in writing. Oral testimony is admissible to establish its terms. (Wash.) *Manning v. Foster*, 877.

Quitclaim Deed.

5. **QUITCLAIM DEED.**—A Bona Fide Purchaser Under a Quitclaim Deed is protected against an outstanding unrecorded conveyance. (Neb.) *Bannard v. Duncan*, 661.

6. **QUITCLAIM DEED.**—The Words "Remise," "Release" and "Quitclaim" are interchangeable, and when used in an instrument pur-

porting to be a deed are sufficient to convey the grantor's title. (Neb.) *Bannard v. Duncan*, 661.

See Covenants; Estates; Husband and Wife, 6-9.

DESCENT AND DISTRIBUTION.

1. **DESCENT**—Necessity of Actual Seisin.—The word "estate" in the Illinois statute of descent applies to all property, without reference to the actual seisin of the ancestor. (Ill.) *North v. Graham*, 189.

2. **DESCENT**—Possibility of Reverter.—If the Grantor of a Determinable fee dies before the happening of the event which is to effect a reversion, the possibility of reverter is cast by descent upon his heirs at the time of his death. (Ill.) *North v. Graham*, 189.

3. **SUCCESSION**.—The Uncontroverted Testimony of a Husband that He is the Sole Heir of his wife, in an action of ejectment wherein he is plaintiff, proves his succession to whatever title she had. He is not called upon to show negatively that she did not die testate. (Wis.) *Chase v. Woodruff*, 972.

DISCOVERY.

1. **DISCOVERY**—Physical Examination of Plaintiff.—Trial courts have the power to order a medical examination by experts of the person of a plaintiff seeking to recover for personal injuries. The defendant, however, has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the court, and the exercise of such discretion is reviewable by the appellate court, and to be corrected in cases of abuse. (Colo.) *Western Glass Mfg. Co. v. Schoeninger*, 165.

2. **DISCOVERY**—Physical Examination of Plaintiff.—When a physical examination is desired of the plaintiff in an action for personal injuries, it should be applied for before entering upon the trial, and should then be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice demand the disclosure or more certain ascertainment of important facts which can be disclosed or ascertained only by such an examination, if the plaintiff's life or health will not thereby be endangered. (Colo.) *Western Glass Mfg. Co. v. Schoeninger*, 165.

3. **DISCOVERY**—Physical Examination of Plaintiff.—An order in an action for personal injuries that the plaintiff submit himself to a physical examination may be enforced, not by punishment as for a contempt, but by staying or dismissing the action. (Colo.) *Western Glass Mfg. Co. v. Schoeninger*, 165.

4. **DISCOVERY**—Physical Examination of Plaintiff.—The refusal of the trial court in an action for personal injuries to order the plaintiff to submit to a physical examination by experts, where he alleges permanent injury but the accident produced no visible wound, and an examination would disclose the nature and extent of the injuries, is such an abuse of discretion as will result in a reversal by the supreme court of a judgment in his favor. (Colo.) *Western Glass Mfg. Co. v. Schoeninger*, 165.

DIVORCE.

Grounds.

1. **DIVORCE** on Ground of Antenuptial Pregnancy.—Illicit relations between a man and woman before their marriage will not bar his action for divorce on the ground of her antenuptial pregnancy which she induced him to believe was a result of intercourse with him

but which in fact was by another man. (Iowa) *Wallace v. Wallace*, 253.

2. **DIVORCE—Antenuptial Pregnancy—Evidence.**—The testimony of a wife as to intercourse with another man besides her husband before marriage is admissible in an action against her for a divorce on the ground of antenuptial pregnancy. (Iowa) *Wallace v. Wallace*, 253.

Against Nonresidents.

3. **DIVORCE Granted Against a Nonresident—Validity of.**—If a wife obtains a divorce pursuant to the laws of the state in which she has for several years had her domicile, and in which state was also the domicile of the marital relation, the decree is not only valid in the state, but is entitled to recognition in every other under the full faith and credit clause of the constitution of the United States, and if this be not so, it may be recognized in another state as a matter of comity. (Wash.) *Buckley v. Buckley*, 900.

4. **PLEADING—Divorce and Annulment—Variance.**—If a woman files a complaint for divorce, and in response to the answer prays for an annulment of the marriage on the ground that the husband had a wife still living when it was contracted, this is not such a variance as precludes the court from granting the annulment. (Wash.) *Buckley v. Buckley*, 900.

5. **DIVORCE—Decree not Making Any Disposition of the Property—Power of Courts of Another State.**—If a woman, residing in one state obtained a decree of divorce against her husband residing in another, without making any disposition of the property, a court of the state of his residence and in which the property is situated may thereafter, in a suit for partition or any other appropriate action, divide the property as it would do under the statute controlling divorce proceedings in such manner as seems just, and is not bound to regard her as entitled to the undivided one-half thereof. (Wash.) *Buckley v. Buckley*, 900.

Alimony.

See Husband and Wife, 1-5.

6. **DIVORCE—Judgment for Alimony, When Void.**—A judgment entered in a divorce suit awarding the plaintiff alimony, if based on service of process made without the state, is, as to such alimony, void. (Mo.) *Moss v. Fitch*, 568.

7. **DIVORCE—Alimony, Presentment of Claim for Against the Estate of a Decedent.**—If by a decree of divorce a wife is allowed a specified sum of alimony, to be paid at a designated rate per week, and the husband dies without seeking any modification of the decree and with arrears remaining unpaid, the court having jurisdiction of his estate may entertain and allow the claim as against the defendant for the amount of such arrears. (Mich.) *Martin v. Thison's Estate*, 537.

8. **HOMESTEAD—Whether Subject to Lien for Alimony.**—Where the law provides that a homestead is exempt, "except as otherwise provided in these statutes," but also provides that in an action for divorce where alimony is allowed the court "may impose the same as a charge upon any specific real estate of the party liable," the homestead of a husband may be charged with a lien for alimony. (Wis.) *Schultz v. Schultz*, 934.

9. **HOMESTEAD—Lien for Alimony not Discharged by General Execution.**—Where alimony has been charged as a lien upon the homestead of the husband, to be enforced in such manner as the

court shall direct, the issue of a general writ of execution upon the order of the court to enforce the judgment does not release the specific lien decreed. (Wis.) *Schultz v. Schultz*, 934.

10. **HOMESTEAD—Execution to Satisfy Alimony—Writ of Assistance.**—Where alimony has been decreed a specific lien on the homestead of the husband, and a sale of the property has been made under execution, the purchaser may properly be granted a writ of assistance. (Wis.) *Schultz v. Schultz*, 934.

DOWER.

1. **DOWER—Statute Enlarging, When Impairs Obligation.**—A statute enlarging the dower estate is unconstitutional as against one who has contracted with the husband for a judgment lien on the property, although the judgment is not actually entered until after the passage of the statute. (Or.) *Davidson v. Richardson*, 738.

2. **DOWER—Power of Attorney in Husband to Convey.**—Dower cannot be alienated by the husband under a power of attorney from the wife, where the statute provides that such estate cannot be the subject of contract between them. (Iowa) *Swartz v. Andrews*, 285.

3. **DOWER—Statute Legalizing Conveyance.**—A statute intended to legalize a conveyance of dower which has been made by a husband under a power of attorney from his wife is unconstitutional, where the law denies to her any capacity to execute such a power of attorney. (Iowa) *Swartz v. Andrews*, 285.

4. **DOWER—Statute Legalizing a Conveyance.**—A statute intended to legalize a conveyance of dower by a man under a power of attorney from his wife is unconstitutional in case her estate has become vested by his death before the passage of the act. (Iowa) *Swartz v. Andrews*, 285.

5. **DOWER.—The Curative Act of Iowa** relating to conveyances by one spouse of the inchoate interest of the other under a power of attorney does not apply to a letter of attorney executed by the wife alone, but only to a joint instrument involving mutual rights and benefits. (Iowa) *Swartz v. Andrews*, 285.

DRAWBRIDGE.

See Navigable Waters, 9-19.

DRUGGISTS.

DRUGGIST—Injury from Drug to One Who did not Purchase It. The unlawful sale of croton oil to a minor, who administers it as a joke to another minor to his injury, creates no cause of action in favor of the father of the latter, for the injury is not the natural or proximate consequence of the sale. (Neb.) *McKibbin v. Bax & Co.*, 677.

EASEMENTS.

EASEMENTS—Manner of Conveyance.—A statute requiring deeds to be executed, acknowledged and recorded as therein provided is applicable to grants conveyances of easements in land. (Md.) *Dawson v. Western Maryland R. R. Co.*, 337.

EJECTMENT.

1. **EJECTMENT—The Defendant in Ejectment can Defeat Recovery** by showing title out of the plaintiff or right of possession in third person. (Ill.) *North v. Graham*, 189.

2. EJECTMENT—Title Acquired After Commencement of Suit.—A defendant in ejectment can defeat a recovery of the entire property by showing a half interest in himself acquired after the commencement of the suit. (Ill.) *North v. Graham*, 189.

3. JUDGMENTS IN EJECTMENT—When Erroneous.—If, in an action of ejectment, the answer contains neither an affirmative defense nor a counterclaim, but only a general denial, and the plaintiff fails to prove title, any other judgment than a judgment of nonsuit is erroneous but not necessarily void. (Wis.) *Comstock v. Boyle*, 1033.

4. JURISDICTION—Ejectment.—The circuit court has jurisdiction of actions of ejectment, and if the plaintiff properly commences such an action in that court and serves his summons on the defendant, complete jurisdiction of both the subject matter and the parties is acquired by the court, and the contentions of the parties may be heard and decided. (Wis.) *Comstock v. Boyle*, 1033.

EMPLOYER'S LIABILITY.

See Master and Servant.

EQUITY.

Chancery Practice.

1. EQUITY PRACTICE.—Averments on information and belief, when not denied, warrant the interposition of courts of equity. (Mich.) *Ainsworth v. Munoskong Hunting etc. Club*, 474.

2. EQUITY PRACTICE—Additional Findings.—It is the right and duty of the judge to make such additional or different findings of fact, without hearing further evidence, as follow as inferences from the facts reported by the master. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

3. EQUITY PRACTICE.—The formal confirmation of the report of a master, though the more regular practice, is not indispensable where the action of the court amounts to a practical confirmation. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

4. EQUITY PRACTICE—Discretion Respecting Recommitting the Master's Report.—It is within the discretion of the trial judge to determine whether he will recommit the master's report as requested at different times by each party. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

5. EQUITY PRACTICE—Amount to be Paid for an Assignment When Should not be Left Open.—When a court finds that the plaintiff should pay the defendant certain expenditures made by him as a condition of the assignment by him to the plaintiff of letters patent, the amount so to be paid should not be left in blank in the final decree, to be determined on a further application to the court, but the question of such amounts should be settled by the final decree. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

6. EQUITY PRACTICE—Requirement of an Assignment, When Should not be Absolute.—Where a decree establishes the complainant's rights to the assignment of letters patent on the repayment of disbursements made by the defendant, and where the plaintiff has an option not to make such payment unless he wishes to enforce his right to such assignment, the decree should not require the defendant absolutely to make the assignment, and should be to the effect that the defendant assign upon the repayment of the sums found to be due. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

Multiplicity of Suits.

7. EQUITY—Jurisdiction to Prevent Multiplicity of Suits.—That a plaintiff has severally sued many defendants to recover separate

tracts of land, that they have combined or conspired to maintain their several defenses, that he has incurred large expense and long delay will arise in the litigation, that one of the actions has already been determined in his favor, that each defendant claims title to his tract through an entry and subsequent adverse possession by M., that he tacks his adverse possession to M.'s and has no title without it, that the determination of M.'s adverse possession will settle the title of all of the defendants—does not confer jurisdiction on a court of equity to determine in one suit the rights of all the parties, for there is not a sufficient community of interest in the subject matter. (Wis.) *Illinois Steel Co. v. Schroeder*, 977.

8. EQUITY.—A Multiplicity of Suits does not Mean a Multitude of suits. The term does not apply merely because each of several parties jointly and severally liable may be independently sued; it applies where one party may be sued several times in relation to the same subject matter in its entirety, or in respect to some element or elements thereof. (Wis.) *Illinois Steel Co. v. Schroeder*, 977.

Note.

Equity, multiplicity of suits, bills of peace, when maintainable to prevent, 992.

multiplicity of suits, common source of title, whether supports jurisdiction, 995.

multiplicity of suits, community of interest or of title, whether essential to sustain jurisdiction, 993, 994.

multiplicity of suits, jurisdiction of to prevent, 992.

multiplicity of suits, parties holding separate tracts of land, 994.

separate claims to different parcels of land, whether court may maintain an action to determine to prevent multiplicity of suits, decisions affirming, 998-1002.

separate claims to different parcels of land, whether court may maintain an action to determine to prevent multiplicity of suits, decisions denying, 994-998.

title, establishing in one suit against persons holding different tracts in severalty, 998.

ESCROW.

See Deeds, 4; Frauds, Statute of, 2.

ESTATES.

1. ESTATE—Determinable Fee Created by Deed to Church.—A deed to the trustees of a church providing that the land shall "revert to the party of the first part whenever it ceases to be used or occupied for a meeting-house or church" creates a "determinable or qualified fee." (Ill.) *North v. Graham*, 189.

2. ESTATE—Possibility of Reverter cannot be Conveyed.—The possibility of reverter when land has been conveyed on the condition that it shall revert to the grantor if it ceases to be used for church purposes is not such an estate as he can convey or assign, and hence does not pass by his quitclaim deed executed before the reverter takes place. (Ill.) *North v. Graham*, 189.

3. ESTATE—Descent of Possibility of Reverter.—A possibility of reverter, while it cannot be alienated or devised by the grantor, may descend to his heirs. (Ill.) *North v. Graham*, 189.

4. ESTATE—Possibility of Reverter Distinguished from Reversion. The right or interest under a possibility of reverter is very like, though not strictly identical with, a reversion. (Ill.) *North v. Graham*, 189.

ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators; Wills.

ESTOPPEL.**ESTOPPEL, When not Proper for the Consideration of the Jury.**

Where neither the pleadings nor the evidence raises the question of estoppel, the court should not submit that question to the jury. (Utah) *Manti City Savings Bank v. Peterson*, 817.

EVIDENCE.

1. EVIDENCE—Inference from Facts Proved.—If a well-settled design is proved to exist, it is a legitimate inference that it will be persisted in and acted upon unless it appears that there is some supervening obstacle. (Wis.) *Barker v. Western Union Tel. Co.*, 1017.

2. EVIDENCE—Offer to Compromise.—In an action to recover for injury to a boat caused by the negligence of a drawbridge-tender in failing to open the draw in time upon proper signals, evidence that the bridge-tender, on the next morning after the injury, visited the vessel and inquired of her master if he would take a named sum and drop the matter is not admissible, as it was a mere offer to compromise. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

3. EVIDENCE OF INTENT.—Where All Persons may Testify, a witness may be examined as to the intent with which he did an act, where such intent is material in the action. (Cal.) *Walker v. Chancellor*, 61.

4. EVIDENCE—Admission—Harmless Error.—In an action to recover on an account for lumber sold and delivered, it is harmless error to admit books of account in evidence without first showing that the witness knew the entries made therein were original, when the same thing is shown by the defendant as is shown by such entries. (Ala.) *Alabama Lumber Co. v. Cross*, 55.

5. EVIDENCE, Conclusiveness of the Court's Refusal to Admit.—If letters are offered in evidence, and there is a conflict of evidence as to whether the party whom it is claimed wrote them did so or not, and the judge refused to admit them, it must be presumed he found they were not written by such party, and this finding will not be reversed by the appellate court. (Mass.) *Pilon v. Viger*, 408.

6. APPEAL AND ERROR.—The Fact that the Excluded Evidence does not Necessarily Appear to have been Material will not sustain the action of the trial court in excluding it in the case of a contested will, where the witness altogether refuses to answer on the ground of privilege, and it was therefore not possible for the attorney representing the contestants to know what the testimony, if admitted, would be. (Utah) *In re Young's Estate*, 843.

See Criminal Law; Customs and Usages; Trial.

Note.

Evidence, to prove illegitimacy. See Children.

EXECUTIONS.

In General.

1. A JOINT EXECUTION upon Two Separate Judgments in Favor of Two Plaintiffs is Void, and so also is the sale made thereunder. The result cannot be avoided by amending the writ. (Ark.) *Bigham v. Dower*, 1096.

2. EXECUTION SALE—Strict Redemption can be Made from an execution sale only as prescribed by statute; and where the statute provides that redemption by a lienholder shall be by paying the nec-

essary amount into the clerk's office and filing an affidavit of the nature and amount of the lien, merely paying such amount to the purchaser's attorney does not satisfy the law. (Iowa) *Howard v. Kelly*, 274.

3. EXECUTION SALE—Assignment of Certificate.—An Attorney who has by execution sale acquired for his client a sheriff's certificate to the property has no implied power to assign it or accept the amount represented thereby from a lienholder. (Iowa) *Howard v. Kelly*, 274.

Dissolution of Injunction Against Execution.

4. EXECUTIONS—Dissolution of Injunction—Attorney's Fees.—On the dissolution of an injunction directed against the execution of a money judgment, attorney's fees may be allowed as damages for not more than twenty per cent on the amount of the judgment without proof of the value of the services rendered. (La.) *Rivet v. George M. Murrell etc. Co.*, 320.

5. EXECUTIONS—Statutory Damages—Dissolution of Injunction. Statutory damages may be allowed on the dissolution of an injunction against the sale of specific property seized in execution of a money judgment. (La.) *Rivet v. George M. Murrell etc. Co.*, 320.

EXECUTORS AND ADMINISTRATORS.

In General.

1. EXECUTORS AND ADMINISTRATORS—Collateral Attack upon Letters of.—The proceedings of the court granting letters of administration of the estate of a deceased person can be collaterally attacked on the ground that the person appointed administrator was a nonresident of the state when the application was made and the letters granted. (Ark.) *Jacobs v. Bentley*, 1086.

2. EVIDENCE of Declarations Made in the Presence of a Party, and not Denied.—Where a deposit is made in a savings bank in the name of a depositor "in trust for F.," his declarations in the presence and hearing of the depositor are admissible against her executors to show his acceptance of the gift and also as declarations of a deceased person, under the statute. (Mass.) *Supple v. Suffolk Savings Bank*, 451.

3. EVIDENCE of Nonaction of Executors, When Admissible Against Them.—In an action by an executor to recover money deposited in the name of a decedent "in trust for F.," and in which it was claimed that a trust in favor of or a gift to F. was created by such deposit, evidence is admissible against an executor to show that he knew of, but did not account for, such deposit, for his failure to so account may be found inconsistent with his claim that the property belonged to the estate of his decedent. (Mass.) *Supple v. Suffolk Savings Bank*, 451.

4. LEASED PERSONAL PROPERTY, Administrator of Lessee, When Acquires No Interest Therein.—If sheep are leased, to be returned with ten per cent of the increase and a specified amount of the wool for each sheep, the contract is personal, so that on the death of the lessee no interest or right of possession passes to his executor or administrator. (Utah) *Manti City Savings Bank v. Peterson*, 817.

5. ADMINISTRATION of the Estate of Decedents—Claims, in What State may be Presented.—Where there is a principal administration in one state and ancillary administration in another, a claim may be presented in the last-named state if it arose therein. (Mich.) *In re Colburn's Estate*, 479.

6. ADMINISTRATOR—Whether Necessary Party to Foreclosure. An administrator of the estate of a deceased mortgagor is not a

necessary or proper party to foreclosure as regards the liability of the estate for any claim enforceable in the county court. (Wis.) *In re Estate of Hanlin*, 938.

Liability of Coexecutor.

7. EXECUTORS AND ADMINISTRATORS—Coexecutors—Devastavit—Liability.—A devastavit by one of two or more executors or administrators does not charge his coexecutor unless he has intentionally or otherwise contributed to it, or made himself liable by the execution of a bond. (Ala.) *Fleming v. Walker*, 46.

8. EXECUTORS AND ADMINISTRATORS—Coexecutors or Trustees—Devastavit—Liability.—If funds in the hands of an executor have never been transferred from himself as such executor to himself and another as coexecutors or cotrustees, the latter is not liable for a devastavit of such fund committed by the coexecutor. (Ala.) *Fleming v. Walker*, 46.

Discovery of Estate in Equity.

9. EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equity Jurisdiction.—If an administratrix alleges her ignorance of the amount, condition and nature of the estate and property claimed to be withheld by certain defendants, under claim of ownership, she may institute an equitable action in the circuit court during the pendency of the administration of the estate in the county court for a discovery of the property of the estate of the deceased and for an accounting. (Wis.) *Eisentraut v. Cornelius*, 1027.

10. EXECUTORS AND ADMINISTRATORS—Discovery of Estates—Equity Jurisdiction.—Although discovery may be had in the county court during administration, if the administratrix alleges ignorance of the amount, condition and nature of property claimed to be withheld by defendant under a claim of ownership, yet the necessity of bringing an action, either at law or in equity, as exigency may demand, to enforce delivery or restoration to the estate of the property discovered, results in such circuitry and multiplicity of action that it is of itself sufficient ground for suing in equity. (Wis.) *Eisentraut v. Cornelius*, 1027.

11. EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Judgment—Form of Decree.—If, during the pendency of the administration of an estate, the administratrix institutes an action in equity for a discovery of property of the estate alleged to be withheld by defendant under a claim of ownership and an accounting, the court should not limit the relief awarded to an adjudication of the amount the defendant is found to have obtained from the estate of the deceased, and enter judgment that plaintiff recover such amount from defendant for the benefit of the estate, without determining defendant's rights to credits for any sums which he claims to have paid to the heirs of the deceased, and upon debts and claims against the deceased and his estate. In such case the court should adjudicate a final and complete settlement of the whole controversy between the parties having an interest in the subject matter of the action. (Wis.) *Eisentraut v. Cornelius*, 1027.

12. EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equity Jurisdiction—Parties.—If an administratrix institutes an action in equity for the discovery of the property of the estate claimed to be withheld by defendant under a claim of ownership, and for an accounting during the pendency of the administration of the estate in the county court, and some of the heirs have released their rights to the defendant, and he is found entitled to receive their shares of whatever estate may be found should be distributed, such heirs should

be made parties to the action to enable their right to any portion of the estate to be litigated if controverted by any interested party, so that the court may, upon a final accounting, require the defendant to account to the administratrix for any part of the estate found to be in his possession and required for the administration of the estate, and the payment of the amount found due to the other distributees. (Wis.) *Eisentraut v. Cornelius*, 1027.

13. EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equitable Action—Form of Judgment.—If, during the pendency of the administration of an estate, the administratrix institutes another action in equity for the discovery of the property of the estate and for an accounting, and the proof discloses that the property for which recovery is sought is held separately by two defendants, the court must ascertain the separate liability of each defendant and award judgment as to each accordingly. (Wis.) *Eisentraut v. Cornelius*, 1027.

14. EXECUTORS AND ADMINISTRATORS—Discovery of Estate—Equitable Action—Evidence.—If an administratrix, during the administration of an estate in one court, begins an equitable action in another court for the discovery of some of the property of the estate alleged to be withheld by the defendants under a claim of ownership, and they are examined as witnesses in plaintiff's behalf as to their course of dealing with the decedent, and are required to give evidence of communications and transactions through which they obtained possession of the property in dispute, and of the repayment of some specific sums collected by them, they are entitled to testify in their own behalf and give the details of such communications and transactions covering the negotiations. (Wis.) *Eisentraut v. Cornelius*, 1027.

See Limitation of Actions, 2.

EXEMPTIONS.

1. EXEMPTIONS—Estoppel to Claim Double Exemptions.—If a debtor has selected two of four mules attached as exempt from seizure under execution and voluntarily transferred them to a third person pending the litigation, and the attachment is thereafter dissolved, but the plaintiff obtains judgment, he is entitled to seize the remaining two mules under a writ of fieri facias, as the defendant is estopped from claiming such mules as also exempt from execution. (La.) *Rivet v. George M. Murrell etc. Co.*, 320.

2. EXEMPTIONS—Successive Exemptions.—A debtor is not entitled to successive or double exemptions as against the same creditor. (La.) *Rivet v. George M. Murrell etc. Co.*, 320.

3. EXEMPTION OF PROCEEDS of the Sale of a Federal Homestead.—If one holding a homestead acquired under the laws of the United States sells it and the money goes into the possession of a third person, it becomes subject to garnishment, though the debtor intended to use such money in the acquisition of a new homestead, to be owned and occupied under the laws of the state. The federal exemption ceases as soon as the land is voluntarily disposed of by the homesteader. (Wash.) *Ritzville Hardware Co. v. Bennington*, 894.

FINES.

FINES—Imprisonment for Debt.—A Fine Imposed for a Violation of a municipal ordinance is not a debt within the meaning of the constitutional prohibition against imprisonment for debt. (Neb.) *Peterson v. State*, 651.

FISHING.

See Game.

FIXTURES.

See Mines and Minerals, 2.

FOREIGN CORPORATIONS.

See Corporations, 17-24.

FORFEITURES.

FORFEITURES—Enforcement of in Equity.—Though equity will not ordinarily enforce a forfeiture, it will do so where the forfeiture works equity and protects the rights of the parties. (Ark.) *Cherokee Construction Co. v. Bishop*, 1098.

FORGERY.

FORGERY—Identical Names.—It is No Defense to a charge of forgery that the name of the defendant is the same as the name of the person whose name he forges. (Tex. Cr.) *Edwards v. State*, 767.

See Banks and Banking, 3-9.

FORMER JEOPARDY.

See Criminal Law, 10.

FRAUDS, STATUTE OF.

1. STATUTE OF FRAUDS—Promise to Answer for the Debt of Another, What is.—The statement of T. that if a beef is sold to McC., he, T., will pay for it, if he, McG., is working for him, is a promise to answer for the debt of another, and hence not enforceable if not in writing. (Mich.) *Sherman v. Alberts*, 486.

2. FRAUDS, STATUTE OF, as Applied to Escrow.—The condition upon which a deed is delivered in escrow must rest in and be proved by parol. (Wash.) *Manning v. Foster*, 876.

Note.

Frauds, Statute of, administrators, promise of to pay debts of their intestate, 494.

assignee for the benefit of creditors, promise of to answer for the debt of his assignor, 498.

collateral and original promises, benefit to the promisor as a test of, 494.

collateral and original promises, intent of the parties as determining, 492.

collateral and original promises, tests of, 492-494.

consideration as supporting a promise to answer for the debt of another, 497-504.

contract between three persons that the first is to pay debt due to the third from the second, 509, 510.

indemnity, contracts of, whether and when within, 512-516.

new consideration, effect of on the promise to pay the debt of another, 497.

original and collateral undertakings, illustrations of, 516-535.

promise to answer for the debt of another, acceptance of order, when is not a, 517.

promise to answer for the debt of another, accommodation indorsements, 516.

promise to answer for the debt of another, agreement to repurchase stock, 489, 490.

promise to answer for the debt of another and promise to see it paid, difference between, 502.

- Frauds, Statute of**, promise to answer for the debt of another based on a new consideration, 497.
- promise to answer for the debt of another, collateral promises, when do not fall within, 495-497.
- promise to answer for the debt of another, consideration for, 497, 498.
- promise to answer for the debt of another, consideration to support and to make an original undertaking, 497-504.
- promise to answer for the debt of another, contracts of indemnity, 512-516.
- promise to answer for the debt of another, credit, to whom given as a test to determine whether the promise was original or collateral, 492.
- promise to answer for the debt of another, discharge of the original debtor, when necessary to validate, 505-509.
- promise to answer for the debt of another, employer's promise to pay debt of his employé, 496.
- promise to answer for the debt of another, form of is not conclusive, 498.
- promise to answer for the debt of another, illustrations of, 516-535.
- promise to answer for the debt of another, includes all collateral undertakings, 487, 488.
- promise to answer for the debt of another, independent liability must exist, 489, 490.
- promise to answer for the debt of another, original undertaking, when amounts to a, 497-500.
- promise to answer for the debt of another presupposes the existence of an enforceable obligation, 489, 490.
- promise to answer for the debt of another, promise of another to pay subcontractor, 494.
- promise to answer for the debt of another, purchaser's promise to pay mortgage given by vendor, 497.
- promise to answer for the debt of another where the original debtor remains liable and there is a new consideration, 497-504.
- promise to answer for the debt of another where the promisor effects the payment of his own debt, 496.
- promise to answer for the debt of another where the promisor obtains an advantage to himself, 500.
- promise to answer for the debt of another where there is a liability on the part of the promisor independent of his promise, 510, 512.
- promise to pay debt due to an attorney from another, 494.
- subcontractor, promise of the owner of a building to pay claim of, 499.

FRAUDULENT CONVEYANCES.

CREDITOR'S SUIT—Burden of Proof in Case of Transfer to Relative.—If a transfer of land is made by a debtor to a near relative in consideration of a past due indebtedness, the burden of proof in a creditor's suit is upon the grantee to show that the debt was genuine, that his purpose was honest, and that he acted in good faith in obtaining title. (Neb.) *Flint v. Chaloupka*, 639.

GAME.

1. NAVIGABLE WATERS.—The Right to Hunt Fowl on the Navigable Waters of the State is a civil right of its citizens, the protection of which is clearly within the jurisdiction of equity. (Mich.) *Ainsworth v. Munoskong Hunting etc. Club*, 474.

2. NAVIGABLE WATERS.—The Right of a Citizen of a State to Hunt Wild Fowl on Its Navigable Waters is one the wrongful interference with which gives substantial injury, and is of such dignity as to require protection by the courts. (Mich.) Ainsworth v. Munoskong Hunting etc. Club, 474.

3. TO HUNT OR FISH in the Navigable Waters of the State is a Public Right of which every citizen may avail himself, subject to the game laws. (Mich.) Ainsworth v. Munoskong Hunting etc. Club, 474.

Note.

Grantees, action against them upon deeds not signed by them, nature of, 349-358.

action of covenant against where they have not signed, 350-359.
are not liable for acts of their lessees, 370.

devises of, liability of on covenants of, 376.

excuses for nonperformance of covenants by, 377.

heirs of, liability of on covenants of, 376.

ignorance will not relieve for nonperformance of covenants, 377.

jurisdiction of actions against for breaches of covenants or conditions, 379.

liability of assignees of on personal covenants, 373.

liability of for acts of third persons, 371.

liability of for breaches of covenant by subsequent grantees, 370, 372.

liability of for breaches of covenants they have not signed, 370-372.

liability of husband on wife's covenants in deeds, 371.

liability of is not that of a covenantee, 350.

liability of lessees who have not signed the lease, 373.

liability of on covenants, conflict of authorities concerning, 349.

liability of on covenants goes to the form of the remedy, 349.

liability of on covenants, remedial and substantive law respecting, 349-354.

liability of on personal covenants, 372.

liability of, rule of in Connecticut, 355-357.

liability of, rule of in Georgia, 360.

liability of, rule of in Indiana, 361.

liability of, rule of in Kansas, 362.

liability of, rule of in Massachusetts, 354, 355.

liability of, rule of in Minnesota, 362.

liability of, rule of in New Hampshire, 363.

liability of, rule of in New Jersey, 363.

liability of, rule of in New York, 363.

liability of, rule of in North Carolina, 365.

liability of, rule of in Ohio, 366.

liability of, rule of in Pennsylvania, 367.

liability of, rule of in the United States courts, 350-354.

liability of under covenants against nuisances, 371.

liability of under covenants respecting the use of buildings, 370.

liability of under covenants respecting the use of property, 370.

liability of wife on husband's covenants in deeds, 371.

performance of covenants by, what sufficient, 378.

privity of estate or of contract, necessity of by, 350, 373-376.

remedies against for breaches of covenants in deeds, 378.

signature of, absence of from deeds, 349.

statutes abolishing distinction between sealed and unsealed instruments, effect of upon liability of, 369.

under covenants running with and restricting the use of land, 369.

GUARANTY.

GUARANTY—Notice of Principal's Default.—If a guaranty is absolute, the liability of the guarantor is as broad and complete as that of a surety; and if it is conditional, a failure to give notice of the principal's default will not discharge the guarantor in the absence of any prejudice to him from the laches. (Iowa) *Van Buren County v. American Surety Co.*, 290.

HABEAS CORPUS.

1. **HABEAS CORPUS—Scope of Writ.**—The writ of habeas corpus reaches jurisdictional error only; it cannot properly be used to serve the mere purpose of a writ of error. If jurisdiction of the accused is obtained so that the court might, under some circumstances, render a valid judgment, but error is committed in reaching a final result, then such error is judicial and reviewable only upon a writ of error; but if the court, though having no jurisdiction to render judgment at all, attempts to do so, the judgment is void, and habeas corpus is a proper remedy for relief therefrom. (Wis.) *Servonitz v. State*, 955.

2. **HABEAS CORPUS—Regulation by Statute.**—The legislature may reasonably regulate the procedure in respect to habeas corpus, but the writ cannot be abrogated nor its efficiency curtailed by legislative action. (Wis.) *Servonitz v. State*, 955.

3. **HABEAS CORPUS is Effective to Test the Jurisdiction of any Court** assuming by its judgment, or otherwise, to deprive one of his personal liberty. (Wis.) *Servonitz v. State*, 955.

4. **HABEAS CORPUS.—A Conviction Under an Unconstitutional Statute** can be impeached in habeas corpus proceedings. (Wis.) *Servonitz v. State*, 955.

5. **HABEAS CORPUS—Questioning the Constitutionality of a Statute.**—One imprisoned on a conviction for the violation of a statute is entitled to his release on habeas corpus if the statute is unconstitutional. (Mo.) *Ex parte Harrison*, 557.

6. **HABEAS CORPUS will not Lie on the Ground** that there has been an illegal sentence, if it is one which may be corrected by a new and legal sentence. Habeas corpus will not be permitted to perform the functions of a writ of error. (Mich.) *In re Vitali*, 535.

HACKMEN.

See Carriers, 3.

HAND-CAR.

See Railroads, 1.

HAWKERS AND PEDDLERS.

PEDDLERS—Classification and Regulation by Statute.—The legislature may treat peddlers as a class by themselves for the purpose of police regulation and occupation taxes; and it may make a subclassification of peddlers according to their facilities for going from place to place and carrying their wares, rendering one class likely to reach more customers than another and to do a correspondingly greater amount of business both as to number of transactions and the amount of money involved. (Wis.) *Servonitz v. State*, 955.

HEALTH REGULATIONS.

1. **MUNICIPAL CORPORATIONS—Police Power—Destruction of Cattle Affected with Tuberculosis.**—Delegation of power to a city

"to maintain the city's cleanliness and health, and to this end to regulate the location of and the inspection and cleaning of dairies, and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health, and to prevent the spread of disease," vests in the city plenary power in the exercise of its police power to pass an ordinance requiring cows in cities to be inspected, and if found to be affected with tuberculosis, to be destroyed without compensation to the owner. (La.) *City of New Orleans v. Charouleau*, 332.

2. MUNICIPAL CORPORATIONS—Exercise of Police Power—Delegation of Power.—A city may exercise its police power expressly given it through the agency of its board of health. (La.) *City of New Orleans v. Charouleau*, 332.

3. MUNICIPAL CORPORATIONS—Police Power—Destruction of Property Without Compensation or Judicial Inquiry.—If a city is given plenary police power to require, by ordinance, dairy cows to be inspected when necessary or expedient for the protection of health and to prevent the spread of disease, it has power to provide that when, by a test recognized to be practically infallible, a cow is found to be afflicted with tuberculosis by its inspector or board of health, such cow shall be destroyed, the destruction of the cow may be accomplished without first making compensation to the owner or affording him a judicial inquiry. (La.) *City of New Orleans v. Charouleau*, 332.

Note.

Heirs, covenants of ancestors, liability of upon, 376.

HOMESTEAD.

See Divorce, 8, 9; Exemptions, 3.

HOMICIDE.

In General.

1. HOMICIDE—Instruction as to Degree of Offense.—Where the evidence in a homicide trial shows on the part of the state an assassination, and on the part of the defendant an accidental killing in self-defense against a third person, an instruction is not erroneous which tells the jury that if they find from the evidence that the killing was not upon express malice, or if they have a reasonable doubt as to whether the killing was upon express malice, but do not find that it was unlawful or intentional, they should find the defendant guilty of murder in the second degree. (Tex. Cr.) *Thomas v. State*, 786.

2. HOMICIDE.—An Instruction on Express Malice, Even if Erroneous, furnishes the defendant with no just cause of complaint where he has been acquitted of murder in the first degree. (Tex. Cr.) *Jones v. State*, 776.

3. HOMICIDE.—Intoxication not Amounting to temporary insanity is not admissible in evidence, even for the purpose of determining the degree of murder. (Tex. Cr.) *Young v. State*, 792.

4. HOMICIDE Inflicted by Weapon not Deadly—Instruction.—Where the evidence in a homicide trial shows that death was probably caused by a blow from a stick of stove-wood, and the court charges that every person is presumed to intend the natural consequences of his own acts, it should further instruct the jury that if the instrument was one not likely to produce death, it was not to be presumed that death was designed unless from the manner in which the instrument was used such intention evidently appears. (Tex. Cr.) *Washington v. State*, 800.

In Commission of Another Offense.

5. **HOMICIDE—Accidental Killing of Third Person.**—One who with express malice shoots at a person with intention to kill him and accidentally kills a third person is guilty of murder in the second degree. (Tex. Cr.) *Thomas v. State*, 786.

6. **HOMICIDE in Commission of Felony.**—An Indictment for Murder Committed in the Perpetration of Burglary and Arson need not define and set out the constituent elements of the offenses of burglary and arson, nor allege what the defendant was doing at the time he committed the homicide, further than that the same was committed in the perpetration of arson and burglary. (Tex. Cr.) *Jones v. State*, 776.

7. **HOMICIDE in Commission of Felony.**—In Instructing the Jury in a prosecution for murder committed in the perpetration of arson and burglary, the court is not required to give a detailed definition of burglary and arson. (Tex. Cr.) *Jones v. State*, 776.

Self-defense.

8. **SELF-DEFENSE.**—If One Provokes a Difficulty in order to have a pretext to kill an adversary or inflict upon him serious bodily injury, he cannot justify such killing when subsequently it becomes necessary in order to save his own life. (Tex. Cr.) *Young v. State*, 792.

9. **SELF-DEFENSE.**—If One Provokes a Difficulty in order to have a pretext to inflict some unlawful injury upon an adversary, but not for the purpose of killing or seriously injuring him, he cannot thereafter justify such killing on the ground of self-defense, but the offense will ordinarily be only manslaughter. (Tex. Cr.) *Young v. State*, 792.

10. **SELF-DEFENSE.**—Where One, with No Intention to Provoke a Difficulty, does an act which induces another to assault him, he does not thereby lose his right of self-defense. (Tex. Cr.) *Young v. State*, 792.

11. **SELF-DEFENSE—Provoking Attack.**—The Mere Fact that One does a Wrongful or Inconsiderate Act which provokes another to attack him does not deprive him of the right of self-defense. (Tex. Cr.) *Young v. State*, 792.

12. **SELF-DEFENSE—Provoking Difficulty.**—An Instruction to the Jury in a homicide case that if what was said or done by the defendant was reasonably calculated to and did provoke the deceased to attack him, that he could not justify killing him, though, as a matter of fact, he did not intend to provoke the attack, is erroneous. (Tex. Cr.) *Young v. State*, 792.

HUNTING.

See Game.

HUSBAND AND WIFE.*Support and Maintenance.*

1. **HUSBAND AND WIFE—Duty of Support—Avoidance of by Contract.**—The law requires a husband to support, care for, and provide comforts for his wife in sickness as well as in health, and a husband cannot shirk such duty even by contract with his wife. (Wis.) *Ryan v. Dockery*, 1025.

2. **HUSBAND AND WIFE—Maintenance—Equity Jurisdiction.**—A court of equity will entertain a suit brought for alimony and grant it, although no divorce or other relief is sought, where the wife is

separated from her husband without her fault. (Neb.) *Rhoades v. Rhoades*, 611.

3. HUSBAND AND WIFE—Maintenance—Equity Jurisdiction of District Courts.—The district courts of Nebraska are courts of general equity jurisdiction, and may grant alimony to the wife, although no divorce or other relief is sought, where she is separated from her husband without her fault. (Neb.) *Rhoades v. Rhoades*, 611.

4. HUSBAND AND WIFE—Maintenance—Nonresident Husband—Service of Process.—Service by publication may be made in an action by a wife for maintenance of herself and child against her husband who has deserted her without her fault, and become a non-resident, and the only relief sought is the appropriation of his real estate situated in the county where the action is brought to the payment of such maintenance. (Neb.) *Rhoades v. Rhoades*, 611.

5. HUSBAND AND WIFE—Maintenance—Nonresident Husband—Jurisdiction on Service of Process by Publication—Receiver.—A wife may maintain an equitable action, on service by publication, to subject the property interests of her nonresident husband within the jurisdiction of the court, if he has deserted her without cause, to her support and maintenance, and after the completion of such service judgment may be entered and the property placed in the hands of a receiver. It is immaterial that her residence is not in the county where the property is situated. (Neb.) *Rhoades v. Rhoades*, 611.

Deeds and Contracts.

6. HUSBAND AND WIFE—Community Property—Wife's Knowledge of Transaction, When Sufficiently Proved.—If a deed is left in escrow pursuant to an agreement between the grantee and the husband of the grantor, and his wife goes to the depository and signs the deed, this is satisfactory evidence that she understood and was assisting to carry out the agreement. (Wash.) *Manning v. Foster*, 876.

7. HUSBAND AND WIFE—Contract Between.—Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. (Wis.) *Ryan v. Dockery*, 1025.

8. HUSBAND AND WIFE—Contracts Between for Personal Services—Consideration.—A promise by a husband to care for, nurse and support his wife after their marriage is a promise only to do that which the law requires of him in any event, and such promise is no consideration for an agreement by his wife to bequeath him her property. (Wis.) *Ryan v. Dockery*, 1025.

9. HUSBAND AND WIFE—Contracts Between—Nudum Pactum. A contract by a wife to bequeath to her husband her property in consideration of his contract to care for, nurse and support her after their marriage, is a nudum pactum, and no recovery can be had thereon. (Wis.) *Ryan v. Dockery*, 1025.

Community and Separate Property.

10. HUSBAND AND WIFE—Presumption that Property Conveyed to Either is Community Estate.—Prior to the adoption of the amendment to section 164 of the Civil Code of California, property conveyed to either husband or wife, after their marriage, by a conveyance other than a gift was presumed to be community property. (Cal.) *Nilson v. Sarment*, 91.

11. HUSBAND AND WIFE—Statute Relating to Community Property, When not Retroactive.—The amendment to the Civil Code of California declaring that property conveyed to a wife is presumed to vest the property in her as her separate estate is not retroactive and has

no application to property conveyed to her prior to such amendment. (Cal.) Nilson v. Sarment, 91.

12. HUSBAND AND WIFE—Gift not to be Presumed from the Fact that the Property was Conveyed to Her.—If real property is paid for out of the community estate, but the conveyance is taken in the name of the wife, no presumption can be indulged that it was purchased as a gift to her, when the only testimony on the subject is that of the husband to the effect that he purchased the property as a home for himself and family, and that he did not intend to make a gift. (Cal.) Nilson v. Sarment, 91.

13. HUSBAND AND WIFE—Property Conveyed to Her Encumbered by a Mortgage Which the Deed Stipulates She shall Pay.—The fact that a conveyance to a married woman declares that the land is encumbered by a mortgage, to be paid by the grantee, does not show that the property is her separate estate, nor support a finding that it was given to her by her husband, if he paid all the consideration for the conveyance, including the sum required to satisfy the mortgage. (Cal.) Nilson v. Sarment, 91.

14. HUSBAND AND WIFE—Taking Insurance in Her Name, Effect of as Evidence of a Gift.—The taking of insurance in the name of a wife on real property conveyed to her does not tend to show that it was her separate estate, or that her husband intended it as a gift to her. (Cal.) Nilson v. Sarment, 91.

15. HUSBAND AND WIFE—Giving of a Trust Deed Providing for a Reconveyance to Her.—Though a conveyance is taken in the name of a wife, the subsequent giving of a trust deed on the property by the husband and wife to secure the payment of a note, with a stipulation that, on the payment of the note, a reconveyance is to be made to her, and, on the sale of the property, any surplus is to be paid to her, does not tend to prove that the property was her separate estate. (Cal.) Nilson v. Sarment, 91.

16. HUSBAND AND WIFE—Estoppel to Show that the Property was not Separate Estate.—The fact that husband and wife joined in a trust deed to secure a debt stipulating that on a sale of the property the proceeds over the payment of the debt should be paid to her, and that on the payment of the debt without sale, that the trustee should reconvey to her, does not estop him, in a subsequent controversy with her grantee, from showing that the property was not her separate estate, but belonged to the community, especially where it appears that the purchaser had not relied on the provisions of this deed, but took a covenant of warranty to protect himself against her husband. (Cal.) Nilson v. Sarment, 91.

17. HUSBAND AND WIFE—Duty of Purchaser to Inquire Whether Property Belongs to the Community.—One who knows that the person of whom he is about to purchase real property is a married woman is bound to inquire and ascertain at his peril whether the property is community estate, in the absence of a statute in force at the time of its acquisition making a conveyance to her presumptive evidence that it was her separate estate. (Cal.) Nilson v. Sarment, 91.

See Bastards; Marriage; Mechanics' Liens, 8, 9.

Note.

Husband and Wife. See Community Property.

covenants, liability of husband on wife's, 371.

IDEM SONANS.

See Names.

ILLEGITIMACY.

See Bastards.

Note.

Indemnity Contracts, frauds, whether and when within the statute of,
512-516.

limitation of actions upon, 946.

INDICTMENTS.

INDICTMENT—Immaterial Variance—Idem Sonans.—Where an indictment for bigamy charges the name of the defendant's wife to be "Sarah Staunton," but the proof shows her name to be "Sarah Stanton," there is no material variance. (Ill.) *People v. Spoor*, 197.

INJUNCTION.

1. EQUITY—Injunction.—An injury is irreparable if it may not be adequately compensated in damages, or where there exists no certain pecuniary standard for the measurement of the damages, due to the nature of the right or property injured. (Mich.) *Ainsworth v. Munoskong Hunting etc. Club*, 474.

2. INJUNCTION to Protect Right to Hunt in the Navigable Waters of the State.—A citizen entitled to hunt on one of the navigable waters of the state is entitled to an injunction against a club and its members who have interposed, and intend to further interpose, to prevent the exercise of such right. (Mich.) *Ainsworth v. Munoskong Hunting etc. Club*, 474.

3. INJUNCTION PENDENTE LITE, Discretion of the Court Respecting.—It is in the discretion of the judge whether he will issue, continue or dissolve an injunction pendente lite, and what terms, if any, he will impose on either party, and whether he will require a bond to be given as a condition to such issuing. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

4. INJUNCTION, Assessment of Damages for Wrongfully Issuing It, When may be Refused.—Where no bond was required or given to authorize the issuing of an injunction, the court issuing may, on its dissolution, refuse to make any assessment of the damages suffered from such issuing. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

See Executions, 4, 5; Waters and Watercourses, 2.

INSANE PERSON.

See Conversion, 2.

INSURANCE.

Of Property.

1. INSURANCE—Principal and Agent.—If an agent in the possession of goods has agreed to become absolutely and unconditionally liable to his principal to the extent of their value for their loss or damage by fire, and he procures insurance upon them in his own name, such insurance is for his own benefit and advantage, to the exclusion of his principal. (Neb.) *David Bradley & Co. v. Brown*, 647.

2. INSURANCE—Principal and Agent—Disposition of Proceeds of Insurance.—If an agent in the possession of goods has agreed to become unconditionally liable to his principal for their value, and he procures insurance upon them in his own name, money due from the insurance company on account of a loss under the policy is not a trust fund for the benefit of the principal, but an indebtedness to such agent, subject to his disposition, and liable for his debts in like man-

ner as other property of his estate. (Neb.) *David Bradley & Co. v. Brown*, 647.

3. FIRE INSURANCE—Unfair Conduct in Receiving Proof of Loss.—Where an insured sends proof of loss to the company, stating that he will correct it if insufficient, but the company makes no reply to this nor to two subsequent letters, and several weeks later its agent writes that the proofs are so carelessly made that he has not felt called upon to enlighten the insured, and in reply to a subsequent demand the agent states that he neither denies nor admits liability, and refers the insured to his policy for information, the conduct of the company is unfair, and amounts to a denial of liability and a waiver of a provision in the policy that losses shall not be payable until the expiration of sixty days after receipt of proof of loss. (Md.) *Springfield Fire and Marine Ins. Co. v. Reynolds*, 379.

Of Life.

4. INSURANCE, LIFE—Forfeiture for Nonpayment of Premium Note.—If in part payment of a premium for issuing a life insurance policy the assured gives his promissory note, and the policy contains a condition that if the note is not paid at maturity the policy shall be void, the failure to pay such note at maturity terminates the right to recover on the policy. (Wash.) *Iles v. Mutual Reserve Life Ins. Co.*, 886.

5. INSURANCE, LIFE—Estoppel, When does not Result from an Attempt to Collect a Note Given for Premium.—If, by the condition of a policy of life insurance it is forfeited and rendered void by the failure to pay a premium note at maturity, the forfeiture is not waived by placing the note in the hands of an attorney and making efforts to collect it, if the policy contains a provision that no contract, alteration of contract, waiving of forfeiture or granting of credits shall be valid unless in writing, signed by the president or vice-president and one other officer of the company. (Wash.) *Iles v. Mutual Reserve Life Ins. Co.*, 886.

See Benefit Associations; Principal and Surety.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—Local Option Law—Sale of Goods C. O. D.—If a person living in a county wherein the local option law is in force orders liquors shipped to him C. O. D. from another county, and they are shipped accordingly, the sale takes place in the county whence the shipment was made, and therefore the seller is not answerable to a prosecution for selling the goods in the county where they are received and paid for by the purchaser. (Mo.) *State v. Rosenberger*, 580.

2. LIQUORS—Want of Knowledge of Intoxicating Character When Sold.—On a prosecution for the violation of a local option law, testimony is admissible that the defendant believed the beverage sold was not intoxicating. (Tex. Cr.) *Reed v. State*, 765.

3. LIQUORS—Evidence.—On a Prosecution for the Violation of a Local Option Law, the statute makes admissible an examined copy of the internal revenue collector's books, but there is no statutory authority for the introduction of his certificate. (Tex. Cr.) *Reed v. State*, 765.

4. LIQUORS—Sale in Violation of Local Option Law.—All parties participating in the sale of liquors in violation of a local option law are principals. (Tex. Cr.) *Reed v. State*, 765.

INTOXICATION.

See Homicide, 3; Jury.

JUDGMENTS.

In General.

1. A JUDGMENT RENDERED Against a Corporation on the Striking Out of Its Answer in a case where the court was not authorized to take that action is void, and will be annulled on certiorari. (Cal.) *American De Forest Wireless Tel. Co. v. Superior Court*, 125.

2. JUDGMENT ENTERED upon One Ground cannot be Supported on Another.—The rendition of judgment against a foreign corporation on the ground that it had not filed a certified copy of its articles of incorporation with the Secretary of State or the county clerk cannot be sustained on the ground that it had not filed with such secretary a designation of a person residing within the state upon whom process against it might be served. (Cal.) *American De Forest Wireless Tel. Co. v. Superior Court*, 125.

Entry After Death.

3. JUDGMENTS—Entry of Decree After Death of Plaintiff—Collateral Attack.—If an action has proceeded to decree without objection after the death of plaintiff and after the jurisdiction of the court has attached, it is a mere irregularity, and the decree is not open to collateral attack. (Neb.) *Wardrobe v. Leonard*, 619.

4. JUDGMENTS—Entry After Death of Party.—If a decree is entered in favor of a party to an action after his death and after the jurisdiction of the court has attached, the failure of the other party to have the decree vacated within three years after notice of the decree renders it as valid and binding as any other judgment. (Neb.) *Wardrobe v. Leonard*, 619.

Entry Nunc Pro Tunc.

5. JUDGMENT.—The Office of a Nunc Pro Tunc Entry is to record some act of the court done at a former term which was not then carried into the records. Such entry is retrospective and has the same effect as if entered at the time when rendered, except as to third parties having intervening rights. (Or.) *Davidson v. Richardson*, 738.

6. JUDGMENT—Nunc Pro Tunc Entry—Intervening Right.—To entitle a person to protection, on the ground of his intervening rights, from the effect of the nunc pro tunc entry of a judgment, he must be in the position of a bona fide purchaser. (Or.) *Davidson v. Richardson*, 738.

7. JUDGMENT—Nunc Pro Tunc Entry—Intervening Dower.—A woman whose dower right has been enlarged by statute passed after the confession of judgment by her husband is not an intervening party against whose rights the judgment cannot thereafter be entered nunc pro tunc. (Or.) *Davidson v. Richardson*, 738.

Res Judicata.

8. RES JUDICATA—Indivisible Demand.—If an action is brought to recover a sum claimed to be due as the purchase price of real property and of shares of stock and is determined in favor of the defendant on the ground that its agreement to purchase such stock is void, there can be no recovery in a subsequent action brought for the

real property alone. The contract cannot be divided after suit. (Wash.) *Brechlin v. Night Hawk Mining Co.*, 863.

9. **RES JUDICATA**—Judgment, When on the Merits.—A Judgment Entered on the Ground that the Complaint does not State a Cause of Action is in the nature of a judgment on demurrer, and is, therefore, on the merits, and may sustain the plea of *res judicata*. (Wash.) *Brechlin v. Night Hawk Mining Co.*, 863.

10. **RES JUDICATA**, When Controls the Effect of Evidence.—Testimony tending to prove that a father agreed to convey a farm to his son affords no basis for a verdict, if in a prior chancery suit the determination has been made that the right to a conveyance never existed. (Mich.) *In re Colburn's Estate*, 479.

Correcting or Setting Aside.

11. **JUDGMENTS**—Setting Aside After Term.—If a judgment is rendered at one term of the court, the court cannot against objection set aside either the judgment or the findings on which it was based at a subsequent term merely because error has been committed. (Wis.) *Comstock v. Boyle*, 1033.

12. **JUDGMENTS**—Correcting After Term.—If the court pronounces judgment from the bench, and all that remains to be done is the clerical duty of reducing the judgment to writing or entering it, or both, the judicial act is complete, and if a mistake is made in the entry so that the judgment as entered does not accord with the judgment ordered, such mistake may be corrected at a subsequent term. but no change can be made after the trial term in the judgment actually ordered on the ground that it is erroneous. (Wis.) *Comstock v. Boyle*, 1033.

Note.

Judgments against corporations after their dissolution, 632.

collateral attack upon by proving the death of a party before the commencement of the action, 632, 633.

Judgments for or Against Deceased Persons are erroneous, 626, 628.

are voidable, 627.

assailing by writ of error *coram nobis* or *coram vobis*, 630, 631.

attack on, how may be made, 630.

by confession, 628.

by default, 628, 629.

collateral attack upon, 626.

correction of, when must be by writ of error, 625.

difference in effect between those for and those against deceased persons, 624, 627.

effect of at the common law, 623.

English statute validating, 623, 624.

English statute validating was not in force in America, 624, 625.

in partition proceedings, 630.

nunc pro tunc entry of, 631.

on service of summons by publication, 628.

rendered on appeal, 626.

states in which are held void, 627, 629.

when forbidden by statute are void, 630.

where one of several parties dies before the entry, 638.

where the court obtained jurisdiction in the lifetime of the decedent, 625.

where the decedent was a nominal party merely, 637.

where the fact of death appears by the record, effect of on appeal, 637.

where the party died on the same day the judgment was rendered, 636.

Judgments for or Against Deceased Persons, where the party dying was served by publication, 635, 637.
 where the party was dead before the commencement of the action, 631-635.

JUDICIAL SALES.

1. JUDICIAL SALES to Next Friend—Reversal of Decree.—The next friend to infant complainants in proceedings which result in a decree under which a sale of land is made, and at which he becomes the purchaser, is not a stranger to the suit, but a real actor, and, in effect, stands in the shoes of the complainants, and cannot be such a bona fide purchaser as to render his title good, as against the real owner upon the reversal of the decree. (Ala.) *Carroll v. Draughon*, 51.

2. APPEAL AND ERROR—Order Brought Up by the Appeal.—An appeal from an order confirming a sale of real estate and directing the commissioner to prepare a new deed for the purpose of correcting a description in a deed previously issued in the same cause brings up all proceedings which led to such order, including an order granting the petition for the vacation of the order of confirmation and for the correction of the error in the first deed. (Mich.) *Walsh v. Colby*, 546.

3. JUDICIAL SALE—Power to Correct an Error After Confirmation.—After a sale under a decree of foreclosure and the confirmation of such sale, the court has power to permit the commissioner making the sale to file a new report showing a mistake in his first report in describing the property sold, and thereupon to set aside the first order of confirmation and confirm the sale as disclosed by the second report, the ultimate object and effect of these proceedings being to make the record speak the truth. (Mich.) *Walsh v. Colby*, 546.

4. JUDICIAL SALE EN MASSE, Confirmation of, When not Improper.—The confirmation of a sale will not be denied nor held erroneous on the ground that the lots were sold as one parcel and not separately, when it appears that the decree of sale was in the form prescribed by the statute, and no issue is made that the premises could be sold in parcels without injury to the parties. The presumption is that the commissioner followed the mandate of the decree and of the law. (Mich.) *Walsh v. Colby*, 546.

5. JUDICIAL SALE, Correcting Deed After the Time Allowed by Law for Filing It with the Register of Deeds.—If a foreclosure sale is made pursuant to the directions of a decree, and the deed is filed with the register of deeds within twenty days after the sale as prescribed by statute, and it subsequently appears on petition and application that the report of the sale by the commissioner did not describe the lots sold correctly, the court, on application and petition, may set aside the first order of confirmation and direct the confirmation of the sale as actually made, and authorize the issuing of a new deed properly describing the property sold, though more than twenty days have elapsed since the sale was made. (Mich.) *Walsh v. Colby*, 546.

JURISDICTION.

See Courts; Patents; Process.

JURY.

1. TRIAL—New Trial—Intoxication of Juror.—The fact that a juror, during the trial of a case or while the jury was deliberating on their verdict, drank intoxicating liquors is not ground for a new trial unless there is some reason to suppose that such liquor was drunk at such time or in such quantity as to unfit the juror for the per-

formance of his duties, or unless it was furnished by the party in whose favor the verdict was afterward rendered, or unless the circumstances were such as to create a reasonable belief that the drinking may have improperly influenced the verdict. (Ala.) Alabama Lumber Co. v. Cross, 55.

2. **TRIAL—New Trial—Intoxication of Juror—Evidence.**—If a party makes a motion for a new trial on the ground that one of the jurors was in such a state of intoxication at the time of the final consideration of the case that he could not properly consider it, he, to be successful, must affirmatively show that he was not aware of the misconduct or disqualification of the juror before the verdict was rendered. (Ala.) Alabama Lumber Co. v. Cross, 55.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—Assignment of Lease.**—If a lease is in the nature of a personal contract and not assignable without the consent of the lessors, an attempted assignment works a forfeiture and authorizes the lessor to re-enter and take possession. (Or.) Myer v. Roberts, 733.

2. **LANDLORD AND TENANT—Right to Crops After Re-entry.**—A lessor who re-enters after a forfeiture is entitled to the crops then growing upon the premises. (Or.) Myer v. Roberts, 733.

3. **LANDLORD AND TENANT—Right to Crops by Lessor Out of Possession.**—The rule that the owner of land out of possession is not entitled to annual crops grown and severed from the soil by an occupant cannot be invoked by the assignee of a tenant, who secures and maintains possession by an injunction wrongfully issued after the lessor had lawfully re-entered for condition broken in making the assignment. (Or.) Myer v. Roberts, 733.

4. **LANDLORD AND TENANT—Receipt of Crop as Evidence of Tenancy.**—The receipt by the owner of land of a part of a crop grown thereon is not evidence of the relation of landlord and tenant, if he denies the right of the occupant to possession and claims title to the entire crop. (Or.) Myer v. Roberts, 733.

LAPSE OF LEGACY.

See Wills, 14-17.

LAW OF CASE.

See Appeal and Error, 1.

LEASES.

See Landlord and Tenant; Mines and Minerals.

Note.

Leases, tenant's liability of on covenants, when he does not sign, 373.

Legitimacy. See Children.

LIBEL AND SLANDER.

In General.

1. **LIBEL—Question of the Application of, When for the Jury.**—Whether an alleged libel was published of the plaintiff is a question for the jury, where extrinsic evidence is necessary to show to whom it applied. (Mass.) Ellis v. Brockton Publishing Co., 454.

2. **LIBEL—The Republication of the Identical Libel** is not another cause of action, but is an aggravation of a pre-existing cause, and competent evidence of malice. (Ark.) Murray v. Galbraith, 1078.

3. LIBEL—Splitting Up Cause of Action.—Where there is a repetition of the libel before the commencement of an action, another and separate action will not lie for such repetition. (Ark.) *Murray v. Galbraith*, 1078.

4. LIBEL—Damages Recoverable.—In an action for libel the damages recoverable include damages for wounded feelings and loss of reputation, and this rule is not abrogated by a statute declaring that "unless the plaintiff proves actual malice or the want of good faith, or a failure to retract or to offer to retract as aforesaid, he shall recover damages only for the actual injury sustained, but in no action of libel shall exemplary or punitive damages be allowed." (Mass.) *Ellis v. Brockton Publishing Co.*, 454.

5. LIBEL, Claim of Privilege, When a Question of Law.—When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged or not. (Cal.) *Dauphiny v. Buhne*, 136.

6. LIBEL, Justification, When may be Considered in Aggravation of Damages.—The court should instruct the jury that if defendant in an action for libel reiterated the alleged libel in his answer, but offered no evidence to prove the truth of his charge, and the jury are satisfied that it was made with a knowledge of its falsity, and malicious, and not in good faith, such plea of justification is an aggravation of the wrong done to the plaintiff and may be considered in assessing the damages. (Cal.) *Dauphiny v. Buhne*, 136.

7. LIBEL, Instruction Respecting Damages, When Improper.—The court, on the trial of an action for slander, should not instruct the jury that an honest mistake made in an honest attempt to enlighten the public must reduce the damages to the minimum if the fault itself is not serious. It is not the province of the court to say to the jury that the damages shall be so reduced in a case where more than the minimum may be awarded as actual damages. (Cal.) *Dauphiny v. Buhne*, 136.

Publication of Judicial Proceedings.

8. LIBEL—Publication of Judicial Proceedings.—At the common law a publication of a fair, correct and good faith report of a judicial proceeding was privileged equally in favor of everyone, newspaper as well as, but no more than, others. (Wis.) *Ilsley v. Sentinel Co.*, 928.

9. LIBEL.—The Publication of Pleadings and other preliminary papers filed in the clerk's office, which have not yet been called to the attention of some judicial officer and to which no judicial action has been invited, is not within the privilege accorded the publication of judicial proceedings, for at that stage of the proceedings the public has no concern therewith. (Wis.) *Ilsley v. Sentinel Co.*, 928.

10. LIBEL—Publication of Court Proceedings.—Conceding that a report of a judicial proceeding, to be privileged, need not be by way of quotations, but may be condensed and expressed in the words of the reporter, yet that does not permit him to declare as on his own authority the existence of facts which are only asserted in the proceedings. He is limited to reporting the fact of the assertion. (Wis.) *Ilsley v. Sentinel Co.*, 928.

Publication Concerning Officers or Candidates for Office.

11. LIBEL PER SE.—To Publish that the Commissioners of a Graveling District have charged their neighbors and fellow property owners a sum greatly in excess of the cost of the material charged for is libel per se, and the charge is not privileged. (Ark.) *Murray v. Galbraith*, 1078.

12. **LIBEL of Candidate for Office.**—One may not assail the character of a candidate for office by charging him with criminal misconduct, and then escape liability on the ground that the charge was made with good intention and for justifiable ends, without malice and under the honest belief that it was true, and that the occasion of his candidacy called for the publication. (Cal.) *Dauphiny v. Buhne*, 130.

13. **LIBEL.**—Libelous Statement of Facts Respecting Candidates for Office can be justified only by proving their truth. (Cal.) *Dauphiny v. Buhne*, 136.

14. **LIBEL** is no More Justifiable when published about a candidate for public office than if published about him on any other occasion. (Cal.) *Dauphiny v. Buhne*, 136.

15. **LIBEL.**—An Article is Libelous on Its Face if it charges the plaintiff with official corruption and with dishonestly agreeing to accept personal benefits as a consideration to use his official office upon a matter before a legislative body of which he was a member. (Cal.) *Dauphiny v. Buhne*, 136.

16. **LIBEL.**—Charge, When Libelous Per Se.—A charge against a public officer imputing want of integrity or corruption in the discharge of his official duties is actionable of itself. (Cal.) *Dauphiny v. Buhne*, 136.

Publication of Retraction.

17. **LIBEL.**—The Publication of the Retraction of a Libel is properly admitted in evidence, irrespective of any statute authorizing such admission, if made immediately upon learning of the libelous publication. It tends to establish the absence of malice, and may have the effect of showing that damages were thereby diminished. (Mass.) *Ellis v. Brockton Publishing Co.*, 454.

18. **LIBEL.**—The Publication of the Retraction of a Newspaper Libel, however complete and prompt, does not necessarily reduce the damages recoverable to a nominal sum, nor exclude a recovery for mental suffering. (Mass.) *Ellis v. Brockton Publishing Co.*, 454.

LIBERTY OF SPEECH AND PRESS.

See Constitutional Law, 1-4.

LICENSE TAX.

OCCUPATION TAX—Unconstitutional Discrimination.—A statute imposing an occupation tax upon persons engaged in the business of taking assignments of wages not yet due, but exempting persons who take such assignments in payment or as security for the purchase price of necessities, insurance premiums and homesteads, is unconstitutional. (Tex. Cr.) *Owens v. State*, 772.

See Hawkers and Peddlers.

LIENS.

See Mechanics' Liens.

LIFE TENANT.

LIFE TENANT—Security for Preservation of Estate.—If a testator, in creating a life estate with remainder over, has not required the life tenant to give security for the benefit of the remaindermen, courts are not authorized to require it in the absence of any showing of danger or liability to waste, for otherwise the intention of the testator that the life tenant shall enjoy the property will be frus-

trated; yet when the estate consists of moneys or securities, courts act with greater caution in guarding the interests of the parties than in other cases, and may require security of the life tenant if he is not kindly disposed toward the remaindermen, and does not exhibit the prudence in managing the property essential to its preservation. (Iowa) *Scott v. Scott*, 277.

See Remainders.

LIMITATION OF ACTIONS.

1. STATUTE OF LIMITATIONS—When Commences to Run.—The statute of limitations commences to run only from the time the cause of action accrues, and a cause of action does not accrue until the person owning it can successfully maintain an action thereon; the unfailing test is to decide upon the precise point of time when the owner of the right can institute a suit to enforce it and prosecute the same to a successful result. (Wis.) *In re Estate of Hanlin*, 839.

2. LIMITATION OF ACTIONS Against the Estates of Decedents. The statute of limitations does not begin to run when no administration exists on the decedent's estate at the time the cause of action accrued. As against the estate, the statute of limitations does not begin to run until the letters of administration issued. (Cal.) *Hibernia Savings etc. Soc. v. Farnham*, 129.

3. LIMITATION OF ACTIONS When One of the Comakers of a Note Secured by a Mortgage Dies.—If a husband and wife execute their joint note and a mortgage of real property to secure its payment, and she afterward dies, there is no doubt that the statute of limitations runs against the husband, notwithstanding there is no administration of the wife's estate, but if he is her grantee and joined in the execution of the mortgage, it may, nevertheless, be foreclosed against him or his successor in interest, provided the judgment does not undertake to fix any judgment against him. (Cal.) *Hibernia Savings etc. Soc. v. Farnham*, 129.

4. LIMITATION OF ACTION to Foreclose Mortgage Against Grantee in an Unrecorded Conveyance.—By the Civil Code of California, a conveyance of real property is void as against any subsequent purchaser or mortgagee of the same property in good faith and for valuable consideration whose conveyance is first duly recorded, and the statute of limitations in favor of the grantee under such unrecorded conveyance does not begin to run against an action to foreclose the mortgage until a conveyance is recorded or the mortgagee has actual notice of it. (Cal.) *Hibernia Savings etc. Soc. v. Farnham*, 129.

5. LIMITATION OF ACTIONS—Town Warrants.—Where the authorities of a town repudiate its warrants, and, because of their alleged invalidity, refuse to provide the special fund out of which they are payable, the statute of limitations commences to run against the holders. (Colo.) *Howe v. Town of Gunnison*, 181.

6. LIMITATION OF ACTIONS.—An Acknowledgment of an Indebtedness which will toll the statutes of limitations should be made to the creditor, or some one representing him, and not to a stranger. (Neb.) *Wallber v. Caldwell*, 675.

7. LIMITATION OF ACTIONS—Acknowledgment of a Debt.—The Recital in a Deed that the conveyance is made "subject to mortgage" is not such an acknowledgment of the mortgage indebtedness as will stay the running of the statute of limitations. (Neb.) *Wallber v. Caldwell*, 675.

See Adverse Possession; Covenants, 6.

Note.

- Limitation of Actions, damages, accrual of substantial after accrual**
 of nominal does not extend, 944-954.
 in actions against public officers, 949, 950.
 in actions against recorders for false searches of title, 949.
 in actions for continuous or repeated injuries, 953.
 in actions for interference with lateral support, 954.
 in actions for interfering with the flow of water, 954.
 in actions for malpractice of physicians, 951.
 in actions for negligence and other torts, 952.
 in actions for nuisances, 953.
 in actions for the negligence of attorneys, 950.
 in actions on misrepresentation as to encumbrances, 948.
 on agreements to furnish abstracts of title, 949.
 on covenants against indemnity, 946-948.
 on covenants of seisin, 947.
 on indemnity contracts, 946.
 on the breach of a contract to carry and delivery goods, 946.
 on the breach of a contract to insure property or to cancel insurance, 945.
 on the breach of a warranty of quality on the sale of personal property, 946.
 on the breach of a warranty of title on the sale of personal property, 945.
 time when cause of action is deemed to accrue if on a contract, 944.
 where the damages are nominal at the breach and substantial damages afterward develop, 944.

LIQUORS.

See Intoxicating Liquors.

LIS PENDENS.***In General.***

1. **LIS PENDENS—Purpose of the Rule.**—The rule that a pendente lite purchaser takes title to property involved in litigation, subject to the judgment finally entered, has been adopted out of considerations of public policy and to inspire confidence in titles based upon the judgment of a court. (Neb.) *Munger v. Beard & Brother*, 688.
2. **LIS PENDENS.**—The Rule of Lis Pendens is not Intended to prevent the sale of property, but to hold it within the jurisdiction of the court for the purpose of granting the relief sought. (Neb.) *Hulen v. Chilcoat*, 681.
3. **LIS PENDENS.**—Pending Litigation Neither Party can Alienate, as a general rule, the property in controversy so as to affect the rights of the other. (Neb.) *Hulen v. Chilcoat*, 681.
4. **LIS PENDENS—Impounding Property not Subject to Lien.**—By the filing of a notice of lis pendens a creditor does not impound property of his debtor for the payment of a debt which is neither a general nor specific lien upon the property. (Neb.) *Hulen v. Chilcoat*, 681.
5. **LIS PENDENS—Purchaser Pendente Lite.**—Where, pending an action of foreclosure, a third person brings ejection against the mortgagor and has judgment for possession, the purchaser at foreclosure is not bound or affected by that judgment. (Neb.) *Bannard v. Duncan*, 661.
- 5a. **LIS PENDENS—Judgment of Foreclosure and Sale Thereunder—Effect of, No Notice of the Action Having been Filed.**—If a suit

is brought to foreclose a mortgage, and a decree is entered and a sale made thereunder, such decree is from the date of its entry constructive notice to anyone purchasing the property both of the decree itself and all proceedings taken for its enforcement. Therefore, a subsequent purchaser from the mortgagor is chargeable with notice of the decree and sale, though neither the certificate of sale nor any notice of the pendency of the action was filed, and on the execution of a conveyance pursuant to the foreclosure sale, the grantee takes title paramount to that of the mortgagor in good faith for value and without actual notice of the foreclosure or the sale. Nor is it material that the latter grantee took possession of the property and made valuable improvements thereon. (Wash.) *Young v. Davis*, 910.

Unrecorded Titles.

6. **LIS PENDENS**—**Constitutionality of Statute.**—The amendment to section 85 of the code of Nebraska in 1887, which brings within the rule of lis pendens persons taking title intermediate the filing of a petition and the service of summons, and also persons holding under unrecorded titles, is not unconstitutional. (Neb.) *Munger v. Beard & Brother*, 688.

7. **LIS PENDENS**—**Holders of Unrecorded Titles.**—The purpose of the amendment to section 85 of the Nebraska code, whereby the rule of lis pendens is extended to persons holding unrecorded titles, is not to make them parties to the action nor to summon or serve them with notice, but rather to provide a means whereby they may be estopped from asserting their secret interests to the property in litigation against the judgment finally entered. (Neb.) *Munger v. Beard & Brother*, 688.

8. **LIS PENDENS**—**Unrecorded Titles Known to Plaintiff.**—Persons holding an unrecorded interest are not affected by the filing of a lis pendens if the plaintiff has actual notice of their interests; in such case his duty is to make them parties that their rights may be litigated. (Neb.) *Munger v. Beard & Brother*, 688.

Amended and Supplemental Pleadings.

9. **LIS PENDENS.**—**An Amendment to a Pleading** which more fully sets forth the original cause of action will relate to the institution of the suit, and will not relieve purchasers pendente lite. (Neb.) *Hulen v. Chilcoat*, 681.

10. **LIS PENDENS.**—**An Amended or Supplemental Petition** setting forth a new or different cause of action does not relate to the filing of the original petition so as to charge property in the hands of a pendente lite purchaser. (Neb.) *Hulen v. Chilcoat*, 681.

11. **LIS PENDENS.**—**Where an Amended or Supplemental Petition** setting forth a new or different cause of action is filed, the lis pendens thereby created does not relate to the commencement of the action so as to affect intervening rights. (Neb.) *Hulen v. Chilcoat*, 681.

LIVERY-STABLES.

See *Municipal Corporations*, 4.

LOCAL OPTION.

See *Intoxicating Liquors*.

LOGGING.

See *Navigable Waters*, 5-8.

MAINTENANCE.

See *Husband and Wife*, 1-5.

MALICE.

See Assault, 3.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION.—A Conviction Procured by Fraud at the instance of the defendants is not a defense to an action against them for malicious prosecution. (Cal.) *Carpenter v. Sibley*, 77.

2. MALICIOUS PROSECUTION.—Fraud in Procuring Judgment of Conviction Need not be Extrinsic.—Though a suit to set aside or obtain relief in equity from a judgment on the ground of fraud in procuring it by false and prejudiced testimony cannot be maintained, this does not apply to an action for malicious prosecution where it is alleged that the prosecution was malicious and the conviction was procured by the defendants by the employment of testimony which they knew to be prejudiced. (Cal.) *Carpenter v. Sibley*, 77.

MARRIAGE.

1. VOID MARRIAGE.—Right of the Court to Annul and to Divide the Property of the Parties.—Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marital state pursuant to some ceremony or agreement recognized by the law of the place, which marriage would be legal but for the incompetency of the man, which he conceals from her, a status is created justifying the court in rendering a decree annulling the assumed marriage on the complaint of the innocent party, and where the woman has helped acquire and materially save the property, the court has jurisdiction, as between the parties, to dispose of it as in the case of granting a divorce. (Wash.) *Buckley v. Buckley*, 900.

2. JURISDICTION.—Publication of Summons in Statutes for the Annulment of Marriage.—The rules governing the publication of summons in divorce cases apply to statutes for the annulment of marriage. (Wash.) *Buckley v. Buckley*, 900.

See Bastards.

MASTER AND SERVANT.

1. MASTER AND SERVANT.—Relation of, When does not Exist Between a Railway Corporation and the Wife of an Employé in Charge of a Cooking Outfit.—Where a man is employed as a manager of the outfit or hotel cars of a railway corporation, and his duties include cooking for its employés, and a woman represented to be his wife is permitted to remain, and does remain, with him in such cars to do such cooking, with the knowledge and consent of the corporation, she is entitled to be regarded as its employé or servant, and to recover as such for personal injuries received through the negligence of other employés of the corporation. This is true though she does not receive pay for her services. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

2. MASTER AND SERVANT.—Contract Undertaking to Waive Right to Recover for Future Negligence.—A master cannot by contract in advance absolve himself from liability for injuries to a servant caused by the master's negligence. Such contract is void as against public policy. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

3. MASTER AND SERVANT.—Volunteer Assistant to Servant—Negligence of Master.—A person who volunteers to assist an employé, whether by request or otherwise, cannot thereby establish the relation of employer and employé so as to establish a claim for injury from negligence. (Ala.) *Grissom v. Atlantic etc. Ry. Co.*, 20.

4. MASTER AND SERVANT—Voluntary Assistant of Employé—Negligence of Master.—The mere fact that an employé has an assistant aiding him, with the consent and knowledge of the master, does not amount to an acquiescence on the part of the master in such volunteer's assuming the place of the employé, so as to render the master liable for negligence in causing an injury to such volunteer as his servant. (Ala.) *Grissom v. Atlantic etc. Ry. Co.*, 20.

5. EMPLOYÉ in Manufacturing Plant, Duty of to His Employer. One who is both a director and an employé of a manufacturing corporation owes it the duty to be vigilant in acquiring information as to all experiments made in its factory relating to machinery, and to communicate to the board of directors, or, at least, to the managing director, all material information he may obtain in regard to contemplated improvements or inventions, to enable his employer to act intelligently and promptly upon the subject of acquiring title to any new inventions or patents relating to its machinery, and is legally bound not to act in antagonism to the interests of the corporation. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

6. MASTER AND SERVANT—Injury to Subordinate Through Negligence of Superior Servant.—If one servant is placed in a position of subordination, and subject to the orders and control of another servant of a common master, and the subordinate servant without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the injured servant against the master. (Neb.) *Bell v. Rocheford*, 595.

7. MASTER AND SERVANT—Liability for Injury.—Defects in scaffolds, forms, and temporary structures, not forming part of the building, and serving only as aids in construction, are not defects of the structure due to its unfinished state. (Neb.) *Bell v. Rocheford*, 595.

See Contracts, 1, 2; Patent Rights, 2-7.

MECHANICS' LIENS.

1. MECHANIC'S LIEN for Sum Due for the Letting of Horses.—One who lets horses to a contractor to aid him in the construction of a railway does not become a subcontractor, nor entitled to a lien as such, nor as a person who bestows labor in the performance of such work. (Cal.) *Wood, Curtis & Co. v. El Dorado Lumber Co.*, 80.

2. MECHANIC'S LIEN—Who may not Claim to Enforce.—A Surety of a Contractor cannot claim a lien for material furnished at the request of such contractor. (Ark.) *Eureka Stone Co. v. First Christian Church*, 1088.

3. MECHANIC'S LIEN—Sureties, When not Released.—A Change in the Plans and Specifications does not release the sureties of the contractor when such change is authorized by the terms of his contract, or is not material. (Ark.) *Eureka Stone Co. v. First Christian Church*, 1088.

4. MECHANIC'S LIEN—Sureties, When not Released by an Extension of Time.—An extension of time for the completion of a building does not affect the obligation of a bond with sureties when such extension is without consideration, and not granted until after the expiration of the time when completion was required by such contract. (Ark.) *Eureka Stone Co. v. First Christian Church*, 1088.

5. MECHANIC'S LIEN—Owner's Rights, When not Affected by His not Reserving a Sum Prescribed by the Contract.—If the contractor for a building abandons his contract before completion so that the owner is required to finish it, his right to recover against the sureties for a sum expended in completing the building in excess of the contract price is not defeated by his failure to reserve ten

per cent of such price as required by contract. (Ark.) Eureka Stone Co. v. First Christian Church, 1088.

6. **MECHANIC'S LIEN** cannot be Asserted Against a Church Building. (Ark.) Eureka Stone Co. v. First Christian Church, 1088.

7. **MECHANIC'S LIEN**—Sureties of Contractor, When not Liable to a Materialman.—Under a bond with sureties for the construction of a building by the principal contractor, conditioned that the latter will perform his work and pay all materialmen, there can be no recovery against the sureties by one not a party to the bond or contract where the purpose apparently for them is to protect the obligee named therein. (Ark.) Eureka Stone Co. v. First Christian Church, 1088.

8. **MECHANIC'S LIEN** Against the Property of a Married Woman—Estoppel.—A wife by silently acquiescing in a contract made and signed by her husband only may estop herself from denying his authority or his ownership of the property. (Ark.) Harris v. Graham, 1110.

9. **MECHANIC'S LIEN**—Estoppel Against Married Woman.—If a husband contracts for improvements on his wife's property with one who believes him to be the owner, and she, knowing this fact, permits the work to be done without disclosing her title, she is estopped from setting up such title in defense of an action brought to enforce a mechanic's lien. (Ark.) Harris v. Graham, 1110.

10. **MECHANIC'S LIEN**.—Where There has been a Lack of Substantial Performance of the Contract by Contractor, he cannot establish a lien on the property. (Ark.) Harris v. Graham, 1110.

11. **MECHANIC'S LIEN**—Building, When does not Become the Property of the Land Owner.—Where a contractor agrees to build and deliver a house on the land of another, such house does not become the property of the land owner until it is finished in substantial conformity with the contract, or is accepted by him. (Ark.) Harris v. Graham, 1110.

12. **JURY TRIAL**—Condition of Verdict—When Should be Entered.—If, in an action to enforce a mechanic's lien, the jury returns a verdict for the defendant in a suit to enforce a mechanic's lien, but states to the court that it is intended that the plaintiff should be permitted to remove the building, and the defendant asks for a judgment on the verdict, and to have the records show that the plaintiff be permitted to remove such building, the court errs in refusing to enter judgment on the verdict. (Ark.) Harris v. Graham, 1110.

MINES AND MINERALS.

1. **LEASES**—Forfeiture of in Equity.—Where a lease provides that all machinery placed on the property by the lessee shall remain thereon until the royalties reserved are paid, and that the leased property shall be operated for mining purposes with due diligence, and if it remains idle for more than thirty consecutive days the lease shall be forfeited, the forfeiture arising from the removal of such machinery and the failure to prosecute such work will be enforced in equity. (Ark.) Cherokee Construction Co. v. Bishop, 1098.

2. **MINING FIXTURES**, When Remain the Property of the Lessee.—If a lease of a mine provides that the machinery placed thereon may be removed after the royalty reserved is paid, such machinery becomes a removable fixture, and remains the property of the lessee. The only interest which the lessor has therein is a lien for unpaid royalty. (Ark.) Cherokee Construction Co. v. Bishop, 1098.

See Constitutional Law, 24, 25.

MONOPOLIES.

See Constitutional Law, 9-13.

MORTGAGES.*Parol to Explain.*

1. **WRITING.**—**Extrinsic Evidence to Aid in the Interpretation of a Mortgage** is admissible only when the writing is ambiguous and capable of different constructions. (Wash.) *Bartlett Estate Co. v. Fairhaven Land Co.*, 856.

Assignment.

2. **MORTGAGE, Assignment of by Transfer of the Indebtedness.** A mortgage is a mere lien or security for the debt, and passes by the assignment of the debt without any formal assignment of the mortgage. (Wash.) *Bartlett Estate Co. v. Fairhaven Land Co.*, 856.

3. **MORTGAGE—Assignee of the Debt, Right of to Exercise an Option Reserved to the Mortgagee.**—The assignee of a debt secured by a mortgage takes the security with the debt and all the rights thereunder possessed by his assignor. Such assignee has, therefore, the right reserved to the mortgagee to declare the whole debt due on default in the payment of interest, and this is true though the mortgage does not purport to run in favor of, or to reserve powers in favor of, successors in interest of the mortgagee. (Wash.) *Bartlett Estate Co. v. Fairhaven Land Co.*, 856.

4. **MORTGAGEE—Effect of Exercising an Option to Declare the Whole Debt Due.**—If a mortgage provides that certain partial payments may be made and releases obtained on the doing of specified acts prior to the maturity of the mortgage, and because of a default on the part of the mortgagor, the assignee of the mortgage exercises an option to declare the whole of the indebtedness due, the mortgage is thereby matured for the purposes of foreclosure, and the right to make partial payments and receive releases terminates. (Wash.) *Bartlett Estate Co. v. Fairhaven Land Co.*, 856.

Foreclosure.

5. **MORTGAGES—Foreclosure—Action to Redeem.**—If the assignee of record of a decree of foreclosure procures the property to be sold thereunder after the death of the plaintiff and without any revivor of the action, the confirmation of the sale cures any irregularity in the decree as against an action to redeem. (Neb.) *Wardrobe v. Leonard*, 619.

6. **MORTGAGE FORECLOSURE—Rights of Purchaser.**—The purchaser of real estate under a mortgage foreclosure buys at his peril, but acquires all of the interest of the mortgagor and mortgagee in the premises as effectually as he would have done by deed from them. (Neb.) *Bannard v. Duncan*, 661.

7. **MORTGAGES—Attorneys' Fee.**—If the assignee of a mortgage declares the whole principal to be due for a default in the payment of interest and brings an action to foreclose, he is entitled to the allowance of attorneys' fees based on the entire amount of the indebtedness. (Wash.) *Bartlett Estate Co. v. Fairhaven Land Co.*, 856.

See Assignment; Chattel Mortgages; Executors and Administrators, 6; Judicial Sales; Limitation of Actions, 3, 4.

Note.

Multiplicity of Suits. See Equity; Quieting Title.

MUNICIPAL CORPORATIONS.*Ordinances.*

1. **MUNICIPAL ORDINANCE—Determination of Reasonableness.** The determination of whether an ordinance is reasonably necessary

for the protection of life and property is committed in the first instance to the municipal authorities. When they have acted and passed an ordinance, it is presumptively valid, and before a court will hold otherwise the unreasonableness or want of necessity of the measure should be made clearly to appear; it should be manifest that the discretion imposed on the municipal authorities has been abused by acting in arbitrary manner. (Neb.) *Peterson v. State*, 651.

2. **MUNICIPAL ORDINANCE.**—A Prosecution for the Violation of a city ordinance which embraces no offense made criminal by the laws of the state, though in form a criminal prosecution, is in fact a civil proceeding, so that clear and satisfactory evidence is sufficient to sustain a conviction, proof beyond a reasonable doubt not being required. (Neb.) *Peterson v. State*, 651.

Building Regulations.

3. **MUNICIPAL CORPORATIONS**—Building Regulations.—A municipal ordinance regulating the construction of buildings within the city, and providing that it shall not be lawful to erect a gas-tank or holder within the city without the written consent of all of the property owners within a radius of one thousand feet from the site of such tank or reservoir is unconstitutional and void. (Neb.) *State v. Withnell*, 586.

Regulation of Livery-stables.

4. **MUNICIPAL ORDINANCE** Relating to Livery-stable, When not Void for Indefiniteness.—An ordinance declaring it to be unlawful to locate, build, construct or occupy in any block in which two-thirds of the buildings are devoted to residence purposes, a livery, boarding or sale stable or private stable where more than five head of stock are kept within two hundred feet of any such residence on either side of the street, unless the owners of a majority of the lots in such block fronting on the street consent in writing, is not void on the ground that it is so ambiguous that it cannot be ascertained how many blocks must be considered in determining the number of residences in a block. (Wash.) *Spokane v. Camp*, 913.

5. **MUNICIPAL ORDINANCE**—When not Void as Delegation of Legislative Power—Livery-stable.—An ordinance prohibiting the keeping of a livery-stable in any block in which two-thirds of the buildings are used for residence purposes, unless the owners of the majority of the lots in the block consent in writing, is not a delegation of legislative power to such property owners, and will not be declared void on that ground. (Wash.) *Spokane v. Camp*, 913.

Property of City—Devotion to Private Use.

6. **MUNICIPAL CORPORATIONS**—Power to Devote Municipal Property to Private Use.—The power of municipal officers to hold and own real estate for public uses confers no power to apply it to any other than a public purpose. (Wis.) *Lakeside Lumber Co. v. Jacobs*, 1023.

7. **MUNICIPAL CORPORATIONS.**—Under the power of municipal boards to hold and own real estate for public uses, such boards act as a trustee for the public, and as such trustee, in exercising the public functions of the town, they can only deal with public property by devoting it to public uses. (Wis.) *Lakeside Lumber Co. v. Jacobs*, 1023.

8. **MUNICIPAL CORPORATIONS**—Authority to Devote Municipal Property to Private Use.—Municipal boards holding and owning real estate for public use have no power to confer on persons for their private use and benefit any right in or to any such property of the

town which is entirely unrelated to any of the governmental functions of the town. (Wis.) *Lakeside Lumber Co. v. Jacobs*, 1023.

9. MUNICIPAL CORPORATIONS—Power to Confer Special Privileges in Property of.—Any grant by a municipal board attempting to confer on private persons any interest or right in public property amounts to a diversion of such property from its rightful use, and is unauthorized and void. (Wis.) *Lakeside Lumber Co. v. Jacobs*, 1023.

10. MUNICIPAL CORPORATIONS—Grant of Special Privileges in Property of.—An attempt by a municipal board to grant to a private person a right to lay a steam-pipe across a town lot is an attempt to confer on him the right to devote such property to a merely private use, wholly unrelated to any public town purpose, is beyond the power of the board, void, and cannot be enforced. (Wis.) *Lakeside Lumber Co. v. Jacobs*, 1023.

Abutting Owners—Interference with Access to Street.

11. CONSTITUTIONAL LAW—Damage to Private Property—Interfering with Ingress and Egress to Public Street.—The right of ingress and egress to lots abutting on a public street is property, and interference with it is damage within the meaning of the provision of the state constitution declaring that no private property shall be taken or damaged for a public or private use without just compensation having first been made or paid into court for the owner. (Wash.) *Lund v. Idaho etc. R. R.*, 916.

12. AN INJUNCTION will be Granted Against the Construction and Maintenance of a Railroad materially interfering with the complainant's right of ingress and egress to his property abutting on a public street, and thereby diminishing its value and rendering less profitable his business thereon. (Wash.) *Lund v. Idaho etc. R. R.*, 916.

13. INJUNCTION Against Construction of Railroad—When may be Held in Abeyance.—In a suit to enjoin the construction and maintenance of a railroad in front of complainant's property, and thereby materially affecting the right of ingress and egress to and from a public street, an injunction may be held in abeyance for a stated period to allow the railroad company to commence condemnation proceedings. (Wash.) *Lund v. Idaho etc. R. R.*, 916.

Dangerous Streets and Premises.

14. PUBLIC STREET—Injury to Blind Man by Falling into Hole. Where a blind man walking along a street with which he is familiar and feeling his way with a cane falls into an unguarded hole dug by a telephone company, the question of his contributory negligence and of the negligence of the company is for the jury. (Md.) *Chesapeake etc. Tel. Co. v. Lysher*, 389.

15. MUNICIPAL CORPORATION, Liability of for Negligence in the Maintenance of Waterworks and Their Appliances.—If a municipality acquires and maintains a system of waterworks voluntarily and with a view of obtaining revenue therefrom, including a supply for fire protection, and the supplying of water for all uses and purposes, it is not to be regarded as acting in its governmental capacity, so as to relieve it from liability for the death of a human being due to negligence. (Utah) *Brown v. Salt Lake City*, 828.

16. MUNICIPAL CORPORATION—Liability for a Conduit Connected with Its Waterworks System.—Where a city maintains, in connection with its waterworks system, a conduit through which water is conducted for irrigation, for which no charge is made, it is required to exercise the same degree of care as any private owner would be. (Utah) *Brown v. Salt Lake City*, 828.

17. MUNICIPAL CORPORATION, Liability of for the Death of a Child Playing in a Conduit Connected with the Waterworks System.—Where a city maintained a conduit in connection with its waterworks system into which flowed the waters of a canal or stream, and boys, to the knowledge of the city authorities, resorted to such conduit to play games, though the conduit was dark for several hundred feet, and a boy entering such conduit was drowned, a verdict finding the municipality liable for his death will be permitted to stand. (Utah) *Brown v. Salt Lake City*, 828.

Presentation of Claims against City.

18. MUNICIPAL CORPORATION—Claim for Damages Resulting in the Death of a Human Being, Presentment of, When Necessary.—Where a statute provides for the presentment to the city council of claims for damages within a time specified after the happening of the damage, such presentment is a condition precedent to the maintenance of an action against such city. (Utah) *Brown v. Salt Lake City*, 828.

19. MUNICIPAL CORPORATION—Damages, Claim for, When Need not be Presented—Negligence.—Under a statute providing that all claims against a city for damages alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, culvert or bridge, or other negligence of the city authorities in respect to such street, culvert or bridge, shall be presented to the city council, in writing, within ninety days after the happening of such injury or damage, a claim need not be presented if it is for the death of a human being arising out of a defective condition of city property, owned and maintained in its corporate capacity merely and over which its dominion is the same as any other property owner. (Utah) *Brown v. Salt Lake City*, 828.

Nuisance—Animals and Stockyards.

20. MUNICIPAL CORPORATION—Power to Declare Nuisance.—A municipality has no power to declare anything a nuisance which is not such by statute or at common law. (Md.) *Mayor etc. of Hagerstown v. Baltimore etc. R. R. Co.*, 382.

21. MUNICIPAL CORPORATION—Stockyard as Nuisance.—A stockyard situated in a town is not a nuisance per se. (Md.) *Mayor etc. of Hagerstown v. Baltimore etc. R. R. Co.*, 382.

22. MUNICIPAL CORPORATION—Regulation of Domestic Animals.—A municipal ordinance making it unlawful for any person, without obtaining a permit, to herd or keep domestic animals, temporarily or permanently, within the city limits, at any point within two hundred and fifty feet of two or more residences, unless the animals are kept in an inclosed structure, is unconstitutional. (Md.) *Mayor etc. of Hagerstown v. Baltimore etc. R. R. Co.*, 382.

23. MUNICIPAL CORPORATION—Permit to Keep Animals.—An ordinance which invests the mayor and council with arbitrary power to grant or withhold a permit to keep domestic animals within the city limits is unreasonable and void. (Md.) *Mayor etc. of Hagerstown v. Baltimore etc. R. R. Co.*, 382.

See Health Regulations.

MURDER.

See Homicide.

NAMES.

NAMES—Doctrine of Idem Sonans.—The names "Sarah Staunton" and "Sarah Stanton" are idem sonans. (Ill.) *People v. Spoor*, 197.

NAVIGABLE WATERS.

In General.

1. **NAVIGABLE STREAMS.**—The Common Law of England that the only navigable streams are those in which the tide ebbs and flows has never been adopted in this country. (Or.) *Kamm v. Normand*, 698.

2. **NAVIGABLE WATERS.**—To Make a Stream a Highway, it must at least be navigable or floatable in its natural state, at ordinary recurring freshets, long enough to make it useful for some purposes of trade or agriculture. (Or.) *Kamm v. Normand*, 698.

3. **NAVIGABLE WATERS**—Aiding by Artificial Means.—A stream which is not a highway cannot be made so by the use of dams or other artificial means; nor can a stream, navigable in its natural condition at certain stages of the water, be made so at other times by artificial means, such as flooding and the like. (Or.) *Kamm v. Normand*, 698.

4. **NAVIGABLE WATERS.**—Unless a Stream is in Fact Navigable or floatable, it cannot be taken or used without the consent of the owner, except by due process of law, however beneficial it might be to private interest or to the public itself. (Or.) *Kamm v. Normand*, 698.

Floating Logs.

5. **NAVIGABLE WATERS**—Use of Stream for Floating Logs.—Streams which in their natural course are useful for the transportation of sawlogs during the whole or a part of each year are highways for that purpose. (Or.) *Kamm v. Normand*, 698.

6. **NAVIGABLE WATERS.**—A Stream Capable of Floating Logs unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose. (Or.) *Kamm v. Normand*, 698.

7. **NAVIGABLE WATERS**—Floating of Sawlogs.—A stream, to be navigable or floatable for sawlogs, must be capable, in its natural condition at ordinary recurring freshets, of being successfully and profitably used for that purpose; and a stream not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation. (Or.) *Kamm v. Normand*, 698.

8. **NAVIGABLE WATERS**—Stream Floatable for Short Period.—A stream which will carry sawlogs only at times of freshets which occur only a few times each year and continue but a few hours at a time is not navigable for the purpose of floatage, and cannot be made so by means of a splash dam or other artificial structures, without first acquiring the rights of the riparian proprietors. (Or.) *Kamm v. Normand*, 698.

Drawbridges—Negligence in Management.

9. **WATERS**—Navigable Streams—Drawbridges.—A drawbridge, constructed and maintained under and according to proper authority over navigable waters, is not an unlawful obstruction to navigation, but the owner is bound to provide for the safe and prompt passage of vessels through the draw. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

10. **WATERS**—Navigable Streams—Drawbridges, Control of—Damages.—Reasonable care and diligence in the use and control of a drawbridge over a navigable stream to permit the prompt passage of vessels is required of those in whose custody it is, and the want of

such care and diligence carries liability for proximately resulting injuries. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

11. **WATERS—Drawbridges—Signals for Opening—Statutory Regulations.**—A statute prescribing the signals to be given by a boat in approaching a drawbridge over a navigable stream and the amount which may be recovered for a failure to comply with such signals need not necessarily prescribe an exclusive remedy for a failure to obey such signals, as other signals may be agreed upon between boat owners and bridge proprietors of a desire to pass through the bridge, but in order to recover the penalty prescribed by the statute and caused by the negligence of the bridge-tender, the statutory signals must be given. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

12. **WATERS—Drawbridges—Signals for Opening—Damages for Failure to Comply with.**—Although a statute prescribes the signals to be given in approaching a drawbridge over a navigable stream for the opening of the draw and fixes the amount as a penalty to be recovered for a failure to obey such signals, craftsmen and bridge proprietors may establish and use a signal different from that provided by the statute, and a boat owner may recover damages for the negligent conduct of the bridge-tender in failing to open the draw, after he is by such signal given a reasonable time and advised by those in control of the approaching vessel of an intention to pass the draw. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

13. **WATERS—Drawbridges—Signals for Opening—Negligence.**—After giving the proper signal, those in charge of a boat have a right, in reliance upon the performance of the duty of opening of a draw in a drawbridge, to approach the bridge at such speed and in such control of the boat, and to such nearness to the bridge as reasonable prudence and care, under all of the circumstances, require, and if this duty is performed, negligence cannot be imputed to those in charge of the boat. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

14. **WATERS—Drawbridges—Signals for Opening—Negligence.**—A boat owner, after giving the proper signal for the opening of the draw in a drawbridge, cannot, in reliance upon the performance of his duty by the bridge-tender, disregard due prudence and care and speculate upon the hazards and dangers incident to the occasion and situation, but he must be at all times in such control of his vessel, which must be so equipped with the necessary and adequate machinery for control and operation as reasonable diligence requires, as that injury naturally resulting from the negligence of the tender may be, under skillful and prompt management, averted; otherwise the boat owner is guilty of contributory negligence. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

15. **WATERS—Drawbridges—Negligence—Question for Jury.**—In an action to recover for injuries to a boat caused by the negligence of a bridge-tender in failing to open the draw of a drawbridge in time, the issue of negligence on the part of the bridge-tender and contributory negligence on the part of those in charge of the boat is generally for the jury. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

16. **WATERS—Drawbridges—Negligence—Proximate Cause.**—If a drawbridge-tender is primarily negligent in failing to open the draw in time after the proper signal has been given, the operation of the boat by those in charge in undertaking to stop it in time to prevent injury, and the striking of the bridge, are not such intervening causes as to prevent the bridge-tender's original negligence from constituting the proximate cause of the injury, when those in charge of the boat are not guilty of contributory negligence. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

17. **WATERS—Drawbridges—Signals to Open—Negligence.**—If the proper signals to open the draw of a drawbridge are given by a boat

owner, the duty to safely and with due dispatch open the draw arises, and the failure of the bridge-tender to understand the proper signals or to hear them is negligence, and no excuse for a dereliction in duty. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

18. WATERS—Drawbridges—Collisions—Measure of Damages for Negligence.—In an action to recover for injury to a boat caused by collision with a drawbridge on account of the failure of the bridge-tender to open the draw in time upon proper signals, the measure of damages is remuneration to the boat owner for necessary repairs to the boat and the market value of its use during the time necessary to make such repairs. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

19. WATERS—Drawbridges—Collisions—Evidence—Res Gestae.—In an action to recover for injury to a boat caused by the negligence of the tender of a drawbridge to open the draw in time upon proper signals, evidence that on the next morning after the injury the bridge-tender visited the boat and inquired of her master if he would take a named sum and drop the matter, is not admissible as part of the *res gestae* of the immediate transaction for redress of which the action is brought. (Ala.) *Southern Ry. Co. v. Reeder*, 23.

See Game.

Note.

Navigable Waters are in England synonymous with tide waters, 710, 711.

are natural highways, 719.

artificial means, employment of, whether creates, 728, 730.

at the common law, modification of as applied in the United States, 711.

at the common law, what constitutes, 711.

bayous, when are, 733.

capacity essential to, 720.

capacity of for boating, fishing and the like, 723.

civil-law law, doctrine of and its effect in the United States, 715-717.

civil law, doctrine of, difference between and the common law, 716, 717.

classification of, 711.

continuous capacity not essential to, 729, 730.

courses, whether essential to, 723-725.

definitions of, 710.

depth, whether a test of, 724, 731.

duration as a test of, 730.

drainage ditches, when are not, 733.

extent of actual use is not the test of, 722.

floatage and navigability, difference between, 725.

floatage, capacity for, when sufficient, 726-728.

illustrations of, 724.

improvement, capacity of for and its effect, 730, 731.

lakes and bays, when are, 732, 733.

marshes, when are, 732.

meanders by government as affecting the question of, 732.

obstructions as affecting the question of, 731.

rivers, what are, 720.

statutory declaration is not necessary to, 717.

terminals as a test, 731.

tests of in America, 717-722.

tidal test, rejection of in America, 711-715, 718.

vessels, capacity for, whether essential to, 725, 726.

what are is a question of fact, 718.

NEGLIGENCE.

1. **RES IPSA LOQUITUR**, General Doctrine of.—Where the physical conditions, together with the other established facts, show that an occurrence is one which could not ordinarily, in the nature of things, happen but for negligence on the part of defendant, and where the negligent operation of the apparatus is naturally accompanied with danger and its control and the knowledge of its condition are practically limited to the defendant or his servants, and evidence as to the same is unavailable except through him or them, the rule of *res ipsa loquitur* may usually be invoked by one to whom the defendant owed a duty of protection and who was under no obligation to and did not know, or have reason or opportunity to know, of the danger that threatened him. (Wash.) *Anderson v. McCarthy Dry-Goods Co.*, 870.

2. **RES IPSA LOQUITUR**—Storekeeper's Liability to Customer.—If a customer enters a store to make a purchase, and while there a basket used upon the storekeeper's carrier system to convey goods to and from the counter falls from the track and strikes the customer, a *prima facie* case is there made out against the storekeeper, entitling the customer to have it submitted to the jury to say whether negligence has been established by the facts proved, unless the defendant shows that the carrier system was properly installed and in good repair, or that it had been properly inspected without any defect being discovered, or that the basket was caused to fall by some person or influence for whom or which the defendant was not responsible. (Wash.) *Anderson v. McCarthy Dry-Goods Co.*, 870.

3. **NEGLIGENCE**.—The Doctrine of the Turntable Cases is Adopted in Utah in favor of children of immature years and discretion. If an owner places something upon his premises which is easily accessible to children, alluring and attractive to their childish propensities, and excites their curiosity and desire for play, it, in effect, amounts to an implied invitation to them to come upon the premises, and if it is inherently dangerous to a person of immature judgment, the owner of the premises may, under peculiar circumstances, be held liable for his neglect of duty to a child coming thereon by reason of such allurement. (Utah) *Brown v. Salt Lake City*, 828.

4. **NEGLIGENCE**—Proximate Cause.—The proximate cause is the dominant cause, not the one which is incidental to that cause or its mere instrument, though the latter may be nearest in time to the inquiry. (Neb.) *Bell v. Rocheford*, 595.

5. **NEGLIGENCE**—Whether a Question for Jury.—Negligence or contributory negligence is ordinarily a question of fact for the jury; it may, however, become a question of law for the court. (Colo.) *Farrier v. Colorado Springs etc. Ry. Co.*, 158.

6. **NEGLIGENCE**—When a Question for Jury.—The question of negligence is for the jury when it depends on inference to be drawn from acts and circumstances of a character that different intelligent minds may honestly reach different conclusions. (Colo.) *Farrier v. Colorado Springs etc. Ry. Co.*, 158.

7. **NEGLIGENCE**—Sufficiency of Complaint.—It is necessary for a complaint claiming damages for an injury caused by negligence to allege such relationship between the plaintiff and defendant as to raise a duty from the former to the latter and a failure to perform it. (Ala.) *Grissom v. Atlantic etc. Ry.*, 20.

See Death; Druggists.

Note.

Negligence, limitation of actions for when nominal damages have been succeeded by substantial, 952.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWSPAPER.

See Trademark.

NOTICE.

1. **NOTICE.**—Possession of Property is Actual Notice of whatever interest the occupant has therein. (Neb.) Munger v. Beard & Brother, 688.

2. **NOTICE of Unrecorded Conveyance—Evidence of Proof.**—The burden of proof must be assumed by one who claims to be a subsequent purchaser or mortgagee without notice of a prior unrecorded conveyance. (Cal.) Hibernia Savings etc. Soc. v. Farnham, 129.

NUISANCE.

See Municipal Corporations, 20-23.

Note.

Nuisances, limitation of actions upon, 953, 954.

NUNC PRO TUNC ENTRY.

See Judgments, 5-7.

OFFICERS.

OFFICIAL BONDS—Estoppel Against Sureties.—The official reports of a township treasurer, who has for many years been his own successor, conclude his sureties, and they cannot maintain a suit in equity to correct such reports so as to show that defalcations of their principal occurred prior to the time when they became his sureties. (Ill.) Cowden v. Trustees of Schools, 244.

OSTEOPATH.

See Damages, 3.

PARDON.

1. **PARDON—Person Committed in Bastardy Proceeding.**—The governor has no authority to direct a sheriff to release a prisoner who has been adjudged the father of an illegitimate child, ordered to pay a specified amount for its maintenance, and committed to jail for default, in making payment. (Neb.) Campion v. Gillan, 667.

2. **PARDON.**—Bastardy is not an "Offense" within the meaning of that term in a constitutional provision giving the governor power to pardon "offenses"; the words "crime" and "offense" are used interchangeably, and bastardy is not a "crime." (Neb.) Campion v. Gillan, 667.

3. **PARDON.**—Unless There has been a Crime and a Conviction, the governor cannot pardon. (Neb.) Campion v. Gillan, 667.

4. **PARDON.**—The Governor can Pardon Only After Conviction by the judgment of a court. (Neb.) Campion v. Gillan, 667.

PARENT AND CHILD.

PARENT AND CHILD—Implied Agreement to Pay for Services.—The relation of father and son prevents the implication of an

agreement that the latter should be compensated for services rendered the former. (Mich.) *In re Colburn's Estate*, 479.

PARTIES.

PARTIES.—One is not a Party to an Action Unless made so by the record in the case, or unless he institutes the action in the name of another, or, being interested in the subject matter of the litigation, employs counsel to conduct or direct the suit. (Neb.) *Munger v. Beard & Brother*, 688.

PATENT RIGHTS.

1. JURISDICTION—State and National Courts—Patent Rights.—A state court has jurisdiction to try and determine a suit in equity to establish an equitable title to letters patent issued by the United States. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

2. LETTERS PATENT—Employer's Right to an Invention of His Employé.—The superintendent of a manufacturing department, charged with the duty of looking after machinery and making improvements therein, who makes an invention, his employer furnishing the money necessary to pay the expenses of procuring a patent, does not thereby lose his right to the invention so as to entitle his employer to an assignment of the letters patent, where such employer has had the benefit of the invention through the use of machines made under the patent and contributing largely to the success of his business. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

3. LETTERS PATENT, Employer's Right or License to Use.—When one in the employ of another in a certain line of work devises an improved method or instrument for doing that work, and uses the property of his employers and the services of their employés to develop and put into practicable form such invention, and explicitly assents to the use by his employers of such invention, he thereby gives some kind of license, or, at least, a shop right to any patent which may be issued to him as the result of his invention and of the use of his employers' property and employés thus given to him, but his employers are not from these facts entitled to a perpetual and exclusive right under the patent. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

4. CORPORATION, MANUFACTURING, Employé and Director of, When may not Acquire a Patent for His Own Use.—A director and trusted employé of a manufacturing corporation, knowing that it is able to purchase any invention or improved machinery for use in its business, and that its interests would be promoted by such acquisition, violates his duty by secretly purchasing any such invention or improvement, either for the purpose of afterward selling it at an advance price or of using it to the injury of his employer, and such employing corporation may, by proper proceedings in equity, secure to itself the benefit of any purchase made by such employé. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

5. EMPLOYER AND EMPLOYÉ, Duty of the Former to Act Promptly When Informed that the Latter has Purchased Patent Rights to Which the Employer may Become Entitled.—If an employé, becoming aware of an invention susceptible of being applied to the machinery and in the business of his employer, takes an assignment of the patents for his own use, and the employer permits the employé to pay off an indebtedness existing in favor of the employer for moneys advanced to the inventor while perfecting his invention and also to make additional payments to the inventor, and then remains silent for more than two and a half years, this is

an election to permit the employé to retain for his own use the rights acquired by an assignment to him of the letters patent, and precludes the employer from maintaining any suit to compel such rights to be assigned to it or used for its benefit. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

6. EMPLOYER AND EMPLOYÉ, Right of the Former to an Assignment of Patent Rights Acquired by the Latter.—If a trusted employé of a manufacturing corporation knows of experiments being made and inventions perfected relating to machinery of the class used in the business of the employer in the charge of such employé, and acquires by assignment letters patent to such invention without first giving his employer an opportunity to do so, the latter may treat the assignment as taken in trust for his benefit, and may compel the transfer upon reimbursing his employé for the respective amounts paid by him. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

7. LETTERS PATENT, Equitable Assignment of Right to by One Corporation to Another.—If letters patent to an invention are acquired under such circumstances that a corporation has a right to insist that the acquisition shall be treated as a trust for its benefit, and it turns over all its assets to another corporation, which takes charge of its business affairs, and a formal assignment is made of such assets, including letters patent, inventions and choses in action, the assignee corporation is entitled to have the inventions so acquired held in trust for its benefit, and to a decree requiring an assignment to it. (Mass.) *American Circular Loom Co. v. Wilson*, 409.

PAYMENT.

PAYMENT.—The Giving of a Check is Presumptive Evidence of the payment of a debt where the transaction is bona fide, but this presumption may be overcome by other evidence. (Wis.) *Meyer v. Doherty*, 967.

PEDDLERS.

See Hawkers and Peddlers.

PHYSICAL EXAMINATION OF PLAINTIFF.

See Discovery.

PHYSICIANS.

See Witnesses, 5.

Note.

Physicians, limitation of actions against for damages, 951.

PLEADING.

1. PLEADINGS—Relief, When Restricted to the Facts and Purposes Alleged.—In a suit to have certain conveyances declared fraudulent as against the complainant and for relief therefrom on the ground that she holds a judgment for alimony against the grantor of such deeds, she is not entitled to have a decree permitting her to redeem on the ground that she is entitled to so redeem because of her inchoate right of dower, the right of redemption not having been made an issue by the complaint. (Mo.) *Moss v. Fitch*, 568.

2. PLEADINGS—Nature of Irregular Action, When cannot be Changed by the Plaintiff's Reply Pleadings.—A plaintiff, having set out one cause of action in his complaint, cannot, in his reply to the defendant's answer, introduce and obtain relief upon an entirely different cause. (Mo.) *Moss v. Fitch*, 568.

3. PLEADING—Damages not Alleged in the Complaint.—In an action for personal injuries alleged to be due to the negligence of the defendant corporation, wherein the plaintiff specified several classes of injuries from which she had suffered, with the consequences claimed to have resulted, and without referring to any injury to her eyes, it is improper, against objection, to receive testimony of injury to the plaintiff's eyes and its effect upon her sight up to the time of the trial, and the further injurious effect reasonably apprehended. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

4. PLEADING, Injury to Eyesight, When not Put in Issue by General Allegation.—Where, in an action by a woman to recover for personal injury, she alleges that by reason of such injury she has been incapacitated from performing her daily work and household duties, this general allegation does not justify the reception of testimony showing injury to her eyes and impairment of her sight, where the complaint specifies different injuries suffered by the plaintiff and the consequences resulting from them, but does not state any injury to her eyes or any loss of her sight. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

5. APPEAL AND ERROR—Objections to Evidence, Questions Proper to be Raised by.—If a complaint fails to disclose the facts requisite to sustain an action, the defendants may, at the trial, object that the complaint is so insufficient, notwithstanding a demurrer thereto has been overruled. (Cal.) *Carpenter v. Sibley*, 77.

PLEDGE.

JUDGMENT Foreclosing a Pledge—Effect of upon the Right to the Possession of the Pledged Property.—A judgment in favor of the pledgee of a certificate of stock directing its sale to satisfy the judgment merges the rights of the pledgee into the judgment, leaving him only the right to have it enforced by the sale as directed, and terminating his right to possession of the certificate. (Wash.) *American Bonding Co. v. Loeb*, 891.

POLICE POWER.

See Constitutional Law, 14-25.

Note.

Presumption of legitimacy of one born of a married woman, 261, 262, 264, 272.

of the authority of an attorney at law to appear, 33, 37, 39, 40.

of the authority of an attorney at law to appear, evidence sufficient to overcome, 40.

PRINCIPAL AND SURETY.

1. SURETY COMPANY—Contracts in Nature of Insurance.—The business of corporations organized for profit in assuring performance of contracts partakes largely of the nature of insurance, and is governed by essentially the same principles of law. (Iowa) *Van Buren Company v. American Surety Co.*, 290.

2. SURETY COMPANY—Notice of Default—Strict Compliance.—A condition in a surety bond requiring notice of default pertains to the remedy, and though precedent to the maintenance of an action, is not so strictly construed by the courts as are conditions involving the essence of the agreement. (Iowa) *Van Buren County v. American Surety Co.*, 290.

3. SURETY COMPANY—Notice of Default—Time for Giving.—The notice of default required by a surety bond is not due until the fact of which the surety is to be apprised is known to the in-

sured, or until he should have known it in the exercise of reasonable diligence. (Iowa) Van Buren County v. American Surety Co., 290.

4. SURETY COMPANY—Notice of Default in Construction of Bridge.—Where a corporation employed by a county to construct a bridge secretly substitutes materials different from and inferior to those agreed upon, notice thereof to a surety company that has undertaken to insure the county for the faithful performance of the contract is not due until the fraud is or should have been discovered in the exercise of reasonable diligence. (Iowa) Van Buren County v. American Surety Co., 290.

5. SURETY COMPANY—Release by Overpayment to Contractor. The rule that if the obligee in a bond to secure the performance of a construction contract pays installments before they are earned, or in excess of the amount due, the surety is released, does not apply where a county is induced to make overpayments by the fraud of the contractor participated in by the county engineer. (Iowa) Van Buren County v. American Surety Co., 290.

6. SURETY COMPANY—Notice of Breach of Contract.—Where a contractor in erecting a county bridge substitutes materials inferior to and different from those contracted for, the county cannot be charged with notice because of the knowledge of its engineer who is acting in collusion with the contractor. (Iowa) Van Buren County v. American Surety Co., 290.

7. SURETY COMPANY—Release by Change of Contract.—A surety company which has undertaken to insure a county for the faithful performance of a corporation's agreement to construct a bridge is not released, on the theory of material changes in the principal contract, where the contractor fraudulently substitutes materials different from and inferior to those agreed upon. (Iowa) Van Buren County v. American Surety Co., 290.

See Officers.

PRIVILEGED COMMUNICATIONS.

See Witnesses.

PROCESS.

1. JURISDICTION—Process, Service of Out of the State.—No personal jurisdiction can be had on process served out of the state, whether personal or by publication, or whether the defendant has been a resident of the state whence the process issued or not. (Mo.) Moss v. Fitch, 568.

2. PROCESS—Presumption of Service in Case of Collateral Attack. If the record is silent as to service, or if, in the absence of a return, there is a recital of due service in the judgment, then jurisdiction will be conclusively presumed on collateral attack; but if the record contains the return of service, then the recital must be considered as referring to such return. (Or.) Knapp v. Wallace, 742.

3. PROCESS—Amendment of Return, Who can Make.—A sheriff cannot, after the termination of his office, amend a return of service which his deputy made. (Or.) Knapp v. Wallace, 742.

4. PROCESS—Service by Publication.—All Statutory Requirements for the institution and prosecution of proceedings to subject to sale the property of nonresidents upon notice by publication, especially such as are of a jurisdictional character, must be strictly and literally observed, in order that the judgment entered thereon shall be of legal force and validity. (Iowa) Empire Real Estate etc. Co. v. Beechley, 248.

5. PROCESS—Proof by Interested Party of Service by Publication.—The plaintiff in an action against a nonresident on published notice is disqualified to take the affidavit of the publisher in making proof of the publication; and a judgment based upon such proof of service is without jurisdiction, and a sale of the property thereunder ineffectual. (Iowa) *Empire Real Estate etc. Co. v. Beechley*, 248.

6. PROCESS—Service by Publication—Mailing.—Where an affidavit for an order of service by publication states the defendant's postoffice address; the order of court requires mailing accordingly; the summons requires the defendant to appear and answer "on or before the last day of the time prescribed in the order for the publication"; the order for publication is dated May 16, 1904; the first publication is made June 25, 1904, and the last August 6, 1904; the affidavit of mailing was made January 4, and filed January 9, 1905, and states that the copies of summons and complaint were mailed August 6, 1904—the mailing is not a compliance with the order of court or the statute, and is insufficient to confer jurisdiction. (Or.) *Knapp v. Wallace*, 742.

7. PROCESS—Service by Publication—Amendment of Return.—Where the plaintiff, four months after the entry of a decree based on service by publication wherein the mailing was insufficient to confer jurisdiction, files as an amended return an affidavit of mailing, but it does not appear that leave of court was obtained for such amendment, nor is there any showing by affidavit as to facts upon which to base the order for leave to amend, the amendment is ineffectual to aid the jurisdiction of the court. (Or.) *Knapp v. Wallace*, 742.

See Corporations, 17-24.

Note.

Public Officers, limitations of actions against, 949, 950.

PUBLICATION OF SUMMONS.

See Process.

QUIETING TITLE.

1. QUIETING TITLE—Action by Person Out of Possession.—A person claiming title to real estate may maintain an action to quiet title, whether he is in or out of possession. (Neb.) *Bannard v. Duncan*, 661.

2. REMAINDERMEN—Right to Maintain Action to Quiet Title. An action to quiet title may be maintained by a remainderman during the continuance of the particular estate. (Neb.) *First Nat. Bank v. Pilger*, 592.

3. REMAINDERMEN—Right to Maintain Action to Quiet Title—Limitations of Actions.—In an action to quiet title, by a remainderman during the continuance of the particular estate, the statute of limitations commences to run at the time the adverse claim arises and attaches. (Neb.) *First Nat. Bank v. Pilger*, 592.

4. QUIETING TITLE.—A Suit to Quiet Title is not Defeated by Evidence that the grantor of the plaintiff possessed less than a full and undivided ownership, since that fact goes to the measure of relief and not to the right to maintain the action. (Iowa) *Empire Real Estate etc. Co. v. Beechley*, 248.

5. QUIETING TITLE—What Relief may be Granted.—In a suit to quiet title against a sheriff's deed void for want of due proof of publication of process, the plaintiff may have his rights in the premises adjudicated, although the defendant may yet amend the proof of service and have a new and valid judgment entered. (Iowa) *Empire Real Estate etc. Co. v. Beechley*, 248.

Note.

Quieting Title, against persons claiming separate tracts on the ground of preventing multiplicity of suits, 992-1002.

QUITCLAIM DEED.

See Deeds, 5, 6.

RAILROADS.

1. RAILROAD—Liability for Injury to Child Invited to Ride on Hand-car.—A railroad company is not answerable for injuries sustained by a child, while riding in a dangerous position on a hand-car at the invitation of sectionmen, no matter how gross their negligence, if the injuries are not inflicted wantonly, purposely or maliciously, since the men are acting outside their authority, and the injury is not due to the dangerous character of the car but to the negligence of those in charge of it. (Iowa) *Dougherty v. Chicago etc. Ry. Co.*, 282.

2. RAILROADS—Warnings at Crossings.—A railroad company by leaving its cars so near a public crossing as to obstruct the view of an approaching traveler thereby increases the danger to him, and assumes the duty of taking extra precautions for guarding against accidents, and, failing in this, it is negligent, and must respond in damages in case of accident. (La.) *Cherry v. Louisiana etc. Ry. Co.*, 323.

3. RAILROADS—Public Crossings—Negligence.—One who, on a public highway, approaches a railroad track, and after stopping can neither hear nor see any indication of a moving train approaching, is not chargeable with negligence in assuming that there is none sufficiently near to make the crossing dangerous. (La.) *Cherry v. Louisiana etc. Ry. Co.*, 323.

4. RAILWAY CORPORATION, Duty of to Persons Working for Its Outfit or Hotel Cars.—Where outfit cars are fitted up and stationed on a sidetrack for the use of employes of a railway corporation, one in such cars with its consent and engaged in the business of cooking for employes has the right to assume that the corporation will exercise ordinary and reasonable care to prevent the cars from being run into by switch-engines and passing trains. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

5. NEGLIGENCE on the Part of a Railway in Running into Outfit Cars.—If outfit cars are stationed on a sidetrack for the use of the employes, and without warning or signal a locomotive is run onto such track and into such outfit cars, a jury is justified in finding that the corporation was guilty of negligence, and on such finding is liable to an employe injured while in such outfit train. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

6. EVIDENCE—Cross-examination as to Marriage.—In an action by a woman to recover for injuries received by her on an outfit train where she had been permitted to be for the purpose of cooking on her representation that she was the wife of the manager of such train, it is not material whether she was in fact such wife, and the trial court properly sustained an objection to a question asked her on cross-examination as to whether she and such manager were married. (Utah) *Pugmire v. Oregon Short Line R. R. Co.*, 805.

See Carriers; Street Railways.

RECORDS.

See Notice, 2.

REMAINDERS.

1. **REMAINDERS.**—A Vested Remainder is a Present Interest which passes to one to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after a particular estate terminates. (Ill.) *Golladay v. Knock*, 224.

2. **REMAINDERS.**—A Remainder is Vested When a Definite Interest is created in a certain person and no further condition is imposed than the determination of the precedent estate. It is not sufficient that there is a person in being who has the present capacity to take the remainder if the particular estate be presently determined; but it must also appear that there are no other contingencies which may intervene to defeat the estate before the falling in of the particular estate. (Ill.) *Golladay v. Knock*, 224.

3. **REMAINDERS.**—A Contingent Remainder is One Limited to take effect either to a dubious or uncertain person, or upon a dubious or uncertain event. (Ill.) *Golladay v. Knock*, 224.

4. **REMAINDERS**—When Vested and When Contingent.—When a remainder is subject to contingencies or conditions precedent, it is contingent; but when subject to contingencies or conditions subsequent, it is vested, subject to be divested by the happening of the subsequent event. (Ill.) *Golladay v. Knock*, 224.

5. **REMAINDERS**—When Contingent.—A Devise to One with Remainder in Fee to his children who survive him, with a devise over to another in case the life tenant dies leaving no children, does not create a vested interest in the last devisee, but such remainder is contingent upon the death of the life tenant without leaving children. (Ill.) *Golladay v. Knock*, 224.

6. **REMAINDERS**—When Contingent.—A Devise to the Testator's Wife for Life "and to her children after her death," and if she does not have children "that will live to inherit" the land, then it shall, on the death of her and her children, go to a named person and his heirs, creates a contingent remainder with a double aspect, and the children have no vested interest unless they survive the mother. (Ill.) *Golladay v. Knock*, 224.

7. **REMAINDERS**—How Far Transferable by Deed.—Where a grantor in a warranty deed of a contingent remainder dies before the contingency happens upon which the estate is to vest, nothing passes by the deed, and its covenants do not estop his children from asserting title when they do not claim by descent from him. (Ill.) *Golladay v. Knock*, 224.

See Life Tenant; Quieting Title.

REPEAL OF CHARTER.

See Corporations, 2-5.

REPLEVIN.

See Tenants in Common.

RES IPSA LOQUITUR.

See Negligence, 1-3.

RES JUDICATA.

See Judgments, 8-10.

REVERSION.

See Estates.

SALES.

Bulk Sales Statute.

1. **CONSTITUTIONAL LAW—Bulk Sales Act.**—A statute declaring that a sale of a stock of merchandise in bulk, or a sale of any portion thereof otherwise than in the ordinary course of trade, shall be presumed fraudulent as against creditors of the seller, unless certain prescribed inquiries, inventories and notices are made or given by the parties, is unconstitutional because it arbitrarily imposes a burden upon certain persons from which others are exempt. (Ill.) *Off & Co. v. Morehead*, 184.

Delivery and Passing of Title.

2. **SALE—Delivery of Goods to a Carrier.**—The delivery of goods by a vendor to a carrier is equivalent to delivery to the purchaser, subject only to the right of stoppage in transitu. (Mo.) *State v. Rosenberger*, 580.

3. **SALE of Goods Shipped C. O. D. Where Deemed to have been Made.**—If one in the county of his residence, without solicitation, orders goods of a seller doing business in another county, and the latter, in response to the order, ships the goods C. O. D. to the purchaser, the sale takes place in the county whence the goods are so shipped. (Mo.) *State v. Rosenberger*, 580.

4. **SALES—When for Cash on Delivery.**—In the absence of a specific agreement, goods sold are to be paid for in cash on delivery. (Colo.) *Hill v. Fruita Mercantile Co.*, 172.

5. **SALES—Payment Due on Delivery to Carrier.**—When there is no time fixed for the payment of goods, the purchase price is due when the vendor delivers them pursuant to the contract of sale to a carrier to be transported to the vendee. (Colo.) *Hill v. Fruita Mercantile Co.*, 172.

6. **SALES—Delivery to Carrier—Attachment.**—Where an offer to purchase goods at a certain price if shipped on a specified day is accepted by the vendor, and he delivers them to a carrier pursuant to the requirements of the offer, the sale is consummated so that an attachment may be sustained in an action for the purchase price. (Colo.) *Hill v. Fruita Mercantile Co.*, 172.

7. **SALES—Vesting of Title on Delivery to Carrier.**—Where an offer to purchase goods at a certain price if shipped on a specified day is accepted, and the seller pursuant to the requirements of the offer delivers them to a carrier on that day, and the buyer is at once notified that shipment is made to him, the delivery to the carrier vests title in the buyer, and for any default on the part of the carrier a right of action arises in his favor rather than in favor of the seller. (Colo.) *Hill v. Fruita Mercantile Co.*, 172.

Breach of Warranty.

8. **TORT may be Maintained for the Breach of a Warranty as well as an action of contract.** (Mass.) *Farrell v. Manhattan Market Co.*, 436.

9. **TORT, Scienter in, When Need not be Proved.**—In tort for a false warranty, the scienter need not be alleged, and if alleged, need not be proved. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

10. **SALE OF FOOD—Purpose of Purchase Need not be Stated to the Dealer.**—A contract for the supply of food, without stating the purpose for which it is required, stands on the same footing as a contract to supply other articles when the particular purpose for which they are wanted has been stated to the dealer. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

11. FOOD, Liability of the Seller for Unwholesomeness of.—Provisions may be ordered by the purchaser in person in the dealer's shop in such a way as to make known to him that his knowledge and skill are relied upon to supply wholesome food, and if they are so ordered, he is liable if they are not fit to be eaten. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

12. SALE OF FOOD by One not a Dealer—Implied Warranty.—There is no implied term or condition that articles of food sold by one not a dealer are fit to be eaten. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

13. SALE—Food, Effect of Offering for Sale.—An offer of food for sale by a dealer is an implied representation that it is believed to be sound, but where there is no implied term or condition of soundness, the seller is not liable unless he knows that the food sold is not fit to be eaten. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

14. SALE OF UNFIT FOOD—Burden of Proof.—In an action to recover for injuries resulting from a sale of unfit food under an allegation that the food was sold by the defendant with an implied warranty that it was fit for food, the burden is on the plaintiff to prove that, in making the purchase, it relied on the skill and judgment of the defendant or his employé in selecting the article sold, and this burden is not met by showing that the food consisted of a fowl exhibited on a Saturday night in July, on a bargain counter, and offered at less than the usual rates, though the defendant's salesman affirmed that it was strictly fresh. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

15. A DEALER is not Liable for Selling Unfit Food, on the Ground of Negligence, when he offers several articles for sale, from which the buyer makes his selection. By such offering the dealer impliedly represents that he believes the article to be fit for food, and is not liable to a purchaser made ill by eating the food, when there is no evidence that the dealer knew it was unfit. (Mass.) *Farrell v. Manhattan Market Co.*, 436.

Stoppage in Transitu.

16. STOPPAGE IN TRANSITU—Right of When Defeated by Death of Purchaser and the Appointment of Administrator.—If, while goods are in transit, the consignee dies and his administrator is appointed, to whom the goods are delivered, the right of stoppage in transitu terminates. (Ark.) *Jacobs v. Bentley*, 1086.

SEARCHES AND SEIZURES.

CONSTITUTIONAL LAW—Unreasonable Searches and Seizures.—That part of the anti-trust act by which, in proceedings against corporations thereunder, the prosecuting attorney may file a statement of the names of the persons whose testimony he wishes to take, and the court may thereupon make an order for the taking of their testimony and the production of any books, papers or documents in the possession or control of the witnesses, and authorizing the striking out of the answer of the defendant on the refusal of a person so named to appear and testify or to produce the books and papers, and the entry of judgment against the defendant corporation, does not authorize an unreasonable search and seizure of the books, papers or documents contrary to the fourth amendment to the constitution of the United States, and that provision of similar purport in the constitution of Arkansas. (Ark.) *Hammond Packing Co. v. State*, 1014.

See Druggists.

SEISIN.

See Descent and Distribution.

SELF-DEFENSE.

See Assault and Battery; Homicide; Trespass.

SENTENCE.

See Criminal Law, 9.

SHERIFF'S BOND.

See Attachment, 4, 5.

SHIPPING.

See Attachment, 2, 3.

SLANDER.

See Libel and Slander.

SLEEPING-CARS.

See Carriers, 2.

STATES.

ESTOPPEL Against State by Acts of Officers.—The state is bound by the acts of its taxing officers in placing property previously forfeited to the state for unpaid taxes on the taxing rolls for succeeding years, and receiving taxes from the former owner for ten years, he remaining in undisturbed possession. Such acts are in equity a waiver of the prior forfeiture and binding on the state and its assign. (La.) *Gauthreaux v. Theriot*, 328.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. STATUTES, Motives of the Legislature in Enacting—Effect of Misrepresentation.—Evidence is not admissible to prove that legislators voted in favor of a statute without investigating the merits and without exercising their judgment and discretion on the merits in compliance with a custom relating to local measures, in reliance upon the representations that the representatives of the counties supposed to be affected were unanimous in favor of the measure. (Mich.) *People v. Calder*, 550.

2. STATUTES.—The Motives of the Legislature in Enacting a Statute are not admissible in evidence to defeat it, though fraud and corruption are alleged to annul their action. (Mich.) *People v. Calder*, 550.

3. STATUTES.—The Presumption of Good Faith on the Part of the Legislators in enacting a statute must be indulged and held conclusive. (Mich.) *People v. Calder*, 550.

4. STATUTES, Notice of Hearing Before Enactment, When Unnecessary.—The provision of a state constitution declaring that previous notice of any application for the alteration of the charter of any corporation shall be given in such manner as shall be prescribed by law does not require any additional notice to be given to the corporation, when the statute in question is introduced in the legislature in the regular manner and one day's notice is given by the legislator of his intention to introduce it, and the corporation learns of such introduction and is allowed to be heard before the governor, but denied the right of a hearing before either house of the legislature. The bill thus introduced by a member cannot be regarded as an application for which any special notice must be given to entitle the legislature to dispose of it. (Mich.) *People v. Calder*, 550.

STOCK AND STOCKHOLDERS.

See Corporations.

STOCKYARDS.

See Municipal Corporations, 20-23.

STOPPAGE IN TRANSITU.

See Sales, 16.

STREET RAILWAYS.

Duty to Persons in Street.

1. STREET RAILWAYS—Duty of Motorman to Person Whom He Sees will be Injured Through the Latter's Negligence.—When the motorman of a car sees a team which is ahead being driven in a straight line "coming in toward" the track, so that if both keep on a collision will ensue, it is his duty to stop his car if he sees that the driver of the team is going on, even though the driver ought not to go on. (Mass.) *Carrahar v. Boston etc. Ry. Co.*, 461.

2. STREET RAILWAYS—Duty of Person About to Cross Track of.—One about to cross the track of a street railway is bound to exercise care in looking to see whether he can safely do so. (Mass.) *Carrahar v. Boston etc. Ry. Co.*, 461.

3. NEGLIGENCE, Contributory, in not Looking at the Crossing of a Track, When a Question for the Jury.—The fact that the plaintiff, after looking along the track of a street railway and seeing no car approaching, drove from one hundred and twenty to one hundred and forty feet without again looking, does not establish his contributory negligence as a matter of law, but the question is for the jury. (Mass.) *Carrahar v. Boston etc. Ry. Co.*, 461.

4. STREET RAILWAYS—Right of Person Who Would Naturally Reach a Point First.—Where two are driving vehicles upon a street, the one who, pursuing his course and not increasing his rate of speed or changing his direction, would naturally reach an intersecting point first has the right of way, and the one who, not changing his rate of speed or direction, would reach such point last ought to give way to the rights of the one who would reach there first. (Mass.) *Carrahar v. Boston etc. Ry. Co.*, 461.

5. STREET RAILWAYS—Instruction as to Right of the Party Who Would Reach a Point First, When Improper and Misleading.—In an action against a street railway to recover for injuries suffered by the collision of a team which the plaintiff was driving and a street-car, it is error to give an instruction which the jury may under-

stand to make the right to recover depend on who would have reached the point of intersection first, and would therefore have the right of way, where there is evidence from which the jury might infer that the plaintiff, had he exercised due care, would not have exposed himself to the injury by going on the track at all. (Mass.) *Carrahar v. Boston etc. Ry. Co.*, 461.

Act of Motorman in Emergency.

6. **STREET RAILWAYS—Act of Employé in Emergency.**—The law does not exact the same measure of prudent judgment from the employés of a street railway company when they are compelled to act in a sudden emergency, as it does when there is time for deliberation. (Ill.) *Barnes v. Danville Street Ry. etc. Co.*, 237.

7. **STREET RAILWAYS—Negligence of Motorman in Emergency.**—When a street-car, owing to a sudden cessation of power, stops on a steam railroad crossing, and in the emergency the motorman throws his controller around intending to disconnect the current but in fact not doing so, and then jumps from the car and with the aid of others pushes it back to a place of safety, from which it suddenly starts when the power is resumed and dashes forward into an approaching locomotive, injuring a passenger who did not alight from the car, the question whether the motorman was negligent in not completely shutting off the power is a question of fact for the jury. (Ill.) *Barnes v. Danville Street Ry. etc. Co.*, 237.

Injury to Passenger.

8. **STREET RAILWAYS—Contributory Negligence of Passenger.** When a street-car, owing to a sudden cessation of power, stops on a steam railroad crossing, and the crew and most of the passengers jump to the ground and push the car back to a place of safety, from which it suddenly starts when the power is resumed and runs in front of an approaching locomotive, the question whether a passenger, who remains on the car in the face of the danger, fails to exercise due care for his safety is a question of fact for the jury. (Ill.) *Barnes v. Danville Street Ry. etc. Co.*, 237.

9. **STREET RAILWAYS.**—The Maxim "*Res Ipsa Loquitur*" does not apply upon mere proof of the happening of an accident to a street-car which results in injury to a passenger who was exercising due care for his safety. (Ill.) *Barnes v. Danville Street Ry. etc. Co.*, 237.

SUCCESSION.

See Descent and Distribution.

SUMMONS.

See Process.

SURETYSHIP.

See Principal and Surety.

TAXATION.

1. **TAXATION—Situs of Credits for.**—Debts due on an open account to a nonresident are taxable at the domicile of the debtor, if they arise out of a business carried on in the state levying the tax and form part of the capital of such business. (La.) *National Fire Ins. Co. v. Board of Assessors*, 313.

2. **TAX TITLES, Who may not Acquire and Enforce.**—One in Possession of Real Property Under a Contract of Purchase binding him to pay the taxes and who fails to make such payment, with the

result that the property is sold for delinquent taxes without his knowledge and without any collusion between him and the tax purchaser, cannot acquire the resulting tax title and enforce it against his vendor. (Wash.) *Finch v. Noble*, 880.

TELEGRAPHS AND TELEPHONES.

1. TELEGRAPH COMPANIES—Liability for Failure to Deliver Message.—A statute making telegraph companies "liable for all damages occasioned" by failure or negligence in performing their duty to correctly transmit and deliver messages removes, as a condition of liability, all necessity that the company should have had in contemplation, or had any notice or suggestion of probability of, such damages as are in fact occasioned. (Wis.) *Barker v. Western Union Tel. Co.*, 1017.

2. TELEGRAPH COMPANIES—Liability for Failure to Deliver Messages—Damages—Speculative.—In an action against a telegraph company for failure to deliver to a physician a telegram summoning him for a consultation with another physician and to attend a patient, he is not entitled to establish by his own testimony directly that he would have made pecuniary gains if he had received the telegram, and was prevented from so doing solely by its nondelivery without any intervening independent cause, yet he is entitled to establish facts by proof, from which the jury may legitimately infer a probable course of conduct which would have secured him such gains if the telegram had been properly delivered. (Wis.) *Barker v. Western Union Tel. Co.*, 1017.

3. TELEGRAPH COMPANIES—Failure to Deliver Telegram—Damages.—In an action against a telegraph company to recover for failure to deliver to a physician a telegram summoning him for a consultation with another physician and to attend a patient, the plaintiff is entitled to recover the amount of the fee which he would have received for the consultation. (Wis.) *Barker v. Western Union Tel. Co.*, 1017.

TENANTS IN COMMON.

1. TENANCY IN COMMON Arising from the Confusion of Leased Sheep.—If a lessee of sheep causes them to be mingled with sheep of his own, so that his animals cannot be distinguished from those leased to him, he and his lessor become tenants in common of the whole flock thus rendered incapable of identification and segregation. (Utah) *Manti City Savings Bank v. Peterson*, 817.

2. COTENANCY — Replevin.—Generally one tenant in common cannot maintain replevin against another for his individual interest in the common property, but this rule is not applicable where the subject of the cotenancy consists of intermingled property alike in quality and value and readily advisable by measurement or weight. (Utah) *Manti City Savings Bank v. Peterson*, 817.

3. TENANTS IN COMMON—Right to Contribution.—A tenant in common of a mining claim who, without the consent of his cotenants, incurs expense in prospecting, cannot demand contribution from them; but a tenant operating mining property may, when called upon to account for profits, set off as against a nonoperating tenant the cost of improvements which were necessary and enhanced the value of the common property. (Colo.) *Wolfe v. Childs*, 152.

4. COTENANCY—Compensation for Care of Property.—Tenants in common are not entitled to compensation from one another for services rendered in the care and management of the common property, in the absence of an agreement to that effect. (Colo.) *Wolfe v. Childs*, 152.

TENDER.

TENDER, Estoppel Arising from Refusal of.—If the assignee of a contract for the sale of real property tenders his own promissory note in payment of the residue of the purchase price, and offers to execute a mortgage on the property to secure its payment, and the tender is refused on the express ground that the vendors do not wish the money, and with a refusal to do anything in the matter, they are estopped in a suit for specific performance from defending on the ground that the obligation of the original vendee was personal, and his note should have been tendered instead of that of his assignee. (Cal.) *Montgomery v. De Picot*, 84.

THEATERS.

MUNICIPAL CORPORATIONS—Ordinances—Control of Theaters.—A municipal ordinance making it the duty of the chief of the fire department to assign a fireman to all performances in any theater, he to be paid by the manager of such theater, is within the charter power of the city and a valid exercise of its police power. (Ala.) *Tannebaum v. Rehm*, 52.

TRADEMARK.

TRADEMARK.—The Name of a Newspaper is in the nature of a trademark, and passes by an assignment in connection with the business in which it is used; but apart from the article or business to which it is affixed, it confers no right of ownership. (Md.) *Seabrook v. Grimes*, 400.

TRESPASS.

1. **EVIDENCE to Show that Trespassers Expelled were Armed.**—In an action to recover for personal injuries inflicted by the defendants in an effort to take possession of their property by force, evidence is admissible on their part to show that the employers of the plaintiff took possession of such property by force, and were armed when taking such possession and when resisting the defendants' effort to retake possession. Such evidence shows the character of the force which the defendants had the right to anticipate and overcome. (Cal.) *Walker v. Chanslor*, 61.

2. **REAL PROPERTY—Right of Owner to Expel Intruders.**—At the common law an owner of real estate had the right to enter upon it to expel by force intruders, and in doing so was entitled to use all the force necessary to secure possession, and therefore is not subject to an action of tort for damages resulting from his entry or from any assault upon, or physical injury sustained by, one in wrongful possession, provided no more force is used than is necessary to dispossess him. This common-law rule remains in force in California, except in so far as it has been changed by provisions of the code relative to the summary remedy provided therein for the forcible entry upon real property. (Cal.) *Walker v. Chanslor*, 61.

3. **APPEAL AND ERROR—Rejection of Evidence, When cannot be Regarded as Nonprejudicial.**—If a court errs in rejecting evidence offered by the defendants in an action to recover for personal injuries inflicted on them by the plaintiff for the purpose of showing that the defendants were the owners of real property and entered thereon to expel an intruder and his employés, and used no more force than was necessary in so doing, and the jury has awarded plaintiff a sum for exemplary damages and another sum as actual damages, the judgment cannot be affirmed as to actual damages on the ground that it appears from the evidence that the defendants used unnecessary force and violence, where it also found that the defendants had not title and were trespassers ab initio, and had no right or business on the

land, and were there in violation of law. (Cal.) *Walker v. Chanslor*, 61.

See Assault and Battery.

TRIAL.

TRIAL—Order of Proof—Discretion of Court.—The order of proof is a matter within the sound discretion of the trial court, the exercise of which will not be disturbed on appeal except in case of an abuse. (Or.) *First Nat. Bank v. McCullough*, 758.

See Criminal Law, 6-9; Jury.

TROVER AND CONVERSION.

1. CONVERSION—Sufficiency of Allegations by Administrator.—A complaint by an administrator alleging that the defendants had the decedent's money in their possession at the time of the death and retain the same in their possession, and have converted it to their own use, sufficiently alleges a taking and conversion of the money before the death of the decedent; and an allegation that, although often requested to do so, they refused to pay the same to the plaintiff as administrator, does not limit the right to recover for a conversion after the death. (Wis.) *Meyer v. Doherty*, 967.

2. CONVERSION—Procuring Lunatic to Draw Checks.—A son who procures his mentally incompetent mother to draw checks upon her bank account, and obtains the money thereon, is liable to her, or to her personal representatives after her death, as for a conversion of the money. (Wis.) *Meyer v. Doherty*, 967.

3. CONVERSION.—A Demand is Unnecessary to Perfect a Cause of Action for the conversion of money, where the defendant obtained it through wrongful conduct, but denies all possession or appropriation. (Wis.) *Meyer v. Doherty*, 967.

4. CONVERSION.—A Complaint in the Usual Form of Conversion is sufficient under the rules of the Wisconsin code, without stating the particulars of the claim. (Wis.) *Meyer v. Doherty*, 967.

TRUSTS.

1. TRUST—Extension by Implication.—The scope of duration of a trust will not be extended by mere implication beyond the plain and reasonable construction of the language employed in creating it. (Md.) *Seabrook v. Grimes*, 400.

2. TRUST DEED—Effect of the Payment of the Debt Which It was Given to Secure.—Upon the payment of a debt to secure which a deed of trust to real property was given, the property at once, without any reconveyance, reverts in the persons who owned it before. (Cal.) *Nilson v. Sarment*, 91.

TUBERCULOSIS.

See Health Regulations.

VENDOR AND VENDEE.

1. CONTRACT for the Sale of Lands—Tender of a Promissory Note of a Person Other than the Original Contractor.—If a contract for the sale of lands calls for notes of the vendee for deferred payments of the purchase price, his personal liability enters as a controlling element into the contract. Hence, the offer of the notes of the assignee does not satisfy the contract nor warrant him in asserting the right to specific performance. (Cal.) *Montgomery v. De Picot*, 84.

2. VENDOR AND VENDEE.—A Grantee in a Bond for a Deed who assigns his interest in the bond to third persons becomes a trustee of such interest in their favor, and on the conveyance of the legal title he holds it for their benefit. (Colo.) *Wolfe v. Childs*, 152.

3. VENDOR AND VENDEE.—*Bona Fide Purchaser.*—Where one of the tenants in common in a mining claim executes a bond for a deed to a person who thereafter assigns a half interest in the bond, the bond and assignment being recorded, and subsequently the grantee in the bond obtains a conveyance of the legal title, his successor takes subject to the rights of his assignees and holds the legal title in trust for them. (Colo.) *Wolfe v. Childs*, 152.

See Deeds.

VESSELS.

See Attachment, 2, 3.

VOLUNTEER EMPLOYÉ.

See Master and Servant, 3, 4.

WARRANTS.

See Limitation of Actions, 5.

WARRANTY.

See Sales, 8-15.

WATERS AND WATERCOURSES.

1. WATERS.—*Artesian Wells.*—*Rights in Acquired by Conveyance.*—If an owner of lands on which is situated an artesian well conveys the waters thereof, estimated by inches of miner's measurement, and subsequently grants part of such lands, subject to the existing rights of all persons to take waters from such well, the grantee must respect the rights of the persons having prior conveyance of such water. (Wash.) *Charon v. Clark*, 896.

2. WATERS.—*Artesian Wells.*—*Injunction to Protect Rights in.*—If the owner of lands on which is an artesian well conveys portions of the waters thereof, his grantees are entitled to an injunction against a subsequent grantee with notice to prevent such diversion by him of the waters of the well as infringes on the complainant's rights. (Wash.) *Charon v. Clark*, 896.

3. WATERS of Artesian Wells.—*Conflict Between Grantees of.*—If there are several grantees of waters flowing from an artesian well by grants of different dates, and it appears that the original grantee has conveyed more than the actual amount flowing in the well, or the flow becomes diminished, his first grantee acquires rights paramount to the subsequent grantees with notice and has the right to retain the specific amount granted to him. (Wash.) *Charon v. Clark*, 896.

See Navigable Waters.

WATERWORKS.

See Municipal Corporations, 15-18.

WEIGHTS AND MEASURES.

CONSTITUTIONAL LAW.—It is Within the Power of the State to Adopt a Uniform System of Weights and Measures, and to

require all persons whose business transactions require the use of the same to conform thereto. (Ark.) *McLean v. State*, 1037.

WILLS.

In General—Description of Property.

1. **WILLS**—Parol Evidence, Though not Admissible to change the language of a will, may be received when necessary to identify the subjects and objects of the testator's bounty. (Ill.) *Collins v. Capps*, 232.

2. **WILLS**.—However Many Errors There may be in a Description, either of the devisees or of the subject of a devise, the gift will not be avoided, if enough remains after rejecting the errors to show with certainty what was intended, when considered from the position of the testator. (Ill.) *Collins v. Capps*, 232.

3. **WILLS**—Rejection of False Description.—Where a testator devised the "west half" of a certain quarter section "containing about seventy-six acres," when the only land owned by him in that county was seventy-six acres in the north half of that quarter section, the word "west" may be stricken out and the will be given effect as a gift of the seventy-six acres in the section which he owned, though there is a residuary clause. (Ill.) *Collins v. Capps*, 232.

4. **WILLS**.—It is Presumed that a Testator Intended to dispose of his own land. (Ill.) *Collins v. Capps*, 232.

Agreement to Make Will.

5. **WILLS**—Agreement to Make in Favor of a Party, Statements Which do not Amount to.—A statement by a father and mother that their son A should have the farm at their death, though made in his presence, affords no evidence of a binding contract. It is consistent with the thought that it was their purpose to give him a gratuitous preference on their deceased. (Mich.) *In re Colburn's Estate*, 479.

6. **WILLS**, Agreement to Make in Favor of a Son, When does not Sustain an Action for His Services.—An agreement between parents and their son that he shall live with them on a farm and work there until their death, when it is to be given to him, does not, in the event of their surviving him, support an action in favor of his representatives for the value of his services, the farm not having been given to him nor to his heirs. (Mich.) *In re Colburn's Estate*, 479.

Agreement to Contest.

7. **WILLS**—Contract to Defeat Probate, When Void.—A contract by beneficiaries in a will to compensate the executor and trustee named therein if he will defeat its probate, so that the estate will descend to them in fee and thereby cut off an interest in remainder created by the will in favor of one not a party to the agreement, is against public policy and no recovery can be had thereon. (Iowa) *Cochran v. Zachery*, 307.

8. **WILLS**—Agreement to Contest, When Champertous.—A contract whereby the executor and trustee in a will agree, for a consideration, to contest the probate of the testament is void as a species of champerty or maintenance. (Iowa) *Cochran v. Zachery*, 307.

Fraud, Undue Influence, Unnatural Disposition.

9. **WILLS**—What Amounts to Undue Influence.—The influence which vitiates a will must be exerted upon the testator to such a degree as to amount to force or coercion, or by importunities which he could not resist, so that the motive was tantamount to force or fear. (Md.) *Saxton v. Krumm*, 393.

10. **EVIDENCE in Will Contests.**—The contents of former wills may be admitted in will contests as tending to establish fraud, duress or undue influence in the will contested. (Utah) *In re Young's Estate*, 843.

11. **WILLS—Unnatural Disposition of Property.**—Neither an illicit relation between the testator and his beneficiary, nor an unjust and unnatural disposition of his property, is sufficient per se to warrant a conclusion of undue influence. They are circumstances properly to be considered by the jury in connection with evidence of undue influence, but are not in themselves evidence either of fraud or undue influence. (Md.) *Saxton v. Krumm*, 393.

12. **WILLS.—Where a Testator Gives All His Property to His Mistress**, and makes no provision for his relatives, including an aged and dependent sister, this raises no presumption of undue influence, and the will must be given effect in the absence of any other vitiating circumstances. (Md.) *Saxton v. Krumm*, 393.

13. **WILLS—Life Estate in Perishable or Consumable Property.**—A bequest for life of property which is consumed in use, such as a newspaper plant, together with the subscription list and goodwill of the business, vests title absolutely in the life tenant. (Md.) *Seabrook v. Grimes*, 400.

Lapse of Legacy.

14. **WILLS—Legacy, When Lapses.**—On the death of the legatee of a pecuniary legacy before that of the testator, the legacy lapses. (Mass.) *Dresel v. King*, 459.

15. **WILLS—Lapsed Legacy, When Passes Under a Residuary Clause.**—On a bequest of legacies to several persons, if one of them dies before the testator, his legacy is ordinarily to be disposed of under the residuary clause, if there is one. (Mass.) *Dresel v. King*, 459.

16. **WILLS—Lapsed Legacy, When Goes to the Next of Kin and not to the Residuary Legatees.**—If a testator, after making a disposition of part of his property, directs his executors to convert the rest into cash and divide it among legatees previously named in proportion to their several legacies, and one of them dies before the testator, the legacy lapses, and does not go to the other legatees under the residuary clause, but to the next of kin. (Mass.) *Dresel v. King*, 459.

17. **WILLS—Lapse of a Legacy Given by the Residuary Clause.**—If a legacy is itself part of a residuary clause, it cannot fall into that residue, and must pass as intestate estate if it lapses by the death of the legatee before that of the testator. (Mass.) *Dresel v. King*, 459.

WITNESS.

Privileged Communications.

1. **EVIDENCE—Privileged Communication—Personal Nature of the Privilege.**—A communication made to an attorney is privileged or not at the option of his client. If the client waives the privilege, neither the attorney nor anyone else may invoke it. (Utah) *In re Young's Estate*, 843.

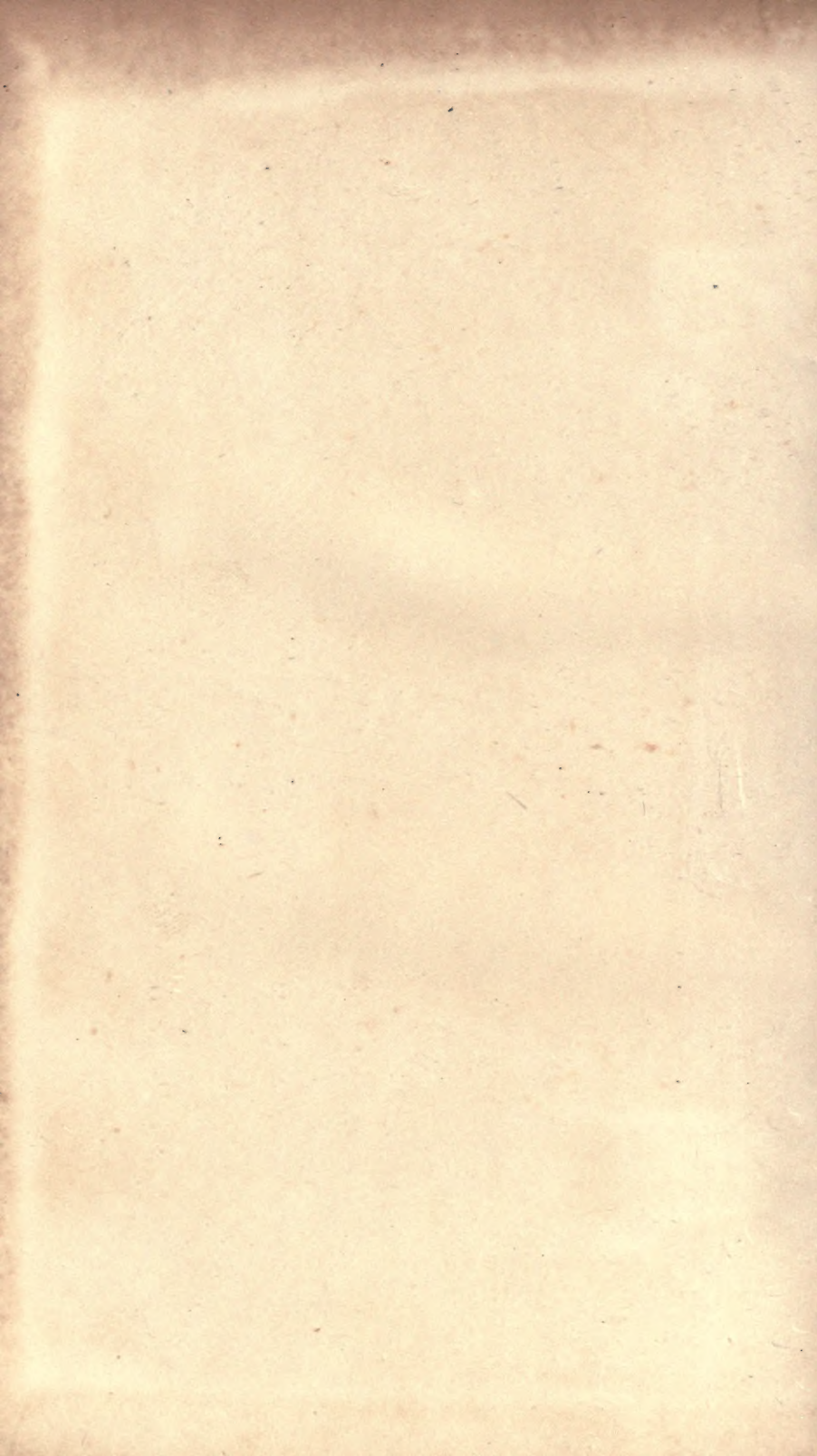
2. **EVIDENCE—Privileged Communication—Effect of Statute.**—The mere fact that common-law privilege is declared in a statutory form does not extend the scope of its operation. (Utah) *In re Young's Estate*, 843.

3. **EVIDENCE—Privileged Communications—Construction of Statute.**—If the statute respecting privileged communications is merely declaratory of the common law, the statute should be applied under the rules in force at the common law. (Utah) *In re Young's Estate*, 843.

4. EVIDENCE—Privileged Communications to an Attorney—Disclosure in Will Contests.—Where the grounds for contesting a will are duress, undue influence or incapacity, the attorney who prepared the will may be called by either side and examined as a witness and compelled to disclose communications made to him by the testator during the preparation of the will, including the contents of former wills, where such communications are relevant to any of the issues. (Utah) *In re Young's Estate*, 843.

5. EVIDENCE—Privileged Communications—Physicians.—At the common law the privilege did not extend to physicians. (Utah) *In re Young's Estate*, 843.





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